

CANADA / JUDGMENT

Michal v. Michal

2000 BCSC 1888

COURT

Supreme Court of British Columbia

DECIDED

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S00-1888 Citation: Michal v. Michal Date: 20000710 2000 BCSC 1888 Docket: F992274 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA Oral Reasons for Judgment Master Bolton Pronounced in Chambers July 10, 2000 BETWEEN: KAREN LYNN MICHAL Plaintiff AND: MIROSLAV MICHAL Defendant Counsel for Plaintiff Ms. K. Basran Counsel for Defendant J. S. Harvey, Esq.

- [1] THE COURT: This is an application for spousal and child maintenance. The difficulty in the application here is primarily whether income should be imputed to the defendant and, if so, how much.
- [2] The parties married in 1979 and separated in January 1998. There are two children. Jason, who I gather lived with his mother immediately following the separation, but is now with his father. Jason has a full-time job and is independent. The younger child is Justin, who just finished grade ten. He lives with his mother and is a dependent child. The mother works as a clerk for Dairyland and earns \$29,000 a year. She has been primarily responsible, recently at least, for paying the mortgage on the former matrimonial home and the mortgage on another investment property. I do not propose to take the investment property into account any further. It seems to me that if it continues to be a financial drain then the obvious course is to sell it. If she succeeds in renting it out then she should be able to keep the rent without any further accounting, any further accounting to the husband that is, at least until the parties get further into the precise accounting of their financial positions, both assets and liabilities as well as income and expenses.
- [3] The father is a businessman. The precise nature of his business is not easy to grasp at the moment. He does run some company, the name of which does not provide a very clear notion of what exactly the company does, and he has also been making money buying and selling on the stock market, as far as I can gather. He says in his property and financial statement that his gross annual income is about \$42,000.

- [4] The wife says that that's nonsense. His lifestyle is totally inconsistent with that low an income. She refers to the several assets that the parties acquired during the relationship. There are certainly several real estate properties. It may possibly be that of all the limited companies she identifies only the first one is active, and the others are simply historical references to companies that the defendant ran at one time or another in his career but are now closed or defunct.
- [5] The problem with the defendant's evidence is that he has not produced any documents of any significance relating to his finances that allow either the plaintiff or the court to check the accuracy of his evidence. For what it is worth for the purposes of this application I do not have any particular difficulty in accepting that there is only one active company, but we are still left with the situation where the parties over the course of their relationship acquired three or four properties, most of which are encumbered, but all of which have some equity.
- [6] Moreover, more importantly for these reasons, the evidence of the husband's income of \$42,000 a year is not consistent with the evidence of his present lifestyle. He lives in a fairly expensive home in the Abbotsford area with his new girlfriend. They paid \$359,000 for this with a mortgage of \$265,000 costing \$1,700 a month. The husband says that the girlfriend provided most of the money. She is unemployed at the moment but she works in the movie industry and works on movies or projects from time to time where unemployment is fairly frequent, but he says she has a good income and some assets as a result of previous jobs. It may be that he is substantially accurate but we are relying simply on his word again, there are no documents to verify either his position or the financial position of the girlfriend and his allegations about her contributions to the relationship.
- [7] Until recently, and this is at a time when he was paying, first of all, \$1,600 a month maintenance for the children and spousal maintenance combined, subsequently reduced to \$1,500 and then more recently to \$500, but at the time, I believe, when he was paying the \$1,600, certainly the 1,500, he was leasing a Jaguar vehicle for \$1100 a month. He has now turned that in on a four wheel drive Tahoe and the payment there, I think, is between 5 and \$600 a month.
- [8] There has been evidence from the wife that since November 1999 he has had a week in Jamaica, a week in the Grand Caymans, a weekend in Reno, and perhaps another holiday for ten days or so, although the wife does not know where he went, but she does know that her mother was here to care for the elder child for ten days whilst the defendant was off somewhere.

- [9] The wife has been trying to get financial records from the husband for the best part of a year, perhaps even longer, with fairly conspicuous lack of success. She has very little precise information about his present finances and the finances during the relationship. She says that he was always in charge of the family finances and she did not know much about it so she needs these documents to figure out the continuity of the parties financial relationship and where each of them stands at the moment.
- [10] There is a distinct lack of credibility in the husband's evidence about how he has been financing his lifestyle - he says that part of it came from \$90,000 that was the proceeds of the division of some assets between himself and the wife a little while ago where each of them got \$90,000 or so, and he says he spent most of that and has even taken out some additional loan. It is possible, although I do not really believe that the lifestyle has been financed entirely as he says, especially without documents. But even if it were true it would not be reasonable. When I couple that with the lack of documentation, despite persistent demands from the plaintiff to produce documents that should, if he is accurate in what he says, be available to confirm the truth of what his evidence has been, I think the inference against the husband is inescapable. There is formal provision for such an inference in relation to child maintenance in the Legislation. As far as spousal maintenance is concerned, it is not necessary that there be any statutory inference. It is the sort of thing that the courts do all the time, to draw inferences against people whose evidence is questionable and who might be expected to produce documents to verify their position given the availability of documents. If they do not do so an inference is not only appropriate, but in my view necessary.
- [11] In the circumstances I conclude that there is no obvious reason why the \$1,600 that he was paying following the separation is no longer either reasonable or feasible. It seems to me that there should be an onus on the defendant to document his financial history over the last several years and to rebut the inference that I believe it is necessary to take on the basis of his present incomplete evidence.
- [12] In the circumstances that is the preferable course to the alternative proposed by the husband himself where the court would set maintenance fairly low at the moment, but reserve a right to the plaintiff to apply to having it increased once she can force him to produce the documents that he has so far kept to himself. As I say, it seems to me that since the problem is of the husband's making, particularly with the lack of documentation, the onus should be on him to produce the documents to explain things fully so that his own position has a properly documented backing.
- [13] I am not going to order maintenance of \$1,600 a month because it does appear that the \$1,600 was originally paid when the elder child was also living with the plaintiff. He is not dependent on the father any more, but nor is he dependent on the mother, so the maintenance will be set at \$1,300 a month which essentially allows about \$300 a month for an abatement because the older child is no longer dependent.

- [14] For the purposes of the guidelines I impute an income to the defendant of precisely double the amount that he has said, which is \$84,000. On that basis child maintenance will be set at \$659 per month. The total maintenance is \$1,300, so the spousal maintenance will be \$641. The order will be that the defendant reimburse the plaintiff for any extra income tax she has to pay as a result of the imposition of this maintenance. I would rather do it the other way around and gross it up but there are too many uncertainties in the finances of both parties for me to be able to do that. So, I think the appropriate result is that he pay that maintenance and then later on pay the tax on it. Once the dust has settled there will be liberty to the defendant to apply to vary the order on production - no, I don't need to say that. If he can produce evidence that there has been a significant change in circumstances from the position of \$84,000 a year, then he does not need any leave from me to do that.
- [15] What precisely were you asking for, Ms. Basran, with respect to the production of documents? (SUBMISSIONS BY COUNSEL)
- [16] All right, that is fine then. An order in the terms of paragraph 6 of the Notice of Motion that Canaccord, Wolverton, Surrey Metro Savings, Peoples Trust and CIBC produce the documents listed in paragraph 5 of the Notice of Motion, to be specified in the order, within seven days of production of the copy of this order and on payment of their reasonable fees for doing the same. The plaintiff within three days of receiving the documents is to make further copies and deliver them to the defendant on receipt of a reasonable fee for the photocopy.
- [17] Costs to the plaintiff in the cause. "Master Bolton"

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