

CANADA / JUDGMENT

Joyce v. Urbauer

2024 BCSC 2082

COURT

Supreme Court of British Columbia

DECIDED

15 November 2024

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2024 BCSC 2082 Joyce v. Urbauer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Joyce v. Urbauer,

2024 BCSC 2082

Date: 20241115

Docket: E153691

Registry: Vancouver

Between:

Anthony Justin Joyce

Claimant

And

Sara Elizabeth Urbauer also known as Sara Elizabeth Watson

Respondent

Before: The Honourable Justice Armstrong

Reasons for Judgment

Counsel for the Claimant:

A. Swabuk-Moe

Counsel for the Respondent:

L. Spencer

Place and Date of Hearing:

New Westminster, B.C.

October 2, 2024

Place and Date of Judgment:

Vancouver, B.C.

November 15, 2024

- [1] These reasons address a preliminary application made at the outset of the claimant's submission on several issues concerning child support, spousal support, and incomes under the Guidelines to be used in determining the parties' financial obligations.

Background

- [2] The parties were married in 1999 and separated in 2014. They were divorced April 5, 2016. There is one child of the marriage (S.E.) born in May 2007, who is currently 17 years old. The parties share equal parenting time with S.E.
- [3] The claimant is 55 years old and the respondent 54 years old.
- [4] On December 1, 2015, the parties entered into a Separation Agreement after engaging in a Collaborative Divorce Process ("CDP").
- [5] Under the Separation Agreement, the parties agreed that the claimant's income for child support purposes was \$170,000 per year and the respondent's income for child support purposes was \$67,000 per year. This resulted in a set-off payment by the claimant to the respondent of \$850 per month.
- [6] For spousal support purposes, the parties agreed that the claimant's income was \$155,000 per year and the respondent's income \$67,000 per year.
- [7] The CDP began in 2015 and was based on governing terms set out in a written agreement between the parties (the "Participation Agreement").
- [8] In the Participation Agreement, the parties promised to make full and honest disclosure of their income, assets and debts if requested. The agreement included a comprehensive confidentiality clause prohibiting either party from disclosing information obtained during the CDP or introducing in any subsequent proceeding verbal agreements, concessions or statements of any kind whatsoever which might have been made during the process. Neither party was to produce or required to produce any notes, records or documents in the possession of their lawyers or the collaborative professionals.

- [9] Most importantly, the parties agreed that they would use only neutral experts, including but not limited to business valuers and appraisers. The parties agreed that any report would be covered by the confidentiality clause of the Participation Agreement and would not be used in any subsequent litigation without written agreement. The parties agreed not to bring on any application to compel the production of any expert reports commenced in the CDP.
- [10] The Separation Agreement contained terms dealing with the review of child support on an annual basis after May 2018. Spousal support was fixed until January 5, 2018, subject to a review based on a "material change in circumstances" of either party.
- [11] In early 2019, the claimant informed the respondent that his income had decreased substantially and that a review of his support obligations was necessary. He sent an email which specifically provided notice of his request to review both child and spousal support.
- [12] On November 6, 2019, the parties entered into a second CDP in order to review the support obligations. The claimant does not seek any review based on the respondent's income changes but relies only on his history of decreased income.
- [13] In January 2020, the parties entered into an agreement varying the Separation Agreement and to retain Patti Daum to assist in the determination of the claimant's current income. Ms. Daum has apparently prepared a report, however, this document cannot be disclosed because the second CDP precludes disclosure.
- [14] The claimant contends the respondent refused to make financial disclosure in 2020 and that he terminated the ongoing collaborative process. He contends the respondent acknowledged that he had overpaid spousal support for several years and was in agreement that no support would be payable on an ongoing basis. The respondent denies any suggestion of that acknowledgement or agreement.
- [15] The next event of note in this dispute happened in September 2023, when the claimant received correspondence from the Family Maintenance Enforcement Program ("FMEP") that he was in arrears of support payments in excess of \$100,000.
- [16] The claimant contends that from November 3, 2023, to January 2024, the respondent refused to provide a form F8 financial statement because the only issues were the claimant's underpayment of child and spousal support.
- [17] Next, the claimant filed a notice of application in this proceeding seeking determination of the respondents Guideline Income and an imputation of income pursuant to s. 213(2)(b) of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [18] Although no claims concerning child or spousal support were made in the divorce proceeding, the claimant now seeks orders under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), setting out their respective child support obligations commencing January 1, 2024.

- [19] The claimant also seeks an order that, commencing January 1, 2024, no spousal support is to be paid by the claimant to the respondent, with a review of the quantum of any entitlement to spousal support to take place not earlier than June 1, 2027.
- [20] The claimant further contends he has overpaid his child support obligations in the sum of \$50,250 (or in the alternative \$35,526) as of December 31, 2023, repayable at \$500 per month commencing July 1, 2024. He also contends he has overpaid his spousal support obligations in the sum of \$41,850 as of December 31, 2023.
- [21] Lastly, he requests a fine of the amount of \$5000 to be paid by the respondent pursuant to. 213(20)(d) of the Family Law Act.
- [22] The claimant's first affidavit concerning this application was filed June 19, 2024 and the respondent filed her application response on July 8, 2024 together with her first affidavit on this application. The claimant filed a responding affidavit July 15, 2024 and the respondent filed a second affidavit on September 24, 2024.
- [23] The claimant contends that the respondent's second affidavit includes three paragraphs and three exhibits which cannot be taken into account on this application because of the Participation Agreement and the principles of law protecting without prejudice documents or communications used in the course of settlement negotiations. Most importantly, she has included reference to an expert opinion from Ron Hooze ("Hooze Report") that they mutually relied upon in coming to their 2015 Separation Agreement. The claimant contends certain paragraphs in her affidavit and exhibits cannot be relied on this application.
- [24] Secondly, the claimant argues the respondent's second affidavit should not be admitted into evidence because the respondent has breached the rules.
- [25] The paragraphs of the respondent's affidavit the claimant seeks to expunge from the record include:
- a) Paragraph 5: she argues that the claimant is relying on a Guideline Income Report of a Mr. Terpkosh, CPA, CA, CBV which is based on a proposition that business losses suffered by the claimant's business were not unforeseen when the 2015 Separation Agreement was made.
 - b) Paragraph 9: she said that during the collaborative process the claimant sought a reduction in his support obligations between 2022 into 2023. She said she could not rely on Ms. Daum's Guideline Income Report because it was based on unaudited financial statements.
 - c) Paragraph 18(b): she affirms that the claimant did not provide financial disclosure, such as his 2019 tax return, throughout the collaborative process. She referred to copies of emails between her lawyer and the claimant's collaborative lawyer at the time.
 - d) Paragraph 18(d): she produced an email purporting to prove that necessary copies of her tax returns were sent to her collaborative lawyer and were forwarded to the claimant's collaborative lawyer.

Jurisdiction and Procedure

- [26] At the outset, neither party addressed the question of this Court's jurisdiction to make the orders requested by the claimant.
- [27] In addition to his claims regarding the respondent's affidavits addressed below, the claimant seeks in his notice of application a new determination of Guidelines income pursuant to the FLA and an order pursuant to the Divorce Act that the respondent pay to the claimant child support at \$1200 per month based on a Guidelines income of \$130,574 commencing January 1, 2024. He seeks to set his child support obligation to the respondent at \$987 per month based on a Guidelines income of \$104,802.
- [28] The claimant also seeks an order that commencing January 1, 2024, no spousal support be payable by the claimant to the respondent and that the respondent's spousal support quantum would be reviewed no earlier than June 1, 2027. He seeks retroactive adjustments for child support and spousal support and an order that the respondent repay \$92,100.
- [29] I received no argument confirming the court's jurisdiction to make orders pursuant to the Divorce Act in light of the fact that a final order was issued in that proceeding and no further steps were taken prior to amend the notice of family claim seeking child support under the Divorce Act. Moreover, the notice of application seems to suggest that the changes to the claimant's spousal support obligations be made in the absence of pleadings.
- [30] It appears there may be a limitations defence to the application for a spousal support order if claimed under s. 165 of the FLA.
- [31] In *Halliday v. Halliday*, 2015 BCCA 82 the court addressed the proper procedure for addressing issues similar to those raised in the instant case.
- [32] Before the upcoming application proceeds, I am requesting the parties to provide submissions and authorities to inform the proper proceeding to be followed. In my view, there may be several options to address these questions, but it will be necessary to establish this court's jurisdiction to deal with the matters set out in the notice of application.
- [33] In that respect, I would also note that the applications by the claimant are in the nature of a summary trial process seeking final support orders. At this point, there are no court orders concerning support issues. I have observed there are significant credibility issues arising from the parties' affidavits. At several places in the claimant's affidavits he said he believes certain details about the respondent which evidence is not likely admissible on this hearing. In other areas, he said he believed certain facts which led him to the conclusion that he had overpaid support.
- [34] These factors cause me to be concerned about the propriety of resolving these issues without pleadings and based only on affidavits alone which have not been the subject of cross-examination by the parties.

[35] Only spousal support orders invoke sections 148(3) and 168 (2) of the FLA.

The Respondent's Affidavit Filed July 8, 2024

The Participation Agreement

[36] The claimant contends that the above-noted paragraphs of the respondent's second affidavit filed in this application should be redacted because they offend the Participation Agreement. The nondisclosure provisions within that agreement extended to:

Term 9

The Expert report shall be covered by the confidentiality clause of the Participation Agreement and shall not be used in any subsequent litigation (unless the Parties and the Expert agree otherwise, which agreement needs to be in writing). This includes all expert reports that were commenced during the Collaborative Process, including those reports commenced during the Collaborative Process and completed after the Collaborative Process ends will neither party will bring an application to compel production of any Expert report commenced in the Collaborative Process..

Term 19:

I. except as set out in subparagraph (II) and (III) below, all communications exchanged or documents generated during the Collaborative Process will be confidential and without prejudice. If subsequent litigation, arbitration or other process for dispute resolution occurs (Any Proceeding) the Parties agree that:

- a. neither party will introduce as evidence in any proceeding, information disclosed during the Collaborative Process for the purpose of reaching a settlement;
- b. neither Party will introduce as evidence in Any Proceeding the verbal agreements, concessions or statements of any kind whatsoever which may have been made during the Collaborative process;
- c. neither Party will introduce as evidence in Any proceeding information disclosed during the Collaborative Process with respect to either Party's behaviour or legal position with respect to settlement;

II the Participation Agreement described those documents and information that are not confidential and are not the subject of the claimant's objections to the respondent's affidavit.

The Respondent's Position

[37] The respondent conceded that in the normal course of events, the claimant's objections to the impugned references in the respondent's affidavit would be well-founded. However, the respondent argues that her reliance on the subject paragraphs of her affidavit is necessary to confront or address a fraud that may occur if the court is not directed to the historical losses

incurred by the claimant's corporation prior to the settlement. She contends that if the court is made aware of those losses that are reflected in the Hooge report, it will conclude that the business losses incurred by the claimant's company were well-known at the time the parties entered into the Separation Agreement, and that subsequent losses which he contends have reduced his Guidelines income were well within the parties' contemplation at the time they made the Separation Agreement.

- [38] The respondent argues that the plaintiff's assertion that business losses were not foreseeable in 2014 is not true, and for him to argue the contrary amounts to an attempt to deprive the court of the known state of affairs at the date of the Separation Agreement.
- [39] She also argues that the claimant has put the issue of profitability prior to separation in issue and cannot therefore be permitted to hide the facts relevant to that issue under the veil of privilege against disclosure.

The Claimant's Position

- [40] The claimant argues that reliance on information in the Hooge report is not necessary to the respondent's defence of the claim and is precluded by reason of the Participation Agreement and the common law concerning the privilege attaching to settlement negotiations.
- [41] The respondent could have obtained Guidelines income reports, historical and at present and present a Guidelines Income opinion concerning the claimant's history, if she had chosen. Moreover, the Participation Agreement clearly precludes the respondent from relying on any of this information, in particular remarks in the Hooge report suggesting that the claimant's business had experienced losses before 2014.

Analysis and Decision

- [42] In analyzing the claimant's objection to portions of the respondent's affidavit, the court is directed to take into account the public interest in encouraging settlements and protecting collaborative divorce processes: *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para. 14; and *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276, 1992 CanLII 4039 (B.C.C.A.) at paras. 18-20.
- [43] This factor is accentuated by the terms of the Participation Agreement regarding how the CDP would proceed.
- [44] It is not controversial that a party invoking the lifting of the privilege blanket over settlement communications and disclosures bears the burden of showing that the public interest in disclosure outweighs the threat to settlement negotiations and favours a litigated result to a mutual settlement: *Dos Santos* at paras. 20-22.

- [45] The public policy underscoring settlement privilege is compelling and the burden to prove an exception cannot be too low. An exception should only be found where the documents sought are both relevant and necessary in the circumstances of the case: *Dos Santos* at paras. 19-20.
- [46] The Hooge report is an opinion in which certain factual matters the author relied upon are set out in summarizing the claimant's income history from 2011 to 2013. As I understand the claimant's submissions, the actual data relied on is most likely currently available to the claimant and could be produced to the respondent without breaching the Participation Agreement.
- [47] The respondent's reliance on the Hooge report includes information that was available and relied on when the parties settled their dispute in the terms of the Settlement Agreement. She contends this evidence is important to this application because it has a direct connection to the question of whether corporate losses were within the contemplation of the parties at the time the agreement was made.
- [48] The facts concerning the corporation's losses prior to 2014 will be available in the corporation's financial statements, which must be produced. In my view, the claimant will be obliged to disclose those documents that were extant prior to the parties' separation.
- [49] It is difficult to imagine how the claimant will be able to argue any unforeseeable change in circumstances since the settlement if he is unable to prove what the corporation's circumstances were at the time of the settlement as compared with its circumstances between 2014 to the present. In my view, the question of the corporation's historical earnings (profits or losses) is a factual question that will be evident from those financial statements.
- [50] I was not informed that the respondent had taken any steps to cross-examine the claimant's expert concerning his opinion about the claimant's income. To the extent that the historical earnings of the corporation might disclose losses, Mr. Terpkosh's opinion does not prove any facts. Rather, he received and relied upon information relating to the corporation's income from 2016 onward.
- [51] Although there is strong public policy supporting the disclosure of privileged material obtained during settlement negotiations to confront frauds, perjury or unambiguous impropriety, this is not a case where permitting disclosure in breach of the parties' written agreement and/or generally is supported on the facts.
- [52] On these facts, I am not satisfied that the respondent has proven that the proper functioning of the justice system will be undermined if the Hooge report is not in evidence. This may beg the question about the respondent's right to cross-examine Mr. Terpkosh using documents that should be produced in this litigation.

- [53] In the result, I am satisfied the impugned paragraphs from the respondent's affidavit will be redacted and will not form part of the evidence on this application.
- [54] In my view, the inclusion of portions of paragraphs 18(b) and (d) from the respondent's affidavit are not necessary and are precluded by reason of the Participation Agreement during CDP.
- [55] I am satisfied that the references to letters between lawyers in 2019 in the midst of a CDP offends the parties' agreement that this information would not be elicited in subsequent litigation.
- [56] The respondent has not demonstrated there is any public interest warranting the disclosure of the impugned information in the respondent's affidavit. This is not a case where settlement privilege is advocated to prevent perjury or some other impropriety. These exchanges occurred during the period of the CDP. The parties expressly agreed that these types of exchanges would not be advanced in future litigation. Moreover, there is nothing in the content of paragraph 18(b) that addresses the respondent's burden to justify relying on emails between the collaborative lawyers. Similarly, the reference in paragraph 18(d) also refers to correspondence between the collaborative lawyers which the parties agreed would not be disclosed.

The Respondent's September 2024 Affidavit

- [57] The claimant also objects to the inclusion of an affidavit from the respondent signed July 18, 2024, but not filed or delivered until September 24, 2024 (the "September 2024 affidavit"). He contends this affidavit includes information already included in an affidavit by respondent's counsel's legal assistant and later replicated in the respondent's September 2024 affidavit.
- [58] The claimant contends that the service on him of this latter affidavit contravened Rule 10-6(13) of the Supreme Court Family Rules, and should not be permitted. Rule 10-6(13) prohibits the service of any additional affidavits "Unless all parties consent or the court otherwise orders."
- [59] On this application, the claimant filed his initial affidavit on June 19, 2024, followed by the respondent's affidavit filed June 19, 2024. The claimant filed a responding affidavit on July 15, 2024. The September 2024 affidavit was sworn July 15, 2024, but not filed or served until September 24, 2024. He contends that the respondent was not permitted to file any further affidavit that includes additional information (presumably not answering the claimant's second affidavit).
- [60] The September 2024 affidavit contained seven paragraphs responding to a number of allegations in the claimant's second affidavit, including paragraphs 6, 12, 20, 25, 26, 27 and 30.

- [61] For reasons that follow, I grant leave to the respondent to rely on paragraphs 3(c), (e), (f), (g) and (h) of the September 2024 affidavit.
- [62] In my view, given the matters at issue and the nature of the claimant's responses that triggered the respondent's September 2024 affidavit, those paragraphs should remain in the record. The claimant had some notice of the substantive allegations in the September 2024 affidavit because it repeats facts set out in an earlier affidavit of the respondent's counsel's legal assistant. Moreover, the claimant had sufficient time to consider and address this affidavit
- [63] The claimant's responding affidavit sworn July 15, 2024 contains several allegations not set out in his prior affidavits, alleging fraud on the part of the respondent in certain actions she took.
- [64] The assertions in paragraph 12 of the claimant's reply affidavit are, at best, argument, and do not contain any facts germane to the application other than to suggest that the respondent had failed to provide supporting documentation of a fact asserted by her. In my view, it was appropriate for the respondent to respond in paragraph 3(c) of the September 2024 affidavit to the allegations against her.
- [65] In my view, paragraph 3(d) of the respondent's affidavit is not relevant to the proceeding and most likely based on conjecture by the respondent rather than actual knowledge.
- [66] Paragraph 3(e) responds to the claimant's assertion that the respondent acted in a fraudulent manner. Although this appears to be something in the nature of argument, it is my view the claimant should be entitled to answer the assertion of fraud.
- [67] The allegations set out in paragraph 3(g) of the respondent's affidavit is, in my view, not relevant to any matter in this proceeding and should not be permitted.
- [68] Paragraph 3(h) of the respondent's affidavit addresses another allegation by the claimant that she has been fraudulent. In the face of an allegation of fraud, the responding affidavit is appropriate and should become evidence on the application.
- [69] There appears to be substantial parts of the claimant's affidavits that represent argument or speculation which are unlikely to be helpful at the hearing.
- [70] In conclusion, Notwithstanding the respondent expanded on evidence touching on these points raised in the claimant's reply affidavit, I am satisfied it is appropriate that paragraphs 3(c), (d), (e), (g), and (h) of the September 2024 affidavit remain in the record, and paragraphs (a) and (g) be redacted. I therefore find that it is in the interests of justice to exercise my discretion to admit the evidence as redacted.

"Armstrong J."

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