
CANADA / JUDGMENT

M.T. v. J.S.

2023 BCCA 64

COURT

British Columbia Court of Appeal

DECIDED

10 February 2023

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2023 BCCA 64 M.T. v. J.S.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

M.T. v. J.S.,

2023 BCCA 64

Date: 20230210

Docket: CA46742

Between:

M.T., also known as

M.S.

Appellant

(Claimant)

And

J.S., also known as J.W.S.,

and S.H. Ltd.

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated February 14, 2020 (M.T. v. J.S., 2020 BCSC 203, Vancouver Docket E173352).

Counsel for the Appellant:

P. Sheppard

Counsel for the Respondent:

P.M. Daykin, K.C.

A. Mihajlović

Place and Date of Hearing:

Vancouver, British Columbia

October 7, 2022

Place and Date of Judgment:

Vancouver, British Columbia

February 10, 2023

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Abrioux

Summary:

The appellant wife appeals on the basis that the trial judge made errors in determining spousal and child support. The respondent husband says those alleged errors were discretionary decisions that are beyond the scope of appellate review. Held: Appeal allowed in part. Fifty percent of the challenged deductions should be included in the respondent's income as a personal benefit. The judge did not use the wrong provision of the Federal Child Support Guidelines, as business expenses can be considered under either s. 18(2) or s. 19(1)(g), but he conflated the test for reasonableness of an expense under those Guidelines with the test under the Income Tax Act. The order providing for a review of support when either of the parties turned 65 should be set aside as that age was not a valid proxy for retirement for these parties.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Background

- [1] Over the course of their 19-year marriage, the parties worked together to promote the husband's highly successful real estate business in West Vancouver and to raise four children, two of whom, C1 and C2, remained dependent on their parents when the trial took place. The sudden end of the marriage led to high conflict litigation as both parties grappled with the rending of the family, reduced income in a falling real estate market, and changes to their wealthy lifestyle necessitated by the need to maintain two households.

Issues on Appeal

- [2] To their credit, the parties were able to agree on a number of issues by the time of trial, and have accepted most of the rulings made by the judge after an 11- day trial on the remaining issues. The appellant wife raises four grounds of appeal, asserting that the judge erred by:
- (1) failing to add back to the respondent husband's income certain business expenses because the judge applied the wrong test and the wrong section of the Federal Child Support Guidelines, S.O.R./97-175 (the "Guidelines");
 - (2) ordering the respondent to pay spousal support at the low end of the Spousal Support Advisory Guidelines (Department of Justice Canada, July 2008) (the "SSAG") range because he failed to consider the strength of the appellant's compensatory claim;
 - (3) not ordering the respondent to pay base child support for C1 during the summer months when he was home from university and living with the appellant; and
 - (4) ordering that either party may apply for a review of support on the occurrence of certain prescribed events which should have been left to be addressed by an application to vary.
- [3] A deferential standard of review applies to all four grounds of appeal because the appellant is asking this Court to interfere with discretionary decisions. As the Supreme Court of Canada stated in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, 1999 CanLII 691 (SCC):
- [12] There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[Emphasis added.]

- [4] I turn now to the first ground of appeal.

1. Did the judge apply the wrong test in determining whether certain business deductions should be added back to the respondent's income for the purposes of child and spousal support?

[5] I turn first to the appellant's submission that the judge used the wrong provision in the Guidelines to assess whether an add back was appropriate--s. 19(1)(g) rather than s. 18, which applies given that the respondent earns income through a company he controls. She submits that if the correct test is applied, deductions for the respondent's meals and entertainment, cell phone, and vehicle expenses should be added back to his income for the purposes of child and spousal support.

[6] The appellant contends the judge was required to use s. 18(2) of the Guidelines to determine whether to add back expenses. That section reads:

18(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[Emphasis added.]

The judge used s. 18(2) to add back salary and dividends, but used s. 19(1)(g) to address business expense deductions. That section provides that a court may impute income "as it considers appropriate in the circumstances" where "the spouse unreasonably deducts expenses from income".

[7] The appellant says the choice of s. 18(2) or s. 19(1)(g) is significant because the language of s. 18(2) is mandatory, dictating that benefits "must be added to the pre-tax income", and placing the burden on the claiming spouse to establish that those deductions are reasonable ones. In contrast, says the appellant, s. 19 is not mandatory, which could affect the burden of proof. I would not accede to this submission.

[8] First, where business expense deductions are in issue, the spouse claiming the deductions will bear the burden of establishing they are reasonable business deductions under either section. The spouse asserting that expenses should be added back to income must put that in issue in their pleadings by identifying the specific expenses being challenged, but it will then be for the other spouse to assume the burden of proving the reasonableness of deductions from business income, whether in the context of self-employment or within a wholly-owned corporation: *Wiebe v. Treissman*, 2017 BCSC 1523 at para. 94. See also *Cunningham v. Seveny*, 2017 ABCA 4 at para. 28.

- [9] Second, there is a long line of cases in this province recognizing that business expenses can be addressed under either s. 18(2) or s. 19(1)(g) where a corporation is involved: *Dornik v. Dornik*, 1999 BCCA 627 at paras. 14 and 20-25; *Hausmann v. Klukas*, 2009 BCCA 32; *Ursel v. Ursel*, 2014 BCSC 1219.
- [10] Section 19 will be the only option available where a sole proprietorship or partnership is in issue, but there is no error in a judge using s. 19(1)(g) even when the payor meets the prerequisites in s. 18 of being a shareholder, director or officer of a corporation. Whether income is being imputed under s. 19(1)(g) or added back as an expense under s. 18(2), the same result obtains. In both cases, the concern of the court is to ensure that the spouse's Guidelines income reflects all of the money reasonably available for child support: *Kowalewich v. Kowalewich*, 2001 BCCA 450 at para. 43.
- [11] I turn now to the appellant's submission that the judge erred by conflating the test for reasonableness of an expense for the purposes of determining a party's Guidelines income with the test for reasonableness of a deduction under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). She says that the judge used the wrong test in determining whether to add back expenses deducted for the respondent's meals and entertainment, cell phone, and vehicle expenses.
- [12] The respondent submits in response that the judge's determination that these expenses were reasonable corporate expenses is a finding of fact that can only be disturbed by this Court if the judge erred in principle or made a palpable and overriding error of fact. He says no such error was made, pointing to the judge's acknowledgement (at para. 53) that there is a distinction between the inquiries called for by the Income Tax Act and the Guidelines to determine whether an expense is reasonable.
- [13] In my view, there is merit to the appellant's submission. Although the judge noted that the reasonableness of an expense for the purposes of determining Guidelines income is not solely governed by whether the deduction is permitted by the Income Tax Act, he assessed reasonableness on the latter basis, saying:
- [67] Under the [Income Tax Act], no deduction in respect of an outlay or expense may be made in computing income from a business "except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business": [Income Tax Act], s. 18(1)(a). Further, as a general limitation, a deduction is only allowed "to the extent that the outlay was reasonable in the circumstances": [Income Tax Act], s. 67(1).
- [70] It was not put to the respondent that he improperly certified the relevant tax returns or claimed expenses that he did not believe were made for the purpose of gaining or producing income. Tax evasion is a serious allegation which goes to both an individual's personal reputation and business reputation. Any such assertion should have been squarely put to the respondent in order to maintain such an assertion.

- [14] Ultimately, the judge determined the expenses were incurred for the purpose of gaining or producing income, and that the respondent had not claimed personal expenses "as business expenses for either accounting or tax purposes" (at para. 75). He therefore declined to add back any of the challenged deductions.
- [15] Respectfully, I conclude that the judge erred in principle by not asking the right question. The legitimacy of an expense deduction under the Income Tax Act is a relevant consideration in the sense that a deduction that is not recognized as a valid business expense under the Income Tax Act is unlikely to be a reasonable business expense under the Guidelines. However, that is not the end of the inquiry. The question under the Guidelines is whether the business deductions include expenses which provide a personal benefit or constitute an ordinary living expense that would normally be paid from a party's employment income--expenses which would not be deducted from a salaried party's income and should equally not be deducted when income flows through a corporation: *Ursel* at para. 27; *Reis v. Bucholz*, 2008 BCSC 1156 aff'd 2010 BCCA 115. Typical examples include meals, entertainment, telephones, Internet and vehicle expenses.
- [16] In the present case, the respondent deducted the following as business-related expenses in computing the company's income: 50% of restaurant meals he viewed as business-related; 50% of his golf and country club memberships; 90% of his car lease payments and car insurance; and 90% of his cell phone costs. As the judge observed, the work of a real estate agent required the respondent to "be seen and known in the community" and led to "personal life and business life" blending, with connections being made over a round of golf or over a meal (at paras. 55-56). It would thus be expected that entertainment, vehicle and cell phone expenses would be higher for the respondent than they would be for other professional service corporations.
- [17] However, even recognizing that, the expenses paid for by the corporation also provided a personal benefit to the appellant who used the golf and country club memberships, enjoyed meals, and used his cell phone and vehicle for personal matters as well as business ones. In the circumstances, I conclude that the appellant's request for inclusion of 50% of the challenged deductions is a reasonable one and I would accordingly add back 50% of the \$86,456 the respondent deducted for vehicle expenses, cell phone expenses, and meals and entertainment, rounded to \$43,000. That results in a total 2019 Guidelines income of \$623,000. Fifty percent of those same expenses should be added back to the respondent's income in determining his Guidelines income for subsequent years.
2. Did the judge err in ordering spousal support at the low end of the Spousal Support Advisory Guidelines range?
- [18] It is common ground that the appellant was entitled to both compensatory and non-compensatory (needs-based) support, and that its duration should be indeterminate (i.e., with no end point specified at this time). Although the parties are both licensed realtors, the appellant had subordinated her career, promoting the respondent's career by supporting

him in his business and acting as the primary caregiver for the children while the respondent worked "all hours of the day and any day of the week" to the benefit of the family. The respondent acknowledged that it would take the appellant time to re-establish her independent career, and did not seek to impute income to her at trial.

[19] The judge's reasons addressing spousal support are brief, consisting of nine paragraphs. He had earlier determined that the respondent's income substantially exceeded the \$350,000 ceiling of the SSAG ranges:

2016

\$2,895,868

2017

\$965,262

2018

\$646,165

2019

\$580,000

(which I have found should be \$623,000 with add backs)

[20] Although it was open to the judge in the circumstances to depart from the SSAG ranges, he decided to use the ranges, ordering support at the low end, saying:

[87] Respondent's counsel submitted that starting January 1, 2020, the respondent should pay \$12,000 per month in spousal support (approximately \$500 below the SSAG low range) subject to the further annual adjustment using the SSAG low range following the exchange of the requisite tax information. Respondent's counsel argued that the net disposable income would be roughly equal for the parties. I agree with this approach and will adopt it other than I will order that the greater of \$12,500 per month and the low-range SSAG monthly amount will be used for 2020.

[88] For the period from July 1, 2019 to December 31, 2019, I find that the monthly spousal support should be at \$10,000. The \$10,000 figure recognizes that the respondent for these months is required to pay greater child support of approximately \$2,500 (\$7,200-\$4,700) while at the same time having a lower monthly amount of net disposable income.

[21] The appellant asks this Court to order spousal support at the high end of the range. She says the judge made two errors by choosing the low end of the range in order to roughly equalize net disposable income in each household. First, he failed to consider the length of the parties' relationship, the roles they played, their past and ongoing incomes, and the relative economic effects of the marriage and its breakdown as required by s. 15.2 of the Divorce Act, R.S.B.C., 1985, c. 3 (2nd Supp.), and in particular, to consider how those factors informed the

strength of the appellant's compensatory support claim. Instead, she says the judge assumed that if each party received 50% of net disposable income ("NDI")--established on the appellant's side by including child support--this would result in an equitable sharing of the economic consequences of the marriage and its breakdown.

- [22] Second, the appellant says that even using an equalization approach, the judge failed to achieve an equitable sharing of the economic consequences of the marriage because the respondent retains 50% of the NDI for himself and the appellant receives the other 50% to support a household of three--herself, C1 and C2. She says that this problem has been squarely identified by the authors of the SSAG, who have cautioned against using a straight NDI calculation in the "with child support" formulas, noting that courts have ordered in excess of 50% of the NDI to the custodial recipient.
- [23] Although the judge did not specifically address the criteria in s. 15.2(6) of the Divorce Act, he was alive to the significant contributions made by the appellant to the respondent's career. The appellant's entitlement to compensatory support was conceded by the respondent. Given that it was not in issue, the absence of a discussion about the basis for such entitlement does not mean that the judge was not aware of the nature and strength of the appellant's compensatory support claim. A judge is presumed to know the law: *E.R.H. v. B.W.H.*, 2009 BCCA 573 at para. 38.
- [24] As for the contention that the judge determined support based on equalizing NDI, I do not read the reasons that way. The judge adopted the low end of the range in part because he viewed it as roughly equalizing the means available to each household, but the support ordered was not a 50/50 allocation.
- [25] For the period of July 2019 through December 2019, while the older child C1 was living away from home but still under the age of 19, the trial judge ordered spousal support of \$10,000 per month and child support of \$7,200 per month. Those amounts were drawn from the DivorceMate calculation attached to the respondent's closing submission. In that DivorceMate calculation, the low-range SSAG figure is \$10,067 per month and the NDI split that the appellant refers to as 50/50 is, in fact, 41.5% to 58.5% in favour of the appellant. A true 50/50 split would have resulted in a much lower monthly spousal support amount.
- [26] For the period of January 2020 and thereafter, once C1 turned 19, the judge ordered spousal support of \$12,500 per month and child support of \$4,710 per month. Those amounts, too, were drawn from the DivorceMate calculation attached to the respondent's closing submission. In that DivorceMate calculation, the low-range SSAG figure is \$12,532 per month, and the NDI split is 48% to 52% in favour of the appellant.

- [27] Determining whether to use the SSAG ranges where the payor's income exceeds \$350,000 is a discretionary decision, as is the point on the range chosen by the judge. As noted, this discretionary decision attracts a deferential standard of review. In my view, the appellant has not established that the amount of spousal support awarded by the judge is either inconsistent with the objects of s. 15.2 of the Divorce Act or the product of an error in principle. It follows that I would not accede to this ground of appeal.
3. Did the judge err by not ordering base child support for C1 during the summer months?
- [28] At the time of trial, C1 was 19 and living away from home attending university in Ontario. The s. 7 special expenses of C1 and C2 were estimated at \$72,000 per year: at para. 95. The judge ordered the respondent to pay 75% of those expenses, or about \$54,000 per year in after-tax costs in addition to the child and spousal support. Those special expenses included C1's university expenses of about \$30,000 per year.
- [29] The appellant says the judge was presumptively required to order base child support payable to her in addition to the s. 7 expenses relating to C1's university education. At a minimum, she says the judge should have ordered a reduced rate of base support for C1 while he is away to assist her in maintaining a home for him, and the full amount of the base child support for the months he is living at home during the summer.
- [30] The governing provision is s. 3(2) of the Guidelines:

Child the age of majority or over

3(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
- (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[31] The judge applied the approach set out in s. 3(2)(b), saying:

- [99] In the case at bar, I see no reason to depart from the general principle that, where a child of the marriage is of the age of majority and is living away from home attending a post-secondary institution, child support should be determined under s. 3(2)(b) of the [Guidelines]. Accordingly, I adopt the relevant provisions of the respondent's proposed draft order with respect to a child of the marriage who is of the age of majority and is living away from home attending a post-secondary institution. C1 is also capable of contributing to his education and living costs.

- [32] The appellant says the judge failed to conduct the requisite analysis under s. 3(2)(b) which required him to consider what amount would be appropriate in light of C1's "condition, means, needs and circumstances" and the financial ability of each spouse to contribute to support. She says the judge assumed that C1 could contribute to his own support when there was no evidence in the record to support that inference. Without some payment of base support, she submits that for at least four months of the year, C1 will not receive any child support from the respondent despite being a child of the marriage and dependent on the appellant for the necessities of life--burdens she will have to shoulder on her own using either her spousal support or child support meant for C2.
- [33] In my view, the judge adequately explained his reasons for using the approach set out in s. 3(2)(b). It was certainly open to him to order base child support during the summer months, but in these circumstances I see no error in his decision not to do so.
- [34] The special expenses for C1 included \$30,000 for C1's educational and living expenses while at university. If the judge had ordered the respondent to pay the appellant base child support for C1 throughout the year, as well as his proportionate share of C1's living expenses at university under s. 7, the respondent would have been paying for the same thing twice.
- [35] The judge was also aware that the respondent was, in addition to paying his contribution to C1's s. 7 expenses, providing C1 (and C2) with spending money of approximately \$1,000 per month on a secondary credit card which they had available to use for clothing and social expenses, amounts which C1 continued to receive during the summer months. The judge was also aware that the respondent had significantly overpaid child support from April 2018 to May 2019, based on income of \$1,010,914, when his actual income was between \$580,000 to \$646,615 during this period: at para. 115. (Although the judge ordered the appellant to repay from the property division an overpayment of \$144,406 for child support, that related to the respondent's overpayment of child and spousal support between July 1, 2019 and February 29, 2020.)
- [36] Finally, there was no evidence at trial with respect to C1's summer plans and whether he would indeed be home and living with the appellant for the summer. When asked by the judge what would happen if C1 stayed in Ontario for the summer or decided to travel, the appellant said that the matter would be brought back to court. It is evident that the judge wished to avoid uncertainty in this high conflict case.
- [37] In summary on this ground of appeal, I see no basis upon which this Court could interfere with the judge's child support order in the circumstances of this case.
4. Did the judge err in allowing for a review of support?
- [38] After making orders for spousal support at the low end of the SSAG range, the judge said:

- [89] I will also order that either party may apply for a review (see *Jendruck v. Jendruck*, 2014 BCCA 320 at paras. 30 to 33) after May 31 and before July 1 of the year following the year in which any of the following occurs:
- a) the respondent's available income is \$350,000 or less;
 - b) the respondent's available income is \$1,000,000 or greater;
 - c) C1 and C2 are each no longer a child of the marriage;
 - d) the claimant turns 65 years of age; and
 - e) the respondent turns 65 years of age.
- [90] Where applicable, the review will include child support.
- [39] Under s. 15.2(3) of the Divorce Act, the court may include review provisions in support orders to permit the parties and the court to reconsider the support award where there is "genuine and material uncertainty at the time of the original trial" on a factual issue that is the basis for a support award. In such cases, once the uncertainty has been resolved, a party should not have to meet the strict threshold of establishing a material change in circumstances to have the support award reconsidered: *Leskun v. Leskun*, 2006 SCC 25 at paras. 36-37 and 39. Unless the order providing for a review sets out limitations on the scope of the review, a review is a hearing de novo and encompasses determination of each of the issues of entitlement, quantum and duration: *Domitri v. Domitri*, 2010 BCCA 472 at paras. 38-39; *Morck v. Morck*, 2013 BCCA 186 at para. 17.
- [40] In *Leskun*, the Supreme Court cautioned against using reviews to defer, to future litigation, controversies which can and should be resolved at trial by way of permanent orders subject only to variation on proof of a change in circumstances: at para. 39.
- [41] On appeal, as at trial, the appellant seeks a review of spousal support when the children are no longer children of the marriage, and to limit any such review to quantum of spousal support. As for the remaining triggering events, she contends that none involves any genuine and material uncertainty. Fluctuations in the respondent's income can be dealt with by way of a variation application, as can the retirement of the parties, which is in any event unrelated to turning age 65, given that neither suggested they intended to retire at that age.
- [42] As the Supreme Court observed in *Leskun* at para. 37:
- [37] Review orders, where justified by genuine and material uncertainty at the time of the original trial, permit parties to bring a motion to alter support awards without having to demonstrate a material change in circumstances: *Choquette v. Choquette* (1998), 39 R.F.L. (4th) 384 (Ont. C.A.). Otherwise, as the amicus curiae fairly points out, the applicant may have his or her application dismissed on the basis that the circumstances at the time of the variation application were contemplated at the time of the original order and, therefore, that there had been no change in circumstances. The test for variation is a strict one: *Willick v.*

Willick, [1994] 3 S.C.R. 670, at pp. 688-90.

[Emphasis added.]

[43] In the present case, the judge was faced with a case in which:

- a) the respondent's income was highly variable and uncertain;
- b) the children were nearing the age of majority;
- c) the pre-trial litigation had been acrimonious and expensive; and
- d) he was being asked by counsel to make orders that would reduce further conflict.

[44] Because the respondent's income had fluctuated widely in the past, it could be argued on an application to vary that those fluctuations were in the contemplation of the parties at the time the order was made. That could work to the disadvantage of either party--the low end of the SSAG range could well be inappropriate if the respondent's income fell below \$350,000, leaving the appellant with too little, and could be too high, arguably, if the respondent's income greatly exceeded \$1 million. In these circumstances, it does not seem to me that the review provisions were unreasonable.

[45] Having said that, I agree with the appellant that the age of 65 is not a valid proxy for retirement for these parties. I also agree that future reviews should be limited to quantum only. The appellant has already proved entitlement to compensatory and non-compensatory support, and the judge has determined that duration of support should be indefinite. That is not to say that an application to vary may not be made in future if there is a change in circumstances, but it does mean that the scope of a review is limited to quantum.

Disposition

[46] The appeal is allowed to the extent of:

- 1) increasing the respondent's income for the purposes of child and spousal support by the sum of \$43,000 for 2019 and by adding back to the pre-tax corporate income in subsequent years 50% of deductions for meals and entertainment, vehicle lease payments, vehicle insurance, and cell phone expenses; and
- 2) by varying para. 37 of the order below so that it reads:

Each year following the exchange of income information on May 31, provided application is made by July 1, either party may apply for a review of quantum of spousal support if any of the following has occurred in the prior year:

- a) the respondent's available income is \$350,000 or less;
- b) the respondent's available income is \$1,000,000 or greater;
- c) C1 and C2 are each no longer a child of the marriage; and

d) either party retires.

[47] In light of the divided success, the parties will bear their own costs of the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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