

CANADA / JUDGMENT

Malhi v. Kang

2020 BCSC 508

COURT

Supreme Court of British Columbia

DECIDED

5 March 2020

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2020 BCSC 508 Malhi v. Kang IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Malhi v. Kang, 2020 BCSC 508 Date: 20200305 Docket: E-192047 Registry: Vancouver Between: Amardeep Kaur Malhi Claimant And Narindar Singh Kang also known as Narindarpal Singh Kang, Nimrita Kaur Kang, Gian Kaur Kang, 0790469 B.C. Ltd., Sandbox Enterprises Corporation, Inc. No. BC0936289, 0727462 B.C. Ltd. and Narindar Singh Kang Law Corporation Respondents Before: Master Cameron Oral Reasons for Judgment Counsel for the Claimant: G.N. Ahluwalia Counsel for the Respondent Narindar Kang: J.M.W. Cudmore Place and Date of Hearing: Vancouver, B.C. February 12 & March 5, 2020 Place and Date of Judgment: Vancouver, B.C. March 5, 2020

- [1] There are two interim applications before the court in, sadly, what has been to date, a very high conflict family law case.
- [2] The notice of family claim was filed in July 2019 and a response was filed in September 2019. The application brought by the claimant filed January 30, 2020, seeks an order for interim without-prejudice spousal support. The amount sought is \$3,283, based on an imputed income of \$20,000 to the claimant and an imputed income of \$218,000 to the respondent.
- [3] The application brought by the respondent is for an interim order requiring the claimant to pay child support of \$1,029 per month based on a Guideline income of \$50,000, and an interim order that the claimant make a proportional contribution towards special and extraordinary expenses for the three children of the marriage, who currently reside with the respondent, in the percentage amount of 27.7 percent.
- [4] This application also seeks an order that a number of prospective expenses should be declared to be special and extraordinary expenses shareable between the parties, including tuition and meal plans for a private school, school trips in the upcoming spring break, school uniforms, tutoring, dental work, and an optometrist.
- [5] The parties began their relationship in May 2002, when they went through a form of religious ceremony. For the purposes of this family law case, whether they were legally married or their period of cohabitation should be found to date from May 2002 or not will be an issue ultimately, if they cannot agree, for the trial judge to resolve. For the purposes of this application, I am satisfied that is the date of the commencement of the relationship. There is

no issue as to the date of separation, which is June 2018, such that for the purposes of determining support, the duration of the relationship amounts to 16 years.

- [6] The case law that both parties have referred to set out the well established principles and there does not appear to be any real issue between them. I remind myself, for the purposes of these two applications, what the Court of Appeal said in *Nestor v. Nestor*, 2019 BCCA 203 at para 18:
- [18] In so far as interim orders in family matters are concerned, it is sometimes said that the general purpose of these orders is to provide "rough justice" between the parties. They are not meant to equate to the results after a trial, at which point a final determination will have been made as to the issues. . .
- [7] I will be guided by that approach.
- [8] The parties have filed a considerable amount of affidavit evidence in respect of these applications.
- [9] What safely, in my view, can be said is this: they are both going through a significant transition.
- [10] The claimant has returned to the workforce relatively recently, approximately three years ago, after having devoted most of her time to the upbringing of the three children. Since the breakdown of the marriage, and in fact shortly before that time, she began to reintegrate herself into the workforce, going back to work as a hairstylist, an occupation that she had some history and aptitude for, based on prior experience many years ago. The work has been part-time. She has had, unfortunately, some medical issues and there are other continuing stresses in her life relating to the manner in which this relationship came to an end.
- [11] Considering the respondent's circumstances, he too is going through some turmoil. He has been for many years a successful lawyer, practising primarily in the area of immigration law. His annual income over a three-year period until most recently was in excess of \$200,000 each year. He has suffered a decline in income and his law firm has been experiencing some reversal in fortunes. They are not as busy, they have laid off staff, and the respondent has, I gather, significant professional conduct issues to address with the Law Society of British Columbia, in terms of his continued entitlement to practice law.
- [12] In brief summary, both parties are not in a situation where one can with any degree of confidence predict what the economic future holds for them. For present purposes I must do my best to ascertain what their Guideline income should be for the spousal support application and also for the child support application.
- [13] In his F8, the respondent specifies that his income is \$130,250. His counsel submitted that his income currently, if one takes a snapshot as to how his law firm has been progressing or not progressing over the past number of months, should be closer to \$95,000. Counsel for

the claimant fairly submitted that the premise behind that reduction in income has not yet been fully tested through oral and documentary discovery. She submitted that it would be more appropriate to set Guideline income based on a three-year average. There is support in the case law for both positions; that is, averaging income when income fluctuates, as it often does for self-employed professionals, and looking more closely on an interim application at what has happened most recently, that is the most current income.

- [14] For the purposes of this application, I will employ the latter approach. On an interim basis, I am satisfied that there is no clear evidence to depart from what the respondent has declared his income to be for the purposes of child and spousal support being \$130,250.
- [15] There are variables that also apply to determining what the claimant's income should be for the purposes of this application. She has been earning, from employment, income in the range of \$15,000 most recently. Her counsel fairly, in my view, has submitted that additional income should be imputed to her, given her more recent ability to increase her hours of work based on her current circumstances and also to reflect what she would earn if she were to do so. The submission from counsel is that her income should be fixed in a range between \$20,000 to \$30,000.
- [16] Counsel for the respondent submitted that the imputed income ought to be in the range of \$50,000. He referred to affidavit evidence from a third party who operates another hairdressing salon, that someone such as Ms. Malhi returning to working in a salon would earn more than she has been earning, likely in the range of \$35,000 to \$40,000. This opinion has not been tested through cross examination and I am not prepared to place much weight on it for the purposes of these applications.
- [17] Accordingly, applying rough justice in the circumstances and allowing for the fact that claimant has not yet developed a clientele to allow her to work fulltime and earn an income commensurate with that, I will fix her interim without-prejudice Guideline income at \$30,000.
- [18] Counsel in their application materials submitted that the requisite amount to be paid for child support by the claimant and to be paid for spousal support by the respondent should be retroactive to either 2018 or 2019. In the course of submissions, counsel agreed with my suggestion that they should leave the issue of retroactivity of any support payable by either party to the other for further and better evidence, and ultimately if necessary for the trial judge to decide.
- [19] Accordingly, the amounts I have fixed for the Guideline incomes will govern the support obligations effective February 1, 2020, going forward, subject to further agreement of the parties or court order.
- [20] For the purposes of any subsequent application, after the parties exchange their 2020 income tax information, they are at liberty to apply without having to show any change in material circumstances.

- [21] That leaves the s. 7 expenses. A number of expenses respecting the private schooling for the children, which has an established history to it, that is both parents were in support of private schooling for the three children, have become hard to provide for due to their significant reduction of income. The respondent has prepaid tuition and a number of other expenses in respect of the private schooling and has also arranged to pay for some spring break 2020 trips for two of the children. I am not in a position on the limited evidence provided to reliably address whether or not those should properly be considered qualifying s. 7 expenses, and that is a matter the parties will have to address either in the further course of these proceedings on another application, if they are in a position to do so, or at trial.
- [22] There is one s. 7 expense that is continuing that both parties recognize is incurred in the best interests of their son, and that is tutoring to assist him with his learning disability. That s. 7 expense will be declared to be a qualifying and continuing s. 7 expense in the sum of \$500 per month and will be a proper factor to include in calculating the Guideline amounts for child and spousal support.
- [23] Neither party achieved substantial success and the costs of both applications are in the cause.
- [24] MS. AHLUWALIA: Your Honour, just in terms of the tutoring, can we say on an interim without-prejudice basis for the tutoring?
- [25] THE COURT: That would seem reasonable as circumstances could change.
- [26] MS. AHLUWALIA: Right.
- [27] MR. CUDMORE: Yes, yes, that's fine, Your Honour, thank you.
- [28] MS. AHLUWALIA: So the mid-range spousal is 1,087.
- [29] THE COURT: Mid-range spousal support is \$1,087.
- [30] MS. AHLUWALIA: And then the child support is \$648.
- [31] THE COURT: Child support is \$648.
- [32] MR. CUDMORE: Nothing is jumping out at me as being in error on this, Your Honour.
- [33] MR. CUDMORE: And \$134 for the s. 7 expense.
- [34] THE COURT: To summarize, the Guideline income on an interim without-prejudice basis for the respondent is \$130,250, and Guideline income on an interim basis for the claimant is \$30,000. For the purposes of this application, there is a qualifying s. 7 expense for tutoring for their one son fixed at \$500 per month.
- [35] These figures are all effective as of February 1, 2020, and subject to counsel confirming in the final order, result in the following: · the respondent pays spousal support to the claimant in the amount of \$1,087 per month commencing February 1, 2020, and on the first day of

each and every month thereafter until further agreement or court order; and · the claimant pays child support for the three children of the marriage in the sum of \$648 per month commencing February 1, 2020, subject to further agreement of the parties or variation by court order. (PROCEEDINGS ADJOURNED) (PROCEEDINGS RECONVENED)

- [36] THE COURT: Based on further discussion between counsel and the refinements to the figures they have agreed upon pursuant to the Guidelines the respondent will pay spousal support of \$1,126 each month on the terms that I have already mentioned and the claimant will pay child support of \$648 each month. The claimant is also to pay \$136 per month towards the s. 7 expense for tutoring on an interim basis, based upon a tutoring cost of \$500 per month.
- [37] MS. AHLUWALIA: So if we could have monthly receipts confirming the tutoring.
- [38] THE COURT: Yes, the respondent will provide monthly receipts in support of the tutoring cost to the claimant.
- [39] THE COURT: In terms of the s. 7 expenses, the proportionate responsibility of each party is, to the claimant, 27.2 percent, and to the respondent, 72.8 percent.
- [40] MR. CUDMORE: But there's nothing that would prevent, for example, Sahaara from having a dental appointment two months from now and that potentially being a shareable expense.
- [41] THE COURT: Yes.
- [42] MR. CUDMORE: The net cost, naturally.
- [43] THE COURT: With both parties being present today, it gives me an opportunity to say that I would hope that you would not have to come back to court to deal with medical and other expenses for the children. I will add that while I appreciate you are a long way away from your trial, I encourage you to consider when you are ready, other forms of dispute resolution rather than the alternative which is a projected 25-day trial. As your financial circumstances become more clear and, hopefully, when you are both on a firmer footing you should really make every effort to do so in the interests of your family. This is going to become a very expensive piece of litigation. We have spent nearly a day just establishing these interim support arrangements. "Master Cameron"

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