
CANADA / JUDGMENT

K.M.D. v. M.E.W.

2011 BCSC 99

COURT

Supreme Court of British Columbia

DECIDED

27 January 2011

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2011 BCSC 99 K.M.D. v. M.E.W.,

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.M.D. v. M.E.W.,

2011 BCSC 99

Date: 20110127

Docket: E051676

Registry: Vancouver

Between:

K.M.D.

Claimant

And

M.E.W.

Respondent

Notice: The Reasons for Judgment were edited for publication
purposes on 16 February 2011

Before: The Honourable Mr. Justice Curtis

Reasons for Judgment

Counsel for the Claimant:

Steven Mansfield

Counsel for the Respondent:

George Gordon

& Anne Demeulemeester

Place and Date of Trial:

Vancouver, B.C.

January 10-14

& 17-21, 2011

Place and Date of Judgment:

Vancouver, B.C.

January 27, 2011

- [1] K.M.D. and M.E.W. are the parents of K.A.W. born August 21, 2003, now seven and a half years of age. The parties have joint custody and guardianship of their son and subject to an issue concerning the terms of the guardianship order - propose that continue to be the case. The issues in this trial are whether K.A.W. should reside equally with both his parents or primarily with one of them, the amount of M.E.W.'s Guideline income for child support purposes and a claim for a retroactive increase in the support M.E.W. has paid for K.A.W.
- [2] K.M.D. is currently 48 years of age and single. She graduated from Simon Fraser University with a Bachelor of Arts degree in 1992 and is employed as a bylaw officer with the City of New Westminster where she earned an annual income of \$61,487.92 after deductions of union dues in 2010. K.M.D. lives with her mother and stepfather in a home her parents recently purchased to enable them to live together in New Westminster.
- [3] M.E.W. is currently 48 years of age and lives in a strata property at #1, 221 Ash Street, New Westminster where he has resided for the last 14 years. He is the sole shareholder of Promax Audio Visual Systems Inc. which he started in 1998 from which he has recently been drawing a salary of about \$55,000 per year. He is also single.

BACKGROUND

- [4] K.M.D. and M.E.W. met in 1994 when they were both living in the strata building on Ash Street with different partners. They began a romantic relationship in 2002. In December 2002, K.M.D. unexpectedly became pregnant. They decided to try and live together to raise their child and she moved in with M.E.W. in August of 2003, however they were unable to live with each other and K.M.D. moved out with their son K.A.W., then 18 months old in January of 2005.

- [5] In September 2005, the parties agreed to an interim consent order, giving K.M.D. sole custody of the child, with joint guardianship and access to M.E.W., including Tuesdays from 5:00 to 8:00 p.m., Thursdays 5:00 p.m. to Friday morning, Sundays from 10:00 a.m. to Monday morning, and extended weekends approximately every six weeks from Saturday morning until Monday morning. M.E.W.'s Guideline income was set at \$30,000 upon which he was ordered to pay \$266 per month commencing October 1, 2005. M.E.W. paid the support ordered, although not always on time, and regularly exercised the access provided, but was not happy with the limitations imposed by the scheduled allowed.
- [6] Prior to the September 2005 order, the parties had attended counselling together with Dr. Kamala Rungta in an effort to work out a parenting arrangement for their son. K.M.D. in the course of that had written a letter to Dr. Rungta received around January 2004 in which she wrote:

The task that lies before us is to shift responsibility for K.A.W. to a more balanced arrangement, with the ideal approaching a 50/50 split. I think we are all in agreement on that point. The point of disagreement seems to be the speed at which that occurs. While it wasn't what I wanted (or what M.E.W. wanted) we did manage to agree to a compromise at the last meeting, i.e. one overnight/week at M.E.W.'s starting January 7 (phase 1) and two consecutive nights/week starting March 15 (phase 2).

What I found most disturbing during our last session was your and M.E.W.'s opposition to my request to pause and assess K.A.W.'s progress before implementing phase 2. For the most part my concerns about K.A.W.'s well-being were de-legitimized and I was written of as being overly protective. I acknowledged that likely everything would be fine but I wanted to have some sensitivity built into the plan. The fact that such an innocuous request ... to pause and assess ... could be so strongly opposed, leads me to really question both your and M.E.W.'s priorities. If I understood correctly, the insistence was largely rooted in the belief that kids are resilient and that K.A.W. will be fine.

- [7] It appears that then, as is the case now, while K.M.D. says she is not opposed to equal parenting philosophically, in her opinion then and at the present time her son K.A.W. is not ready for it, and it would not be in his best interests.
- [8] Unfortunately for K.A.W., the transitions from one parent to another were emotionally stressful for reasons each party attributes to the other. Fortunately, in more recent times, this problem appears to have resolved.
- [9] In September of 2009, negotiating through their lawyers, the parties reached a without prejudice interim agreement. Under the September 2009 agreement, K.A.W. was with M.E.W. alternate weekends from Friday afternoon to Monday morning, with an overnight on Tuesday night on the weeks he was with his father on the weekends and an overnight on Thursday nights on the weeks he was not with his father the following weekend. K.M.D. testified that K.A.W. did well on this schedule which was in place until August 2010 except that she would have preferred he come home on Sunday evenings.

- [10] The parties' disagreement about how much time their son should spend with each of them resulted in a Section 15 report being ordered. Dr. Rebecca England was selected to do the report and began her investigations shortly after the September 2009 schedule was in place. In the resulting report dated November 27, 2009, Dr. England recommended K.A.W. reside equally with his parents on a two, two, five, five schedule for example with K.M.D. every Monday and Tuesday, with M.E.W. every Wednesday and Thursday and them alternating between his parents every Friday, Saturday and Sunday. Dr. England's report did not produce agreement because K.M.D. declined to accept it, being of the opinion that her son, whom she described as a sensitive and anxious boy was primarily attached to her and needed the stability of a primary residence with her.
- [11] M.E.W. applied for an interim order to put the parenting schedule recommended by Dr. England into effect and was successful in doing so. By order dated July 13, 2010, Masuhara J. vacated the September 2005 order and ordered that the parties have interim joint custody and interim joint guardianship of their son with shared parenting in the following terms:
4. there shall be a shared parenting arrangement for the Child as follows:
 - i. the Child to reside with the Defendant father each Monday from after school until Wednesday morning before school in each week;
 - ii. the Child to reside with the Plaintiff mother each Wednesday from after school until Friday morning before school in each week;
 - iii. the Child to reside with each parent on an alternating weekly basis from Friday after school until Monday morning before school in each week; and
 - iv. if there is no school, or if K.A.W. is ill and unable to attend school, the exchange time is to occur at 4 pm on each exchange day,(the "Regular Schedule")
- [12] Judge Masuhara also ordered that K.A.W. should receive no further counselling or therapy without the written consent of both parties or a court order and directed by consent that a Parenting Coordinator be appointed to resolve child care issues between the parties. The parties have since spent \$7,000 on the Parenting Coordinator's services.
- [13] The shared parenting scheme so ordered was put in place in August 2010 and K.A.W. has lived equally, according to that schedule with each of his parents for five months. M.E.W. seeks to have the shared parenting plan now in place continued and has testified K.A.W. is doing well. K.M.D. opposes continuation to the equal parenting and seeks an order that K.A.W. live primarily with her according to the access schedule set out in the September 2005 order, on the basis of evidence she has led that K.A.W. is tired and emotional and not doing well under the shared parenting regime.

PARENTING PLAN

- [14] I accept Dr. England's opinion that it is in K.A.W.'s best interests that he lived with his parents on the schedule she recommends and now in place. Having observed the parties and considered the evidence, I agree with Dr. England that they are each very capable people, and I find that although their parenting styles are different, they each have something to offer which would benefit their son. The major difficulty facing K.A.W. at the present time is not the issue of whether he spend four days more with his father or not, but the existing conflict between his parents. In my opinion, the equal parenting plan now in place is the most likely plan to significantly reduce that conflict over time because in parenting equally these parents will have less occasion for being in conflict over the time their child spends with each of them.
- [15] I have considered the evidence of K.M.D., and her parents, that K.A.W. is not doing well under the equal parenting regime and was better under the September 2009 arrangement, however, while I accept they will see an aspect of K.A.W., that M.E.W. and others may not I find that on the whole, K.A.W. is doing well in an arrangement that will provide long term benefits for him. K.A.W. is in grade two at school in New Westminster. His December 2010 report card is good. His hockey coach's evidence indicates that although he started the hockey season late, and plays with children with one or two years more experience than he has, he has adapted very well. I do not feel this would be possible if he was the anxious and overwhelmed child K.M.D. depicted in her evidence. As demonstrated by the evidence, the equal parenting schedule now in place allows K.A.W.'s father to be much more involved with his school and social life.
- [16] This case is remarkable in my experience for the degree to which these parties can be in conflict over some issues and yet be cordial with and complimentary to the other on many other matters. They can and do communicate effectively concerning their child, the problem is that on some issues they cannot agree. The best approach to this would seem to be twofold: to leave in place the Parenting Coordinator established in Masuhara J.'s order by consent, but to supplement that with an order that the parents shall attend a course of parenting therapy with a qualified professional the cost of which shall be shared in proportion to their Guideline income.
- [17] I do make the order contained in the interim order the K.A.W. shall receive no further counselling or therapy without the written consent of both parents or court order. I would expect that if therapy is necessary for K.A.W., the parents would agree failing which the Parenting Coordinator or the court will decide the matter. On the evidence before me, I find nothing to suggest that K.A.W. needs to be attending therapy at the present time.

- [18] I understand from counsel that the parties are content to continue the provision for holidays and other schedule issues set out in the interim order of Masuhara J. I would expect they are also prepared to extend the order that neither party shall move the child's residence out of the city of New Westminster further than 10 kilometres outside the city boundaries without written agreement of the parties or court order. If that is the case, such matters as the parties agree to should be included in the order following this trial by consent.
- [19] I decline to change the terms of joint guardianship as set forth in the July 13, 2010 order to give the power to make unilateral child care decisions to K.M.D. Each parent has an equal role in caring for K.A.W., they should be able to agree on these issues and if they do not, there is a method in place to resolve them. I also decline to make the order sought by M.E.W. that an agreement or decision is required before K.A.W. is taken to a doctor. Such an order would be impractical. If there is an issue concerning medical treatment for K.A.W. the parties cannot agree upon, it can be referred to the Parenting Coordinator or the Court.
- [20] K.M.D. has sought an order that there be a dinner visit with K.A.W. during the alternating five-day weekends so that he is not away from either parent for five days. In my opinion, this would be of little benefit and unnecessarily disruptive, simply increasing the number of times this child goes back and forth between his parents. Furthermore, the Parenting Coordinator has established a schedule of telephone access which allows frequent contact with each parent.
- [21] In summary, it is ordered that K.M.D. and M.E.W. shall have joint custody and joint guardianship of their son K.A.W. with the terms of guardianship being as set out in the interim order of July 2010. K.A.W. shall continue to reside with his parents on the equal parenting schedule set out in the interim order as recommended by Dr. England and currently in place. The parents shall attend a course of parenting therapy as referred to above, and K.A.W. shall not receive further counselling or therapy, except with written consent of both parties on order of the court. The rest of the terms of the order shall be as consented to.

CHILD SUPPORT

- [22] K.M.D. claims a retroactive child support order increasing the support payable by M.E.W. back to July 2005 on the basis that M.E.W. has had considerably more income than the \$30,000 upon which child support was initially established, that a portion of his wholly owned company's corporate pre-tax income ought to be attributed to him as income, and that personal expenses for automobile and legal fees paid out of corporate funds should be attributed to him as income. M.E.W.'s position is that no retroactive support ought to be ordered because he paid what was agreed to, he draws a reasonable salary from his company in relation to its business reality, and no request on application for an increase in support was made until April 2009 when K.M.D.'s counsel demanded that support of \$479 per month be paid upon his disclosed income of \$51,500 with which he complied, paying \$479 per month from May 1, 2009 on a "without prejudice" basis.

[23] The principles of law applying to a claim for retroactive child support are discussed by the Supreme Court of Canada in the case of *D.B.S. v. S.R.G.*; *T.A.R. v. L.J.W.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, [2006] 2 S.C.R. 231 (S.C.C.). In the headnotes to that case, the decision of McLachlin C.J., Bastarache, LeBel and Deschamps JJ. is reported in part as follows:

Parents have an obligation to support their children in a manner commensurate with their income, and this obligation and the children's concomitant right to support exist independently of any statute or court order. To determine whether a retroactive award would be appropriate, the court must first consider the prevailing legislation and child support scheme. To the extent that the federal scheme has eschewed a purely need-based analysis, this free-standing obligation implies that the total amount of child support owed will generally fluctuate based on the payor parent's income. Thus, under that scheme, payor parents who do not increase their child support payments to correspond with their incomes will not have fulfilled their obligations to their children. However, provinces remain free to espouse a different paradigm. When an application for retroactive support is made, therefore, it will be incumbent upon the court to analyze the statutory scheme pursuant to which the application was brought. [54]

The fact that the current child support scheme under both the Divorce Act and Alberta's Parentage and Maintenance Act are application-based does not preclude courts from considering retroactive awards. While child support orders should provide payor parents with the benefit of predictability, and a degree of certainty in managing their affairs, such an order does not absolve the payor parent -- or the recipient parent -- of the responsibility of continually ensuring that the children are receiving an appropriate amount of support. As the circumstances underlying the original award change, the value of that award in defining the parents' obligations necessarily diminishes. In situations where payor parents are found to be deficient in their support obligations to their children, it will be open for the courts, acting pursuant to the Divorce Act or the Parentage and Maintenance Act, to vary the existing orders retroactively. The consequence will be that amounts that should have been paid earlier will become immediately enforceable. Similarly, a court may award retroactive support where there has been a previous agreement between the parents. Although such agreements should be given considerable weight, where circumstances have changed and the actual support obligations of the payor parent have not been met, the court may order a retroactive award so long as the applicable statutory regime permits it. Under the Divorce Act or the Parentage and Maintenance Act, courts also have the power to order original retroactive child support awards in appropriate circumstances. Lastly, where support, including retroactive support, is requested pursuant to the Parentage and Maintenance Act, a court will not have jurisdiction to order support if the child in question was over 18 at the time the application was made, or if certain expenses occurred more than two years in the past. Under the Divorce Act, a court will not be able to make a retroactive award if the child in question is no longer a "child of the marriage", as defined in s. 2, when the application is made. [59] [74] [78] [84] [87-89]

In determining whether to make a retroactive award, a court should strive for a holistic view of the matter and decide each case on the basis of its particular facts. The payor parent's interest in certainty must be balanced with the need for fairness to the child and for flexibility. In doing this, the court should consider the reason for the recipient parent's delay in seeking child support, the conduct of the payor parent, the past and present circumstances of the child, including the child's needs at the time the support should have been paid, and whether the retroactive award might entail hardship. Once the court determines that a retroactive child support award should be ordered, the award should as a general rule be retroactive to the date of effective notice by the recipient parent that child support should be paid or increased, but to no more than three years in the past. Effective notice does not require the recipient parent to take legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the status quo is fair. However, where the payor parent has engaged in blameworthy conduct, the date when the circumstances changed materially will be the presumptive start date of the award. Finally, the court must ensure not only that the quantum of a retroactive support award is consistent with the statutory scheme under which it is operating, but also that it fits the circumstances. [99-135]

[24] The reasoning of Fish, Abella and Charron JJ. is reported in part as follows:

Parents have a free-standing joint obligation to support their children based on their ability to do so, and this obligation creates a right in the child. Because the child's right to support varies with changes in income, the child's entitlement to a change in support should not be limited to the date of the recipient parent's notice of an intention to enforce it. So long as the change in income warrants different child support from what is being paid, the presumptive starting point for the child's entitlement is when the change occurred, not when it was disclosed or discovered. For payor parents, certainty and predictability are protected by the legal certainty that whenever their income changes materially, that is the moment their obligation changes automatically, even if enforcement of that increased obligation is not automatic. Since the existence of the increased support obligation depends on the existence of the increased income, there is no role for blameworthy conduct in determining the date at which children can recover the support to which they are entitled. The obligation fluctuates with parental income, not with parental misconduct. In the same way, the recipient parent need not demonstrate that the failure to pay child support has resulted in hardship for the child. A presumptive date of entitlement to a change in child support does not, however, eliminate the role of judicial discretion. It will be up to the court in each circumstance to determine whether the presumptive date has been rebutted. While undue hardship could militate against a retroactive order being made as of the date of the change of circumstances, there is no reason to deprive children of the support to which they are entitled by imposing an arbitrary three-year judicial limitation period on the amount of child support that can be recovered. Such a clear restriction of a child's entitlement is an unnecessary fettering of judicial discretion and requires an express statutory direction to that effect. Notwithstanding the differences in approach, there is agreement with the majority's disposition of the four appeals. [157-179]

- [25] Both sets of reasons refer to the fact that a payor spouse has an obligation to pay corresponding to the income earned, which is the effect of the statutory scheme established in British Columbia.
- [26] The original order made by consent September 1, 2005 stipulated a payment of \$266 on a Guideline income of \$30,000 per year. M.E.W.'s T4 for 2004 shows his income from his company to have been \$23,500. The corporate year-end for Promax Audio Visual Systems is July 31st of each year.
- [27] The financial documents of M.E.W. and his company reveal the following information subsequent to the September 2005 consent order:

Line 150

Income

Promax

Pre-Tax Income

Promax Auto Expense

2005

\$44,675.16

\$38,819

\$4,977

2006

\$57,262.40

\$105,972

\$8,941

2007

\$51,500.00

\$53,514

\$8,405

2008

\$55,000

\$231,424

\$14,638

2009

\$50,000

\$70,002

\$9,867

2010

\$50,000

(\$52,215)

\$6,075

- [28] M.E.W. pays 100 percent of his vehicle expenses through his company. Clearly, a significant portion of the vehicle use is for personal purposes such as commuting to work, buying groceries, picking up his son, et cetera. To assess fairly the income upon which child support should be based, a portion of the automobile expenses, recognizing the cost attributable to personal use should be added onto this income. I find it reasonable to attribute 50 percent of M.E.W.'s vehicle expenses to his personal use. A similar consideration arises with respect to the payment of \$7,953.23 from Promax on account of M.E.W.'s personal legal fees. That too should be added back to his income for 2007, the year it was paid.
- [29] A more difficult question arises with respect to whether or not some or all of M.E.W.'s wholly owned company's pre-tax income should be added to his income for the purposes of calculating Guideline child support. M.E.W., being the sole shareholder and president of the company is able to have his company pay him as he chooses. It would not be fair to allow him to minimize the income on which he is liable to pay support simply by having his company pay him a conveniently small amount. On the other hand, however, business and economic realities must be recognized and it would not be fair to attribute to M.E.W. an income his company could ill afford to pay.
- [30] The British Columbia Court of Appeal considered the issue of how to decide what portion of a payor's company's pre-tax income ought to be considered in the case of *Kowalewich v. Kowalewich*, 2001 BCCA 450. In delivering the decision of the Court, Huddart J.A. stated:
- [36] About these provisions, Mr. Kowalewich made two essential points. First, "fair income" under s. 18 is that commensurate with the value of a payor's services to his company. So the trial judge erred in basing child support on any other amount. Second, inclusion of all the corporate income from the Victoria company based on 1997 financial statements updated to July 1998 ignores Ms. Hickey's investment in and management of the Victoria operation after July 1998. To the extent such inclusion is required by the Guidelines, significantly more value should have been given to her contribution.

- [37] Underlying his entire submission is Mr. Kowalewich's view that, once he made the compensation payment to Ms. Kowalewich, he became entitled to make business decisions as he pleases. On this approach, his only child support obligation in 1999 was to pay the table amount and his share of extraordinary expenses based on an annual income of \$96,000.00, the value two valuers placed on his services to the Banff company in 1996 before Justice Drake. He accepts that if the trial judge correctly determined he was providing personal services to the Victoria company, an additional \$35,000.00 should be included in his annual income for the value of those services.
- [38] In support of this submission, he noted the use of the value of personal services to determine a spouse's income would preclude the need for the expensive annual audit required by the approach based on corporate income. Moreover, he noted, use of the personal services approach would provide a relatively stable child support payment as business income rises and falls.
- [39] Mr. Kowalewich finds support for his view in the analysis in *Stamoulos v. Pavlakis* (1997), 82 R.F.L. (4th) 75 at paras. 42 - 48, and particularly in the view Justice Pitfield expressed at paras. 43, 45 and 48:
- [43] While the drafting leaves much to be desired, the object appears to be, insofar as closely held corporations are concerned, to ensure that an individual does not artificially or unnecessarily reduce personal income by causing the company to refrain from paying a salary commensurate with the services provided, thereby reducing the amount to be paid as base child support.
- [45] I need not and should not form the requisite opinion in the absence of signs pointing to the structuring of compensation in an attempt to defeat the Guidelines, or to the subsidization of an individual's personal and living expenses through corporate disbursements, either of which conclusions would provide support for the conclusion that "total income" from the source was not the fairest determination of "annual income" from the source.
- [48] In my opinion the adjustments contemplated by sections 17 and 18 should be made sparingly and then only in situations where one may infer that avoidance of obligations under the Guidelines was intended.
- [40] I disagree with Justice Pitfield's approach to sections 17 and 18. A court need not look for signs of bad faith or undeclared personal benefits to support a conclusion of intentional avoidance of a child support obligation before reaching the opinion required to trigger an adjustment under ss. 17 or 18. Nor should it look only to the value of a payor's services to a company that parent owns or controls.
- [41] I note the use of pre-tax corporate income as a basis for the determination of child support does not strip a spouse of his available money. It is to use available money as a measuring rod for the purpose of fixing annual income and thus the amount of child support.

[42] I suggest that at the root of these provisions is a concept not unlike that of income earning capacity well known to the law of support obligations in the pre-Guidelines era, as this Court noted in *Van Gool v. Van Gool* (1998), 59 B.C.L.R. (3d) 395. Courts have long imputed to underemployed parents the amount they could earn if working to capacity. The Guidelines affirm that approach in s. 19(1)(a) and (e). The purpose of the Guidelines is to permit an impartial assessment of "money" available to a spouse to pay child support. They are not just about actual income as a parent directly or indirectly determines it to be.

[43] In this regard, I find helpful the view Justice Martinson expressed in *Baum v. Baum* (1999), 182 D.L.R. (4th) 715 at para. 28:

Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation. See *Bhopal v. Bhopal*, [1997] B.C.J. No. 1746 (S.C.), *Blackburn v. Elmitt* (1997), 34 R.F.L. (4th) (B.C.S.C.) and *McCrea v. McCrea*.

[44] A court's effort to ensure fairness does not require a court to second-guess business decisions nor, as Justice Pitfield so colourfully noted in *Stamoulos*, supra, at para. 44, to "place the largest available shovel in the company store." What it does require is that a spouse's allocation of pre-tax corporate income between business and family purposes be assessed for fairness by an impartial tribunal when parents cannot reach agreement on priorities as they would in an intact family and may upon separation under s. 15(2).

[45] To determine whether "Total income" fairly reflects money available for child support, a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business over which the parent exercised control, having regard to the objectives of the Guidelines, the underlying parental obligation to support children in accordance with one's means, and any applicable situation in s. 17.

[46] It is common ground that Total income on Mr. Kowalewich's 1997 T1 General form did not fairly reflect the amount of money available to him for the payment of child support in 1998. So the first issue for this Court is whether the trial judge erred in selecting s. 18(1)(a) rather than s. 18(1)(b) after forming that opinion.

[47] The Guidelines give no explicit guidance as to how a parent or a court might go about choosing whether to use the corporate income method or the personal services method in determining annual income. However, s. 18 suggests two considerations in the preconditions for its application: (1) which method produces an annual income that more fairly reflects "all the money available to the spouse for the payment of child support;" and (2) which method does the nature of the spouse's relationship with the corporation support. Section 18 also permits reference to the "situations described in s. 17," and thus to the spouse's income pattern over the previous three years.

- [48] In some cases, the nature of the spouse's relationship with the corporation will be decisive. Section 18 applies to a spouse who wholly controls a corporation, but it also applies to one who shares ownership and control with others. In the former case, the corporate income method is likely to be the fairer method of determining income. This is because it allows a court to include not only reasonable payment for personal services but also a reasonable return on the owner's entrepreneurial capacity and investment. These are sources of income available for child support an intact family would utilize. Moreover, it not only permits but requires the inclusion of the income of companies related within the meaning of the Income Tax Act, and of non-arms length payments made without value for the company.
- [49] There may be factors in particular cases that will recommend the personal services method to a court for a one-person company, as Baum, supra, illustrates. In that case, the company's only business was the provision of the personal services of its owner. There may also be cases where Mr. Kowalewich's submission about stability of income will persuade a trial judge to choose the personal services method, having regard to s. 17 situations. But this is not one of them.
- [31] M.E.W. started his business in December 1998. His company Promax Audio Visual Systems Inc. of which he is the sole officer and shareholder, sells and installs audio and visual equipment and systems. It also rents equipment, and in particular, rents and operates equipment for corporate clients, conferences, schools and other events. The business has 1,300 square feet of office and warehouse space in Burnaby and currently has one full-time manager and a part-time employee. However, when it contracts to supply equipment for large events and conferences it may have to hire 25-30 technicians and others to do the work, which requires financial resources. In order to be competitive in its industry, Promax has to replace outdated equipment and maintain a sufficient inventory of equipment so that it does not end up having to rent too much from its competitors to fulfill its commitments.
- [32] Beginning in 2006, Promax began to get a lot of government contracts which resulted in particularly good income for the company in 2006 and 2008. However, the emphasis of government work, which resulted in other work sources not being so well serviced has had a down-side in that due to funding cuts, there has been a dramatic decrease in such work since 2008, with the result that in 2010 the company suffered a loss of \$52,512 and the retained earnings of the company which had risen to \$352,375 in the 2009 year are now reduced to \$257,222 July 31, 2010.
- [33] In the 2008 year in which Promax had pre-tax earnings of \$231,424 and \$340,160 in cash on account, M.E.W.'s accountant suggested he pay himself \$80,000, however he decided to be more conservative as he could foresee the coming decline in business and took only \$55,000.

- [34] Economic problems however have not been the only reason from the decline in Promax's income as M.E.W. admits he has been significantly distracted from his business by the time and attention he has put into this court case. Hopefully, that problem will be reduced in the future.
- [35] It would not be appropriate to add to M.E.W.'s income all of his company's pre-tax earnings for each year – clearly that would not reflect business reality. The retained earnings of his company do not represent an amount readily available in cash as the earnings may have gone into other things, such as inventory or pre-paid expenses. Furthermore, the company needs some available cash to be able to finance large contracts, particularly as for the moment it appears to have lost its line of credit with its bank. While the retained earnings for the year-end July 31, 2010 are \$257,222 the cash on account on that date was \$89,182.
- [36] Overall, considering the circumstances of Promax's business and the obligation of a reasonable parent to pay child support, I find no reason to add any part of the company's pre-tax income to M.E.W.'s Guideline income for the 2005, 2007 and 2009 years and of course there is none to be added for the 2010 year in which there was a loss. In the 2008 year in which the company had \$231,424 in pre-tax earnings, the company's accountant recommended M.E.W. pay himself \$80,000 which in my opinion would be reasonable for that year. In 2006, when the company's pre-tax income was \$105,972, the figure of \$65,000 is reasonable in my opinion.
- [37] Accordingly, adjusting M.E.W.'s income as discussed above the following figures are appropriate for his Guideline income.

Line 150 Income

50% of Auto Expense

Added from Corporate Income

Total

2005

\$44,675.16

\$2,488

0

\$47,163

2006

\$57,262.40

\$4,470

\$7,738

\$69,470

2007

\$51,500

\$4,202

0

\$63,655*

2008

\$55,000

\$7,319

\$25,000

\$87,319

2009

\$50,000

\$4,933

0

\$54,933

2010

\$50,000

(estimate)

\$3,037

0

\$53,037

* \$7,953.23 added for personal legal fees paid by Promax in 2007.

[38] It is not possible to derive a formula for what should be added, if anything, to M.E.W.'s income from the pre-tax income of his corporation in the future as what is reasonable will depend on the circumstances as they evolve. Insofar as support payments from January 1, 2011 forward, I fix M.E.W.'s Guideline income at \$53,000.

- [39] K.M.D. shows a Guideline income of \$61,487 on her most recent financial statement and I fix it at that amount. In these circumstances, M.E.W. does not seek an order for child support at the present time.
- [40] I find in the circumstances that M.E.W. must pay K.M.D. arrears of child support from January 1, 2006 calculated on his income as I have adjusted it with credit for what he has already paid. The order based on \$30,000 made in 2005 upon the premise that \$30,000 was a fair estimate of M.E.W.'s income, which it was at the time that figure was agreed upon. Around January 2006 however, it would have been apparent to M.E.W. that he had a significantly larger income. While M.E.W. says he regularly gave his financial documents to his lawyer each year, there is no documentary evidence that K.M.D. received financial disclosure until September 2008 after which her lawyer wrote to say that child support should be payable on the actual income. K.M.D. cannot be expected to give notice that she requires higher support payments if she does not have the financial disclosure necessary to assess her position. The retroactive increase is ordered from the date upon which M.E.W. knew he was paying less than he should be. It has not been demonstrated that M.E.W. will suffer hardship in paying the arrears and I find no reason not to order payment of the arrears so calculated.
- [41] The parties may address any issues which are unclear or not resolved by these Reasons.

"V.R. Curtis J."

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Prepared on 26 October 2026 · Esheria