
CANADA / JUDGMENT

Katchen v. Katchen

2015 BCSC 103

COURT

Supreme Court of British Columbia

DECIDED

23 January 2015

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2015 BCSC 103 Katchen v. Katchen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Katchen v. Katchen,

2015 BCSC 103

Date: 20150123

Docket: E142282

Registry: Vancouver

Between:

Deanne April Katchen

Claimant

And

Daryl James Katchen

Respondent

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Claimant:

N. Davies

Counsel for the Respondent:

N.S. Ganapathi

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 26 and December 3, 2014

Place and Date of Judgment:

Vancouver, B.C.

January 23, 2015

[1] This is a family law application in which the claimant seeks orders for interim spousal and child support and related orders pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) ("DA") and the Family Law Act, S.B.C. 2011, c. 25 ("FLA").

Background

[2] The parties were married on December 24, 2001 and separated on June 9, 2014, thus ending a 12 ½ year marriage.

[3] There are two children of the marriage, F.J.K. born September 5, 2004 and K.J.K. born July 13, 2008. The two children are primarily resident with the claimant and reside in the former matrimonial home in Nakusp, B. C. which the parties own jointly.

[4] Prior to their separation, the parties owned and operated a trucking company, D. Katchen Trucking Inc. (the "Company").

[5] The claimant alleges the respondent is a violent person and that he has sought to control her friendships, social activities, finances and home life through mental abuse and physical violence, all of which has been condoned by the respondent's parents.

[6] Master Muir issued an interim conduct order and a protection order on August 22, 2014 which was extended on October 17, 2014 to November 13, 2014.

[7] Prior to separation the parties took draws from the Company to pay for their living expenses. The claimant had access to the Company account and could draw funds as needed. Since separation, the respondent has denied her access to the Company funds, asserting she spent joint monies excessively.

[8] Since separation the claimant has received no child or spousal support except for \$500 the respondent paid her in September 2014 to assist with the children's school expenses and \$989 which he paid on October 1, 2014. The claimant has made repeated requests through her counsel for both child and spousal support.

- [9] The claimant is disabled and has, for several years, received monthly disability insurance payments in the annual amount of \$24,876.00. In 2014 the monthly disability benefits were reduced by the insurer to \$1,216.33 (\$14,598 annually) pending resolution of the claimant's application to the Canada Pension Plan ("CPP") for a disability pension. The claimant says her Guideline income for 2014 is \$14,596.
- [10] The claimant says her monthly living expenses are in excess of \$6,000 per month and she is currently borrowing from family and friends to assist her in meeting family expenses. She has requested the respondent to allow her to withdraw funds from the parties non-registered investment accounts, but he has refused to allow her to do so.
- [11] The claimant says the respondent controls the Company and that his Guideline income should be set at \$169,092 based on corporate income before taxes, tangible assets and personal expenses the Company has paid on his behalf.
- [12] The respondent initially submitted his Guideline income should be set at \$82,000. He says he has every intention of paying child and spousal support, but says the court needs to first set his Guideline income.
- [13] The respondent has been paying mortgage and certain other ongoing expenses since separation. He says he deposits "about \$2,225 monthly" into a joint account which the claimant uses for the purpose of covering the house mortgage and insurance payments, utility costs and health and benefits plan costs.
- [14] He says and that while business has recently been brisk, historically the Company has gone through fluctuations in business cycles; that it is now half way through such a cycle; that he needs to keep cash in reserve to carry it through the low period of such cycle and that he is drawing much less from the Company since separation. He also says the Company will need to hire someone to perform its bookkeeping functions, tasks formerly done by the claimant.
- [15] The respondent also says income should be attributed to the claimant as she is able to earn more than she currently does. He refers to two such areas. He says her monthly disability amount should be determined at \$2,073 per month because although the insurance company now deducts the anticipated amount of CPP benefits she has applied for it and says that if her application is not successful it will make up the amount deducted. The claimant says she does not know when or if her application will be approved.
- [16] The respondent also says the claimant should be able to earn income from a sign making business she started in Nakusp. He seeks to attribute income to her. The claimant says she cannot earn income as she is disabled.
- [17] As the primary issue before me is to determine each party's Guideline income, the court asked each counsel for further submissions on the amounts each party had received from the Company by way of employment income and dividend income over the last three years as that amount was not clear to me based on the material filed in support of the applications.

[18] Counsel then reviewed the Company's financial records, agreed on certain facts which I will outline below and a further hearing was scheduled and the parties have subsequently made further written arguments.

[19] While not necessary for resolving the issue of child and spousal because the parties have been able to agree on the amount to be used for the respondent's Guideline income (after determining the funds available to him which he can draw from the Company), and perhaps because it may be of assistance to the trial judge I will review the material put before me by counsel.

Historic Income of the Parties

[20] The parties' income has historically been derived from the Company by way of dividends and shareholders loans.

1. Dividend Income

[21] Based on her tax return assessments from the Canada Revenue Agency ("CRA") the claimant's line 150 income has been \$16,529 (2011), \$36,389 (2012) and \$35,112 (2013). In addition in each of those years she was in receipt of non-taxable disability income in the amount of \$24,876. As noted, in 2014 the insurer cut back the respondent's disability payment pending her application for a permanent disability from the CPP. She expects her 2014 income from disability benefits to be \$14,596.00.

[22] Based on his tax return assessments from the CRA the respondent's line 150 income has been \$35,299 (2013), \$35,232 (2012), and \$54,165 (2011).

2. The Company Income

[23] The Company's fiscal year ends March 31 of each year. Its gross and net income over the last two years has been:

Year

Gross Income

Net Income

2014

\$303,972

\$97,812

2013

\$275,841

\$110,188

- [24] The respondent says that for the fiscal year ending March, 2015 he estimates the net income for the Company will be "about \$90,000" as he will need to hire a bookkeeper to do the tasks the claimant had formerly done" and because "the lumber business is currently in a slowdown" (para. 8, affidavit #3 of respondent).
- [25] The respondent also says he has been paying about \$2,460 a month to pay expenses including mortgage payments, taxes, heat, electricity, cable, telephone and house insurance.
- [26] The claimant says the Company's net income is too low as the amount of "amortization" claimed by the Company is not an actual expense and should be added back to income to determine how much cash the Company produces which has been used to support the family.

Share holder Loan Accounts

- [27] One of the difficulties counsel, and hence the court initially had in determining the appropriate amount to use as each party's income for support purposes in this case is that, over the last three years, the parties have taken draws from the Company as shareholder's loans and those shareholders loans must now must be allocated to each party and declared as taxable income. While counsel have resolved the issue of the amount to be attributed to the respondent as his Guideline income it is useful to note that the Company's shareholder's loan account has increased from \$23,592 for the Company fiscal year ending March 31, 2012 to \$56,920 for the year ending March 31, 2013 to \$164,125 for year end March 31, 2014.
- [28] For the purpose of determining the appropriate taxable income of each party the cash withdrawal must be recognized in the year the cash was actually withdrawn notwithstanding the claimant and respondent may actually be obligated to pay the tax on the shareholders loans in their respective 2014 personal taxation years.
- [29] Counsel have reviewed the corporate accounts and agreed the on the figures which represent both the claimant's and respondent's line 150 income when such allocation is made for each of the calendar years 2011, 2012 and 2013 (including reported income (as above outlined) and the allocation of the shareholders loans) as:

Claimant:

2011

\$50,254.92

2012

\$76,714.28

2013

\$104,468.90

Respondent:

2011

\$63,012.00

2012

\$50,679.01

2013

\$79,780.08

Some \$26,876 of the increase in the Company's shareholder loan made in the fiscal year ending March 31, 2014 has been allocated to the 2014 calendar year.

Discussion of The applicable Law

[30] Counsel does not disagree on the law applicable to either child or spousal support. The questions for determination, of course, are how that law is to be applied to the particular facts of the case. The claimant's applications seek relief under both the FLA and DA.

[31] Section 147(1) of the FLA provides that each parent has a duty to pay child support:

Each parent and guardian of a child has a duty to provide support for the child,

[32] In determining the amount of child support, the court must do so in accordance with the Guidelines:

Determining child support

150 (1) If a court makes an order respecting child support, the amount of child support must be determined in accordance with the child support guidelines.

- (2) Despite subsection (1), a court may order child support in an amount different from that required by the child support guidelines if
 - (a) the parties consent under section 219 [persons may consent to order being made] or have an agreement respecting child support, and
 - (b) the court is satisfied that reasonable arrangements have been made for the support of the child.
- (3) The court must consider the child support guidelines for the purposes of subsection (2), but must not consider arrangements made for the support of the child to be unreasonable only because the amount required under the child support guidelines differs from those arrangements.

- (4) Despite subsection (1), a court may order child support in an amount different from that required by the child support guidelines if satisfied that
 - (a) an agreement or order respecting the financial duties of the parents or guardians or the division or transfer of property, other than an agreement respecting child support, benefits the child directly or indirectly, or that special provisions have otherwise been made for the benefit of the child, and
 - (b) applying the child support guidelines would be inequitable on consideration of the agreement, order or special provisions.
- (5) If a court makes an order respecting child support in an amount different from that required under the child support guidelines, it must give reasons for doing so.

Spousal Support

[33] The relevant provisions of the DA read as follows:

Spousal support order

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

- (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

- (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;

- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.[]

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[34] Sections 160 - 162 of the FLA contain similar provisions:

Duty to provide support for entitled spouse

160 If, after considering the objectives set out in section 161, a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[35] The above principles apply whether the court is considering interim or permanent spousal support.

[36] In *Robles v. Kuhn*, 2009 BCSC 1163 a para. 12 Master Keighley summarized the principles applicable on an application for interim spousal support:

On interim support applications, the application of these provisions must be qualified by certain established considerations:

1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: *Gibb v. Gibb*, [2005] B.C.J. No. 2730 (S.C.);
2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: *Grossi v. Grossi*, [1993] B.C.J. No. 878 (S.C.);
3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: *Randhawa v. Randhawa*, [1999] B.C.J. No. 3299; *Newson v. Newson*, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);
4. The courts should not unduly emphasise any one of the statutory considerations above others;
5. On interim applications the need to achieve economic self-sufficiency is often of less significance;
6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: *Ladd v. Ladd*, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.);
7. Interim support should only be ordered where it can be said a *prima facie* case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, [2005] B.C.J. No. 2966, 2005 BCSC 1786 (S.C.);
8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support: *L.G.B.*

Incomes of the Parties to be Used for Determination of Support Payments

- [37] In this case it is clear the respondent's line 150 income is not the fairest way to determine income for support purposes. The actual cash flow from the Company which, prior to the separation, was shared now is available to the respondent and is money available to him to pay support: *Bateman v. Bateman*, 2013 BCSC 2026, *Kowalewich v. Kowalewich*, 2001 BCCA 450 [Kowalewich]. In *Kowalewich* the court said at paras. 28 and 41 - 45:
- [28] Despite the implementation of the Guidelines, the process of determining child support in the case of a self-employed businessman in the position of Mr. Kowalewich continues to be problematic for the parties and for a court. This is because child support is based on annual income as determined by the income determination provisions of the Guidelines and they rely on the sources of income in a spouse's T1 General Form, adjusted for Schedule III. For many, if not most small businessmen, Total Income on that form bears no relationship to the money available for child support. That is the case with Mr. Kowalewich. No one suggested Total income on his T1 General Form for the most recent taxation year (1997) fairly reflected the money he had available in 1998 or 1999 for the support of his daughters.
- [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.
1. Respondent

[38] In this case counsel has agreed income should be imputed to the respondent and his Guideline income should be set \$129,730.00. Accordingly, I accept that amount as the appropriate amount to fix as the respondent's income for spousal and child support purposes.
 2. Claimant

[39] I do not accept the respondent's position on this application I should impute income to the claimant. The respondent has an onus on him to establish the claimant could earn income in excess of that she is currently receiving. I am unable to conclude on the evidence before me the claimant has any reasonable prospect of increasing her earning beyond that she receives by way of her disability income.

[40] I also do not accept the respondent's submission the claimant's guideline income should not be reduced because the insurance company has reduced her benefits pending a determination from the CPP whether she is entitled to a disability pension. When and if she receives that pension or whether the insurer reimburses her for the current deduction can be adjusted for by the parties when those events occur. The fact remains that the claimant's income has been reduced and she has been and remains less financially able to pay expenses for herself and the children.

[41] The claimant's income for spousal support and her contribution to special expenses is set at \$14,596.00.
 3. Child Support

[42] Based on a Guideline income of \$129,730.00 the respondent will pay child support for the two children of the marriage in the amount of 1,857 per month to continue as long as each child remains a child of the marriage. The parties will pay any extraordinary expenses based on the prorated amount of their respective Guideline incomes.

4. Spousal Support

- [43] Section 66 of the FLA provides that in determining the amount of spousal support the court must not have regard to any "misconduct" of the parties except in circumstances that do not apply in this case.
- [44] The parties were married some 12 ½ years, a reasonably lengthy relationship and have a six year old daughter and ten year old son whose primary residence is with the claimant. The claimant resides in the former matrimonial home. Prior to their separation the parties enjoyed a reasonably prosperous livelihood as a result of the success of their business. The claimant was able to access Company funds as and when she needed for family expenses.
- [45] Since their separation the respondent has cut the claimant off from her ability to access Company funds and their joint accounts. The respondent says he has done so because of the claimant's financial irresponsibility. The claimant denies this is the case. She says she is left in a situation of having to rely on and borrow from friends and family to support herself and the two children.
- [46] I accept the claimant's position it is unrealistic to expect the claimant to work given her disability and the fact she has the care of two children during the week. This is an interim order intended to last until the trial. It will be the task of the trial judge, based on a full review of the evidence, to determine the then state of the claimant's health, whether there is gainful work she can do and whether she can supplement her income with a view to becoming more self-sufficient in the future.
- [47] I accept the claimant has been significantly disadvantaged by the breakdown of the party's marriage and the separation. Prior to the breakdown she and the respondent had access to whatever cash the Company generated. That amount was significant as evidenced by the amount the parties drew by way of shareholders loans. The claimant kept the Company's books and made a valuable contribution to the Company. The respondent says she was in essence a key employee.
- [48] Based on the length of the marriage, the relationship between the parties, the fact there are two children and the means and needs of each party I award spousal support in the mid-range of the Spousal Support Advisory Guideline based on each income in the amount of \$2,488 per month.
- [49] Child support payments will be retroactive to September 1, 2014, and interim spousal support shall be retroactive to November 1, 2014 (the application for interim spousal support was filed November 5, 2014). The amounts payable are to be adjusted for any interim child or spousal support paid by the respondent.
- [50] I further make the following ancillary orders:
1. The parties shall share extraordinary expenses proportionately in accordance with their respective incomes;

2. The parties will exchange, annually not later than June 1 in each year, full and complete financial information (including full copies of their income tax returns, Notices of Assessment provided by Revenue Canada for the previous year, the Company's (including any successor company or proprietorship in which the respondent has an interest) corporate financial statements and corporate tax returns for the previous fiscal year;
 3. The parties will adjust the amount of child support (including their proportionate contribution to extra ordinary expenses) annually commencing July 1, 2015 in accordance with any changes in their income using the same methodology used by them in determining the respondent's current income;
 4. The claimant's income will be adjusted if and when she receives a CPP disability pension or the disability insurer reimburses her for the amount which is currently deducting from her disability pension payments;
 5. Other Relief
- [51] The claimant seeks other orders that relate to mortgage payments and the preventing disclosure of what she describes as sensitive and private material in her affidavits.
- [52] The matrimonial premises in which the claimant and children of the marriage reside are jointly owned and is encumbered by a mortgage which requires payments in the amount of \$1,191.67. Section 218 of the FLA provides the court with the authority to make any order the court considers "appropriate" in the circumstances governing who is responsible to pay mortgage payments encumbering the matrimonial home. The claimant's position is that should I impute her disability pension income to her the parties should each pay one-half the mortgage payment. I accept this submission and make an order each party is responsible for payment of one-half the mortgage payments. This order is made without prejudice to each party to argue they are entitled to an adjustment for any payments made on account of the mortgage after January 1, 2014 which have reduced the principle outstanding under the mortgage after that time.
- [53] I also order the respondent is to cease and desist from distributing, disclosing or publishing any affidavit sworn by the claimant or any other witness who files an affidavit on her behalf except to his legal and financial advisors without the written consent of the claimant, her legal advisors or a court order.
- [54] As the claimant has been primarily successful on this application she is entitled to her costs which her counsel submits should be fixed at \$5,000. In the absence of a response from the respondent within ten days of the issue of this decision costs are fixed in that amount.

"Greyell J."

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