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CANADA / JUDGMENT

## Nair v. Nair

2020 BCSC 677

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COURT

Supreme Court of British Columbia

DECIDED

7 April 2020

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2020 BCSC 677 Nair v. Nair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nair v. Nair,

2020 BCSC 677

Date: 20200407

Docket: E45329

Registry: New Westminster

Between:

Eric Raman Nair

Claimant

And

Klaudyna Lilianna Nair

Respondent

Before: The Honourable Mr. Justice W. Branch

(Appearance via teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant

appearing by teleconference:

S. Beesley

Counsel for the Respondent

appearing by teleconference:

B. Hepburn

Place and Date of Hearing:

New Westminster, B.C.

February 20 and March 12, 2020

Place and Date of Judgment:

New Westminster, B.C.

April 7, 2020

## Introduction

- [1] The parties in this family law dispute sought a number of orders relating to parenting time and child support in cross applications. Over the course of their submissions, the parties were able to agree on a number of issues. The parties provided a draft order setting out terms that they propose go on consent, including terms in relation to parenting time and religious instruction. I approve the issuance of these consent orders.
- [2] What was left for resolution was whether there should be an adjustment of child support, whether there should be the imposition of a penalty on Mr. Nair, and the issue of costs.

## Child Support

- [3] The parties are presently in a shared custody arrangement pursuant to a March 21, 2017 consent order (the "Consent Order"). The Consent Order provides that no child support be paid by either party. Unfortunately, the Consent Order does not specify what income levels were used to support this order.
- [4] Ms. Nair says there has been a material change justifying a change to the Consent Order, as her income has been reduced as a result of going on maternity leave in September 2018. She argues that if child support is going to be changed, it should be on the basis of an imputed income of \$75,000 for Mr. Nair and \$17,096 for herself flowing from her present maternity benefits.
- [5] Mr. Nair's position is that there has been no material change and that the order should stay as it is. He says that the Consent Order must have contemplated a wide zone that would not constitute a material change. The best information is that when the order was agreed to Mr. Nair's income was less than that of Ms. Nair, yet an agreement was made that no child support be paid. The last F8 Financial Statement from Mr. Nair prior to the Consent Order

indicated that his income was \$22,675. The last statement from Ms. Nair indicated that her income was \$31,202. This potentially suggests that there was a zone of about \$9,000 that would be tolerated.

- [6] However, although their incomes may have been different at the time of the Consent Order, the Consent Order did contemplate an "annual recalculation". Paragraphs 16 and 17 of the Consent Order states:
16. BY CONSENT: Annual recalculation of the parties' respective incomes for child support and special and extraordinary expenses shall occur as follows, pursuant to section 212 of the Family Law Act and Section 7 of the Federal Child Support Guidelines:
- a. The parties will exchange T-1 General tax returns and Notices of Assessment by no later than June 1 of each year, commencing in 2018; and
  - b. Each parent shall then recalculate their respective child support table amounts and special and extraordinary expenses percentages and convey them to the other party by June 10 of each year.
17. BY CONSENT: The Respondent will continue to receive government benefits relating to the Children. The Respondent will use all government benefits towards section 7 expenses, including, but not limited to education expenses, including costs of schooling, extra-curricular activities, clothing and other expenses pertaining to the Children. If there are any additional costs, after exhaustion of the government benefits, the Claimant and the Respondent will share the net costs of all mutually agreeable special and extraordinary expenses for the Child on an equal basis. The Respondent will provide the Claimant with an accounting of the government benefits used each year.
- [7] That said, the Consent Order does not contain an express right of review, which would have avoided the material change requirement entirely: *Reis v. Bucholtz*, 2012 BCSC 50, at para. 18.
- [8] I accept that I have some discretion in determining the proper level of child support in this shared custody situation given s. 9 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines]:

9 Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

- [9] In particular, the last factor (c) creates a scope for a broader assessment of the appropriate order in all of the circumstances: *Lozinski v. Lozinski*, 2017 BCCA 280, at paras. 42-45.
- [10] Hence, given all these factors and elements, I conclude that I do have the ability to adjust the child support order if there has been a material change in circumstances.

## Material Change

- [11] Turning to the alleged material change, the key driver is said to be the changes to the parties' proper income levels as a result of Ms. Nair's pregnancy and Mr. Nair's income (after appropriate imputation).
- [12] Looking first at Mr. Nair's income, Mr. Nair argues that his income should be limited to the amount he received under contract to a program run by Inter Resource Consulting Ltd. ("IRC"). IRC provides income support to persons who provide residential care to persons with disabilities. The parties were engaged in this type of work prior to their separation and Mr. Nair has continued with such work thereafter. He is responsible for buying groceries, preparing meals, cleaning, and driving for the special needs adult residing with him. Mr. Nair produced an April 1, 2019 contract providing for payment of \$2,650 per month. In Ms. Nair's calculation, she used an annual figure for this source of income at \$25,060, which I am prepared to accept. Ms. Nair argued that the payments under this contract were non-taxable. This is consistent with Mr. Nair's November 18, 2019 Financial Statement and I performed the calculations on this basis.
- [13] The core question is whether Mr. Nair could do additional work beyond that performed for the IRC. Until August 2019, Mr. Nair did work on his own bread distribution business, on top of his work for the IRC. This business did not succeed and ceased operating as of August 2019. He says that he has been looking for new business opportunities since then.
- [14] I conclude that it is reasonable to assume that Mr. Nair could do work beyond his responsibilities for the IRC, given that he was able to do so previously in pursuit of his prior business. Mr. Nair says that this additional time is now being filled by efforts to set up a new business. However, there is very little evidence of what he is doing during this extra time. Furthermore, we are now six months beyond the end of his earlier business. If he has not been able to seek out and start up a new business in this six months, it is reasonable to begin to impute income to him on the basis that he should now at least seek more traditional part-time work with his available extra hours. This is not to say that he must abandon his efforts to pursue a new business, only that he can no longer visit the implications of this decision on his children: *Ferguson v. Ferguson*, 2019 BCSC 1946, at para. 31.

- [15] I conclude that it is reasonable to impute further income to Mr. Nair on the basis that he should be able to devote 20 hours per week to other work. I accept that it is only reasonable for him to obtain minimum wage employment, particularly as any work would require substantial flexibility given his responsibilities to IRC. Applying B.C.'s minimum wage of \$13.85 per hour at 20 hours a week for 50 weeks a year, with two weeks' holidays, this justifies an imputation of an additional \$13,850 on top of his IRC income.
- [16] Ms. Nair suggested that there should be further additions to these amounts based on certain rents said to be payable and as necessary to reflect his excessive expense levels that cannot be supported by his claimed income. I do not find that there was sufficient evidence to make further imputation on either basis.
- [17] Mr. Nair argues that any child support adjustments should take into account that Ms. Nair now receives some support from a new partner. Although her new partner declined to provide any income tax information, it is reasonable to infer that he is employed, and it is also known that he received \$250,000 in lottery winnings. Ms. Nair also acknowledges that the partner was contributing to certain expenses at their home. However, on the other side of the ledger, Mr. Nair also has a new partner who is contributing to the expenses of his home. To the extent that the broader family resources should be considered, I find that this new partner issue is effectively neutral as between the two households. Most importantly, there is no indication that the children will have a substantially different lifestyle as between the two households after the adjustment made below: *B.P.E. v. A.E.*, 2016 BCCA 335, at paras. 49-65.
- [18] Mr. Nair initially sought to advance an argument that there should also be an imputation of income to Ms. Nair. However, Mr. Nair did not raise the prospect of his seeking such an imputation in his application materials and I held that it could not be properly raised at this hearing.
- [19] Mr. Nair argued that there should be an accounting for the fact that the claimant has been in receipt of the entire Child Tax Benefit notwithstanding the parties' shared custody arrangement. His counsel says that there is a flaw in the Guidelines in that they are incapable of providing a calculation that accounts for the fact that only one party receives the entirety of the government benefits. It appears that the monthly benefits payable is in the range of \$657. If Ms. Nair receives all of these benefits, Mr. Nair argues that it makes sense for the final child support determination to take this sum into account. However, I find that the Consent Order expressly contemplated that Ms. Nair would receive the entire amount and would use it for s. 7 expenses to the benefit of both parties. Hence, it would be unfair to count the receipt of those amounts to Ms. Nair's credit exclusively.

- [20] Mr. Nair notes that Ms. Nair has not provided the accounting of these s. 7 expenses as required by the Consent Order. That is a fair point. The obligations and benefits of the Consent Order must flow in both directions. Hence, I am prepared to make an order that Ms. Nair provide the accounting contemplated by paragraph 17 of the Consent Order within 60 days of this order.
- [21] By my calculation, running a current DIVORCEmate analysis using the incomes determined above yields a child support offsetting amount payable by Mr. Nair of \$483 per month. If there is any error in this calculation, the parties may address that at the time they submit the order for entry. I conclude that even accounting for the flexibility contemplated by the Consent Order, the material change in incomes that has occurred and that would otherwise justify such a shift in the basic child support payable does justify a modification of the order. I find that effective next month Mr. Nair should commence paying the increased child support figure.
- [22] In terms of the penalty requested by Ms. Nair, I agree that there should be a penalty of \$2000 imposed on Mr. Nair to reflect his failure to properly cooperate in the retainer of a parenting coordinator and his failure to provide timely financial disclosure, Family Law Act, S.B.C. 2011, c. 25, ss. 213, 230; J.D.G. v. J.J.V., 2013 BCSC 1274.
- [23] As to costs, given that much of the motion was eventually resolved on consent, I conclude that costs should be in the cause unless there were settlement discussions of which I was unaware.

"Branch J."

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