
CANADA / JUDGMENT

Kennedy v. Kennedy

2014 BCSC 637

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 637 Kennedy v. Kennedy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kennedy v. Kennedy,

2014 BCSC 637

Date: 20140414

Docket: 6987

Registry: Campbell River

Between:

Jacqueline Ann Kennedy

Claimant

And

David Thompson Kennedy

Respondent

Before: The Honourable Mr. Justice Halfyard

Reasons for Judgment

Counsel for the claimant (respondent on the application):

G.W. Currie

Counsel for the respondent (applicant on this application):

G. Canniff

Place and Date of Chambers Hearing:

Campbell River, B.C.

March 25, 2014

Place and Date of Judgment:

Campbell River, B.C.

April 14, 2014

Nature of the Application

- [1] The respondent, David Kennedy, by notice of application filed September 30, 2013, applies to vary the divorce order made on April 24, 2006, in a number of ways. He also claims an order requiring that the children of the marriage be interviewed by an expert so as to obtain a report stating the views of the children concerning the present parenting arrangements. But the essential part of the respondent father's application consists of an application to vary the child support provisions of the order. The main goal of this application is to have the court cancel the arrears of child support that have accumulated under the April 24, 2006 order. A secondary goal is to have future child support payments reduced.
- [2] The parties were married on June 23, 2001. There are two children of the marriage, namely Dylan Tyler Kennedy born July 22, 2001 (now aged 12) and Shelby Ann Margaret Kennedy born July 31, 2002 (now aged 11). The parties separated in about December 2004. They were divorced by the order of April 24, 2006 (the other terms of the order were made by consent). The father is now 47 years of age, and the mother is 33. The father has worked as a faller for many years. The mother works as a bank teller in Campbell River, and earns an income of about \$35,000 a year.
- [3] The order granted sole custody of the children to the mother, with reasonable and generous access to the father (which was specified to some degree). The parties were awarded joint guardianship of the children, with the mother having ultimate authority with respect to significant decisions.
- [4] The order required the father to pay to the claimant Jacqueline Ann Kennedy ("the mother") child support for the two children in the amount of \$605 per month commencing on January 1, 2006. The order stated that the father had a Guideline Income of \$43,000 and that the mother had a Guideline Income of \$16,000.
- [5] The order contained terms which required the father to pay two-thirds of daycare expenses and medical or dental expenses for the children; and to pay half the cost of the children's "extra-curricular activities."

Subsequent Litigation

- [6] An order that was made on December 18, 2007 varied the April 24, 2006 order by specifying the access that the father would have to the children, including the times and places at which the children would be exchanged.
- [7] The father applied to reduce his payments of child support on August 18, 2008. His application was dismissed. The following additional orders were made at that time:
3. On or before June 15th of each year, the parties are to exchange their filed income tax returns for the previous year and the child support is to be adjusted in accordance with the Child Support Guidelines by July 1st each year;
 4. The plaintiff, Jacqueline Ann Kennedy, is to provide to the defendant, David Thompson Kennedy, all copies of any receipts for extraordinary expenses for the children . . . forthwith or in any event no later than 30 days from the date she receives them.
- [8] It is common ground that, as calculated by FMEP, the arrears as of March 25, 2014 were \$40,277.29, the interest on arrears was \$4,483.63 and the total fees charged were \$2,000. At the time of the father's unsuccessful application on August 18, 2008, the arrears were about \$8,000.

The Grounds of the Application

- [9] To found the court's jurisdiction to entertain his application, the father alleges that a material change in circumstances has occurred since the making of the order of April 24, 2006. He alleges that, since about the fall of 2008, there has been a drastic decrease in his income from employment, which made it impossible for him to pay the \$605 per month child support required by the order. He asserts that his true Guideline Income is the amount stated at line 150 of the income tax returns which he has filed with the Canada Revenue Agency for each of the years from 2007 to 2012. These amounts were as follows:

Year

Line 150 Income on Tax Returns

2007

\$65,585

2008

\$32,266

2009

\$6,026

2010

\$5,978

2011

\$7,276

2012

\$12,200

2013

(not disclosed)

[10] The father deposes that he delivered copies of his income tax returns to the mother in each year, as required by the order made August 18, 2008 (presumably, for each of the years from 2008 through 2012). He says that, each year, he asked the mother to reduce the amount of child support in accordance with his reduced income, but she repeatedly refused to do so. He submits, in effect, that as a result of this unreasonable conduct of the mother, combined with his inability to bring a court application himself and his financial inability to afford counsel, the arrears have unfairly continued to accumulate over the years.

[11] Additionally, the father states that in 2011 he lost his licence to drive motor vehicles as a result of the actions of the Family Maintenance Enforcement Program ("FMEP") and that this has also adversely affected his earning ability.

[12] The initial position advanced by the father was that he had overpaid his child support obligation by more than \$11,000 (which he says is about equal to the arrears as at 2007 plus some small amounts owing for the years 2012 and 2013). It was argued that all arrears of child support, all interest on the arrears and all fees charged by FMEP should be cancelled.

The Defence to the Application

[13] The mother denies that the father has earned an income of less than \$43,000 per year, for any of the years since the order was made in April 2006. She says that the documentary evidence presented by the father contradicts his assertion that he has only earned a minimal income. In the alternative, she submits that, if the court finds that the father earned less than \$43,000 in any of those years, then additional income should be imputed to him (to at least make up the difference, to \$43,000), on the ground that the father has always had the capacity to earn \$43,000 per year.

[14] Moreover, the mother submits that the father had the capacity to earn more than \$43,000 per year since 2006, and she insists that he has failed to make reasonable efforts to earn the amounts that he is capable of earning as a tree faller. The mother has not made application for an order that the father's guideline income be increased above \$43,000, either retroactively or prospectively. But she submits that it is unreasonable in the extreme for him to claim that his guideline income should be reduced below \$43,000, either for past years, or

for the future. She attributes an ulterior motive to the father, namely, to evade his child support obligations.

[15] The mother notes that arrears of \$8,774.42 were already owing, when she engaged FMEP in June 2007, and she argues that the record of payments clearly shows that the father has made practically no effort to pay any reasonable amount of child support through the years. She says that, even assuming that he may have earned less than \$43,000 a year in one or more of the years since the order was made, the father's efforts to comply with the order after 2008 have been almost non-existent. The mother further points out that three orders for costs were made against the father (in 2007, 2008 and 2012) and that the father has failed to pay any amount whatever towards the two earlier orders. She says he owes her about \$10,000 in costs.

[16] The mother states that the yearly amounts paid by (or collected from) the father for child support since FMEP became involved on June 6, 2007 (which amounts are not in dispute), were as follows:

Year

Amount

2007

\$2,008.50

2008

14,171.76

2009

0.0

2010

1,482.25

2011

1,811.46

2012

922.37

2013

705.96

Total

\$21,102.30

- [17] The mother's first position is that the father has failed to show any material change in circumstances. I infer that her alternative position is that, if there has been a change in circumstances, it has been minor, and the father could never satisfy the test of gross unfairness required for cancellation or reduction of arrears. The mother says that his application should be dismissed in its entirety, with the result that the whole of the arrears of child support and accumulated interest should be declared as being due and owing to her.

Reply Position of the Father

- [18] During the hearing, counsel for the father submitted that, if the court was not prepared to accept the father's line 150 income as being his true guideline income, then the court should not impute income to the father of more than \$10,000 to \$15,000 for the years 2008 through 2012, and not more than \$20,000 for the year 2013.

Collateral Issues

- [19] At the end of argument, I adjourned the father's application relating to the views of the children's report. I dismissed the application for specific parenting time, because the times involved had already expired. With respect to the other variations sought by the father (as to the annual exchanging of financial information, payments of extra-ordinary expenses and extra-curricular expenses), the mother submitted that no changes were necessary. Her counsel also submitted that, in any event, it would be wrong to make an order whereby an adjustment to the amount of child support would be automatic, simply upon the father presenting an income tax return which indicated a reduction in his income. I agree with the mother's submission respecting both of those matters, and I would decline to vary those provisions, even if the father shows that a material change of circumstances has occurred.

The Law

- [20] The child support order was made pursuant to s. 15.1 of the Divorce Act. Section 17 of the Act empowers the court to vary a child support order, if it is satisfied that "a change of circumstances as provided for in the applicable Guidelines has occurred since the making of the child support order." There is no doubt that, under section 14(a) of the Federal Child Support Guidelines, a significant reduction in a payor's income can qualify as a change of circumstances.
- [21] A person who seeks a reduction or cancellation of arrears of child support must likewise show that there has been a significant change in circumstances. See *Cherry v. Cherry* (1996), 24 B.C.L.R. (3d) 158 (C.A.).
- [22] A person who applies to reduce or cancel child support arrears on the ground of inability to pay because financial circumstances had changed, must do more than simply show that they earned less. The applicant must establish that:

- a) the change was significant and long lasting, and
- b) the change was real and not one of choice, and
- c) every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.

See *Earle v. Earle* 1999 BCSC 283, at para. 27; *Ghislieri v. Ghislieri* 2007 BCCA 512, at para. 6.

[23] As stated in s. 174 of the Family Law Act, arrears will not be reduced or cancelled unless the applicant satisfies the court that it would be grossly unfair not to do so. That test is similar to the test that applies to s. 17(4) of the Divorce Act. See *Earle v. Earle* at para. 23. An applicant who succeeds in showing that a material change in circumstances has occurred, must also establish that it would be grossly unfair not to cancel or reduce the arrears.

[24] It is apparent that the Guidelines authorize the court to determine a spouse's annual income other than by accepting the income reported by the spouse in his or her income tax returns.

[25] If a spouse is earning less income than he or she is capable of earning, by reason of being intentionally under-employed or unemployed, the court may impute a higher income to that spouse. See Federal Child Support Guidelines s. 19(1)(a). A specific intent to evade child support obligations need not be proved in order to justify the court in imputing a higher income. As stated by the Manitoba Court of Appeal in *Donovan v. Donovan* 2000 MBCA 80, 190 D.L.R. (4th) 696, at para. 16:

... the parent required to pay is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning. The parent required to pay is intentionally unemployed if he or she chooses not to work when capable of earning an income. ...

[26] Persons who have been ordered to pay child support are entitled to make decisions to reduce their working time or to change their career path, provided those decisions are reasonable at the time they are taken, considering all the circumstances. In determining what is reasonable in the circumstances, the court will have regard to the age, education, experience, skills and health of the payor, as well as the availability of work, the freedom to relocate and other obligations. If the payor establishes that his or her decision was reasonable, then the court may decide not to impute a higher income to the payor, for all or some of the time period under examination. See *Donovan v. Donovan* at paras. 19 and 33. I take this to mean that a payor's change of career, if reasonable, may amount to an excuse for some periods of intentional underemployment, or unemployment.

[27] The court may also impute a higher income where a spouse "unreasonably deducts expenses from income": See s. 19(1)(g) of the Guidelines.

Has there been a material change in circumstances?

[28] In order to prove the change in circumstances that he alleges, the father must establish:

- a) that for all or some of the years during the six year period from January 1, 2008 to December 31, 2013, he earned an annual income of less than \$43,000; and
- b) that for each of the years in which he earned an income of less than \$43,000, he was not capable of earning \$43,000.

Main Facts Alleged by the Applicant

[29] The father alleges that, from October of 2008 up to the present time, his capacity to earn \$43,000 per year has been, and continues to be reduced by two factors, namely:

- a) the down turn in the logging industry, which has reduced the amount of falling work available to him; and
- b) his decision to spend more time working in the business of residential tree cutting in the Vernon area of the Okanagan Valley, and less time doing the work of a faller on the Coast of British Columbia.

Findings of Fact

- [30] The father has spent many years working as a faller. The evidence shows that he remarried in June 2006, and that in April 2008 his wife Christina incorporated a company, CDK Contracting Ltd. She is the sole shareholder. The father implies that his wife alone owns and controls the company, and that he is merely an employee of the company, both for commercial falling and for residential tree cutting. The documents produced show that Christina Kennedy is the sole shareholder, but there is no evidence (documentary or testimonial) which identifies the officers or directors. Regardless of what the legal structure of the company may be, I do not accept that Christina Kennedy makes unilateral decisions for the company.
- [31] The father moved from Campbell River to Kelowna in early 2006, after meeting Christina, and they married in June 2006. He and his wife moved back to Campbell River in July 2006, but returned to the Okanagan in September 2007. Those facts are not in dispute. But the father (and his wife) blame the mother's conduct as being one of the main reasons why they moved back to the Okanagan, and that allegation is in dispute. I find that the father's allegation has not been proved.
- [32] The father deposes that, due to a forest industry slow-down, he was unable to find employment as a faller in the period from October 2008 to June 2009. The father, (and his wife) have given evidence to the effect that little work was available for fallers from the fall of 2008 to at least the end of 2009, and perhaps longer. The mother disputes this allegation. But I accept that the work amount of available to fallers was sharply reduced in the time period in question.

- [33] The father deposes that, because of the decline in the forest industry (making less falling work available to him) and due to his advancing age (47) and decreased strength and endurance due to age and some health problems, he decided to try and develop a financially viable residential tree cutting business with his wife. The business of the company also includes landscaping and snowplowing.
- [34] The father deposes that one of the main reasons that he wants to reduce the time he spends falling and wants to increase the time he spends working in a different business with his wife in the Vernon area is because he has arthritis in his elbows, knees and feet and suffers from chronic low back pain and carpal tunnel symptoms in his wrists. He says that he has a large cyst on his right ankle which will require surgery in the near future and a recovery time of six to eight weeks.
- [35] The mother disputes these assertions and says that the complaints of the father should not be given much weight in the absence of expert medical opinion to support them. She also points to the fact that the father has continued to do falling work since the summer of 2009, despite these alleged health problems.
- [36] The mother's objection is a valid one. However, common sense tells me that a man who has worked for many years as a faller can expect to develop the conditions described by the father to some degree, and to experience a decline in his physical strength, endurance and agility after years of doing such strenuous work. The father is far from being disabled from working as a faller. But at this stage of his life, I consider it to be reasonable for him to be reducing the amount of his falling work and increasing the amount of work he spends doing residential tree cutting and other services.
- [37] The father and his wife have both given evidence to the effect that, if the father can work full-time in the new business for a significant period of time, they believe he would earn as much or more income than he would earn if he worked seasonally as a faller, as he has done in past years. They both say that this level of income has not been attainable, because FMEP has caused the father to lose his driver's licence, which is essential to the proper operation of the business. I accept this evidence. But I note that the loss of his driver's licence occurred in 2011, and he did not file his application until September of 2013. I am unable to accept the explanation offered for the delay in bringing the present application, which I was told would enable the father to get his licence back, even if he is unsuccessful.
- [38] Both the father and his wife say that the loss of his driver's licence made it necessary for him to spend more time working as a faller, to earn enough money to get by. The mother deposes that the father should be able to work nine months out of the year as a faller. The father says that, over the years, he has typically worked 90 to 150 days falling per year (that is 120 days per year, on average), which is far less than nine months of the year. He also states (in his affidavit made on January 2, 2014) that:

This year [2013] has been the best year I have had in ten years for tree falling.

I accept the evidence of the father on these points. I also find that there is a great deal of time available for the father to work in the new business, even if he spends 100 days or so a year, doing falling work.

How much revenue of CDK Contracting Ltd. has been generated by the father, working as a commercial faller?

[39] The only commercial faller ever employed by CDK Contracting Ltd ("the company") is the father. He has worked as a faller for the company in each of the six years since the company was incorporated in April 2008. It is common ground that logging companies pay a minimum of \$500 per day for a contract faller.

[40] CDK Contracting Ltd. was incorporated in April 2008. Its first year-end was the year ending April 30, 2009. The father was out of work from October 2008 until June 2009. Christina Kennedy deposes that, after this long period of the father's unemployment, she decided to try and develop work for the company by offering residential tree services in addition to commercial falling services (because of the reduced availability of falling work).

[41] The total revenue of the company for the year ending April 30, 2009 was \$72,023. The evidence does not disclose whether the father worked on his own as a faller from January 1, 2008 until April 2008. But I infer that he worked for the company as a contract faller, from May through October 2008 (and then was off work until June 2009). It is unknown how much of the company's revenue of \$72,023 was from contract falling for the year ending April 30, 2009, but it must have been the vast majority of the revenue, because no residential tree-cutting work was done until the summer of 2009. However, the company claimed expenses of \$83,440 so that it reported a loss of \$11,417 for the year ending April 30, 2009. The expenses included wages of \$42,000, automotive expenses of \$12,101, office expense of \$8,925, tool expenses of \$6,096, travel expenses of \$5,928 and advertisement and promotion expenses of \$5,188. There is no explanation in the evidence to justify the amounts of any of these expenses.

[42] The father's work as a faller during the period from May to September 2008 was the major source of the company's revenue for that first corporate year. Even if only two-thirds of the \$42,000 allegedly paid as wages is attributed to him, that amounts to \$27,900. Moreover, I infer that he would receive a considerable financial benefit from the \$18,000 of automotive and travel expenses claimed. Yet on his personal income tax return for the calendar year ending December 31, 2009 the father reported his income as being \$6,026.

[43] Mr. Currie calculated the days worked at falling by the father, and the amount invoiced by the company for his work, for each of the calendar years, 2009 to 2012. Ms. Canniff did not challenge the invoice amounts used in Mr. Currie's calculations, but cautioned that the amounts would not jibe with the "corporate" years. Keeping those differences in mind, I accept Mr. Currie's calculations relating to the calendar years, and the dates and amounts of the individual invoices he recorded on his summary sheets.

- [44] For the calendar year ending December 31, 2009, the father worked 41 days falling during the time period from July through December. The company issued invoices totalling \$22,870.59 for that work.
- [45] For the year ending April 30, 2010, the company reported revenue of \$68,525. Counsel for the father, during the hearing, said the evidence showed that the invoices for falling totalled \$44,465 for that corporate year, whereas Mr. Currie's figures indicated \$38,423. Yet for some reason not explained in the evidence, the company reported wages paid of only \$13,580. Vehicle and travel expenses were reported as being higher than wages paid, at \$15,344. Rent of \$6,000 was shown (for the first time) as an expense and another \$5,168 was reported as general and administrative expenses. Again, I infer that the father would receive a financial benefit from these expenses being paid by the company. The company reported earnings of \$11,948 for that year. On his personal income tax return for the calendar year 2010, the father reported his personal income as being \$5,978.
- [46] For the calendar year ending December 31, 2010, the father worked 126 days falling during the time period from January through November 1st. The company issued invoices totalling \$57,158.05 for that work.
- [47] For the year ending April 30, 2011, the company reported revenue of \$74,874. Total expenses of \$53,719 were claimed, which included wages of only \$21,896. Other expenses included vehicle and travel expenses (\$11,104), rent (\$6,000), telephone and utilities (\$3,369) and general and administrative expenses (\$5,899). The company reported earnings of \$5,061.
- [48] Using Mr. Currie's summary of the falling invoices presented in evidence, I calculate that, for the corporate year ending April 30, 2011 the company was paid \$65,458.13 for his falling work. Counsel for the father said in argument that the amount of those invoices was \$52,322. I am unable to explain why there is such a large difference in their respective calculations.
- [49] For the calendar year ending December 31, 2011. The father worked 93 days falling during the time period from February to December. The company issued invoices totalling \$62,793.91 for that work.
- [50] In his personal income tax return for the calendar year 2011, the father reported his income as being \$7,276. Clearly, he earned most of the company revenue through falling alone, and he likely generated most of the other revenue from residential services. Moreover, I find that he benefitted financially from the company's payment of the expenses I have described.
- [51] For the year ending April 30, 2012, CDK Contracting Ltd. reported revenue of \$75,096. The total expenses claimed were \$52,304. Of these expenses, only \$18,480 were claimed to be wages (and there is no breakdown of who these wages were paid to). Other expenses included vehicle and travel (\$13,242), rent (\$6,600), telephone and utilities (\$3,029), and general and administrative expenses (\$2,966). There was also an expense claimed for "book publishing" of \$4,201. No explanation was given as to why the company should be paying for book publishing (although there was evidence that Christina Kennedy was writing a book).

- [52] For the corporate year ending April 30, 2012, using the dates and amounts of the invoices in MR. Currie's summary sheets shows that the company was paid \$69,219.61 for the falling work done by the father. Counsel for the father calculated the invoices as being \$44,458. Again, I do not know why there is such a discrepancy between them. The discrepancies between the calculations submitted by counsel for falling revenue are not a crucial matter, because the company had only two sources of revenue, the father generated all of the falling revenue, and I infer that he generated most of the revenue earned from the residential business. However, I accept Mr. Currie's calendar year summaries as correctly showing that, during the three-year time period from May 1, 2009 to April 30, 2012, the company issued invoices totalling \$173,100.90 for falling work done by the father. Ms. Canniff did not challenge the individual dates and amounts of the invoices summarized by Mr. Currie. No falling invoices were produced, for the first corporate year (May 1, 2008 to April 30, 2009) or for the corporate year from May 1, 2012 to April 30, 2013 (or thereafter).
- [53] For the calendar year ending December 31, 2012, the father worked 42 days falling during the time period from January through April. The company issued invoices totalling \$30,278.35 for that work. I infer that the father worked mainly in the residential business, from May through December of 2012 (and then returned to commercial falling in 2013).
- [54] In his personal income tax return for the calendar year ending December 31, 2012, the father reported his income as being \$12,200. Again, I infer that he received financial benefit from the expenses paid for by the company.
- [55] For the year ending April 30, 2013, the company reported revenue of \$116,749 (which is \$40,000 more than its best previous year). The expenses claimed totalled \$77,936. Those expenses included wages of \$29,407, vehicle and travel expenses of \$15,124, rent of \$11,300, and "book publishing" of \$10,719. The company reported earnings of \$9,192 for that year. Again, there is no breakdown of who the wages of \$29,407 were paid to. And Christina Kennedy says that she could not provide the amount of income that was paid to the father for that corporate year, because the books and records of the company were in the hands of the company accountant who had been delayed in bringing the books and records up to date. Without the invoices, it cannot be determined how much of the revenue was the result of the falling work done by the father. But he has given evidence that 2013 was the best year he has had in falling, in ten years. The only records produced to show what he was paid by the company in 2013 were in Exhibit H to the affidavit of Christina Kennedy made on September 30, 2013. That record shows only that, in the three months of May, June and July 2013, the company paid each of the father and his wife the sum of \$800 (gross) per month. The father's income tax return for the year ending December 31, 2013 has not been presented.

- [56] I do not accept the explanation for failing to provide the amount earned by the company in 2013 from the work of the father as a faller and as a bull bucker. Christina Kennedy could easily have obtained the books and records of the company from the accountant (who has his office in Vernon), obtained the necessary information and copies of documents, and then returned the books and records to the accountant's office.
- [57] I would also note that there appears to be a self-contradiction in the father's evidence about his income for 2013. He deposes that this has been the best year he has had in the past ten years, yet on the other hand he deposes that: "I believe my income for 2013 will be approximately \$12,500."
- [58] There is nothing wrong with trying to obtain all of the income tax advantages that are allowed by the law, by deducting expenses from a family business. But in many cases, which include this case, the resulting line 150 income of a person employed in the business bears little resemblance to the income received, directly or indirectly, by that employee. No person would do the difficult and skilled work required of a faller, for the minimum wage or less.
- [59] No evidence has been given to explain the seemingly excessive expenses claimed for automobile and travel costs. Every year, the company reported vehicle and travel expenses which exceeded the wages apparently paid to the father. I do not accept that the company actually paid the full amount of such expenses that were claimed. Likely, a significant amount was allowed for depreciation. However, I do not accept the mother's contention that the travel expenses claimed should be further discounted on the ground that the father chose to move further away from the places where commercial falling work is available.
- [60] Another problem is that the expenses deducted for rent were not explained, nor was it explained why these expenses almost doubled (to \$11,300) in the corporate year ending April 30, 2013. I suspect that the office of the company is located in the family home and that rental expenses are allowable. If so, obviously that would be a financial benefit to both the father and his wife.
- [61] Strangely, Christina Kennedy deposed that the company could not afford to buy damage insurance to cover potential liability for the company when working on residential properties. Yet there are fairly substantial amounts being deducted for expenses for general and administrative expenses and office expenses. No evidence was given as to the cost of such insurance. No explanation was offered for why the company could pay \$10,719 for "book publishing" (which has nothing to do with the business of the company), but could not pay for liability insurance.
- [62] In summary, I reject the father's assertion that his Guideline income for the five years 2008 through 2012 should be assessed as being his income reported at line 150 of his income tax returns. I find that this method "would not provide the fairest determination of the annual income" of the father for the four years of 2009 to 2012. The father and his wife work together in the family business. I reject the implication that he has no say in the

management or operation of the company. I find that the father (in collaboration with his wife) has unreasonably deducted expenses from the company income, which has created the appearance that the amount of income available to him to pay child support, has been substantially reduced.

Conclusions as to the father's guideline income

- [63] I accept that, in the years 2008 and 2009, the father did not earn an income of \$43,000 and that he was not capable of earning \$43,000 in either of those two years. He did earn an income of \$32,266 in 2008. Although he reported his income as being \$6,026 for the calendar year 2009, the falling invoices show that, between August 9, 2009 and December 24, 2009, the father worked 40 days falling and the company was paid approximately \$21,100 for his work. But I recognize that there were some significant expenses associated with generating that revenue. I would assess his guideline income for 2009 as being about \$12,000.
- [64] With respect to the four years from 2010 to 2013, I am not persuaded that the father's guideline income should be assessed at less than \$43,000, for any year. I find that he received (directly or indirectly) income of \$43,000 in each of those four years. If I am wrong in making that finding, then I am far from being satisfied that the father was not capable of earning an income of \$43,000 for any of those years. As I see it, if the father earned less than \$43,000 in any of those four years, then he was either "intentionally under-employed or unemployed", within s. 19(1)(a) of the Guidelines.
- [65] It should be kept in mind that the father was also earning income doing residential tree cutting. The annual revenues of the company have been consistently higher than the total invoices issued for commercial falling work done by the father in each corporate year. In the absence of evidence to the contrary, I infer that the father has been the main revenue earner in the residential business.
- [66] Putting the father's case at its strongest, I conclude that he earned just over \$43,000 in income, for the two years 2008 and 2009, combined. But with respect to the four years from 2010 through 2013, I am not persuaded that he received income (direct and indirect) of less than \$43,000 in any one of those years.

Would it be grossly unfair, not to reduce the arrears?

- [67] I am satisfied that the father's decreases in incomes in 2008 and 2009 meet the test which I have previously set out (at paragraph 22). I consider that the down turn in the forest industry was significant and long-lasting, that the decrease in income was not a choice and that the father made sufficient efforts to earn more money during those years, but was not successful.
- [68] The next question is whether the father has established that it would be grossly unfair not to reduce the arrears, to take account of his decreased incomes in 2008 and 2009. Section 174 of the Family Law Act states that, in deciding this issue,

- (2) . . . the court may consider
- (a) the efforts of the person responsible for paying support to comply with the . . . order respecting support,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) any circumstances that the court considers relevant.

[69] The father's efforts to comply with the child support order, over the years, have been weak in the extreme. Almost double the yearly amount of child support required by the order was paid in 2008, but that must have been as a result of garnishment proceedings by FMEP. He paid nothing in 2009. In 2010, his payments amounted to a little more than two months of child support, and in 2011, amounted to about three months payments. In 2012, his payments amounted to about one and a half months of child support, and in 2013, he paid about \$100 more than one month's child support. Thirty-six of his child support payments were in the amount of \$25 (although in several instances, additional money was garnished by FMEP for that particular month).

[70] I find that the father's efforts to comply with the child support order, for the years from 2010 up to the present time, fell so far below his ability to pay child support as to be inexcusable. The first factor in s. 174(2) weighs heavily against him.

[71] I accept that the father does not have the financial ability to pay the arrears at the present time. However, I am not persuaded that he will not be able to pay the bulk of arrears in the future, if this was done by relatively low monthly payments.

[72] In my opinion, the father's delay in making the present application is a relevant circumstance within the meaning of s. 174(2)(c). The explanation given for the delay was that the father did not know how to make such an application on his own, and that he could not afford to retain counsel to make the application. I find it difficult to accept this explanation. First, I cannot see why the father and his wife could not have put all of his income information together, attached it to an affidavit, and applied to court to have his child support obligation, and the arrears, assessed by the court. Second, in the present application, the father continues to assert that he is only earning a marginal income. If that is so, then one wonders how he could afford to retain counsel now, when he could not afford to do so in the past. I suspect that the loss of his driver's licence has been a major motivating factor in bringing this application.

[73] The father's delay in bringing this application weighs against him, but in my view it should not be given decisive weight.

- [74] I have found that the father's combined income for the years 2008 and 2009, amounted only to about one year of the guideline income set by the order of April 24, 2006, namely \$43,000, and that he was not capable of earning a higher income during that time. I have concluded that it would be grossly unfair not to reduce the arrears of child support by the amount payable for one year, which is \$7,260. Accordingly, the arrears as at March 25, 2014 will be reduced from \$40,277.29 to \$33,017.29.
- [75] I am also satisfied that it would be grossly unfair to permit interest to accrue on the reduced arrears. The remaining amount of arrears is large and if it is to ever get paid off by making relatively low monthly payments, the accumulation of interest needs to be terminated. Accordingly, I order that interest will not accrue on the reduced arrears.
- [76] As to the interest that has accrued to date on the arrears, I think it would also be grossly unfair not to cancel the accrued interest. The father's child support obligation could end in about eight years. He will reach age 65 in 18 years, and at \$100 per month, the arrears payable will not be paid by then. It may be arguable that s. 174(4) does not empower the court to cancel accrued interest, unless the court has ordered that all of the arrears will be cancelled. That interpretation could be available, since the authority to cancel interest appears to arise only: "if a court cancels arrears" and does not say: "if a court cancels or reduces arrears." But that seems to me to be an unreasonable interpretation. In any event, I order that the interest that has accrued on arrears (\$4,483.63) will be cancelled.
- [77] Government fees charged by FMEP amount presently to \$2,000. The father has asked that those fees be cancelled. The findings of fact that I have made weigh heavily against the making of such an order. I have not been referred to any law that authorizes the court to cancel such fees. Moreover, if such an order was to be entertained, I think FMEP should have been given notice that the father was seeking cancellation of the default fees, so that counsel for FMEP would have had an opportunity to make submissions. It appears that no such notice was given.
- [78] I order that the arrears (in combination with default fees) shall be paid at the rate of \$100 per month, commencing on May 1, 2014 and continuing on the first day of each month thereafter, until the arrears (and default fees) are paid in full.
- [79] The child support order of April 24, 2006 remains in full force and effect. That order requires the father to pay to the mother child support in the amount of \$605 per month for the two children of the marriage, on the first day of each month. That order is based on the father having a guideline income of \$43,000, and that part of the order remains unchanged. Amendments to the child support tables may mean that the monthly amount of child support for that guideline income, should be increased. If so, the parties should be able to agree on the amount of any adjustment.

Costs

- [80] The parties did not make any specific submissions as to costs, on the hearing of the application. The father achieved some measure of success, but I would not characterize him as being "the successful party", within the meaning of Family Rule 16-1(7).
- [81] The mother achieved a greater measure of success than did the father, but it is arguable that she was not "the successful party", either.
- [82] There are two previous costs orders against the father that have not yet been paid. Now the order of April 24, 2006 has been reaffirmed, and the father will be required to make payments that he claims to have been unable to make, for years.
- [83] I am inclined to order that each party should bear their own costs. That will be the order, unless the mother notifies the trial scheduling manager within seven days of the filing of these reasons that she wishes to make submissions on the issue of costs.

"Mr. Justice D.A. Halfyard"

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