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CANADA / JUDGMENT

## Nessman v. Nessman

2016 BCSC 2281

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Supreme Court of British Columbia

DECIDED

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2016 BCSC 2281 Nessman v. Nessman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nessman v. Nessman,

2016 BCSC 2281

Date: 20161124

Docket: E17370

Registry: Smithers

Between:

Kerry Lee Nessman

Claimant

And

Paul Joseph Nessman

Respondent

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

Counsel for the Claimant:

T. Hudson

Counsel for the Respondent:

C. MacEachern

Place and Date of Trial/Hearing:

Smithers, B.C.

November 21, 2016

Place and Date of Judgment:

Smithers, B.C.

### **November 24, 2016**

[1] There are two applications before me, both addressing issues relating to spousal support. Ms. Nessman agrees to two of the orders sought by Mr. Nessman, which I grant. They are:

- i. that she provide a receipt for spousal support within one week of receiving a spousal support payment, and
- ii. that she provide a receipt for all spousal support payments she has received to date within one week of the day this Order.

[2] In addition, Mr. Nessman seeks an order compelling Ms. Nessman to repay \$5,200 that he says is an overpayment of spousal support for November, 2016. He also seeks an order setting that the amount of spousal support he will pay from February 1, 2017 (when the current Order for spousal support expires) until January 31, 2018 at \$1,720 per month. He says the spousal support amount should be lower than the current rate, which is \$5,200 per month.

[3] Ms. Nessman opposes that application and says the amount should stay the same at least until the trial, which is in March 2017. She also seeks from Driftwood Diamond Drilling Ltd. ("Driftwood") disclosure of details relating to businesses in which Mr. Nessman is an owner or part owner. Driftwood is one of the companies in which Mr. Nessman has an ownership interest.

### **BACKGROUND:**

[4] The parties were married on June 29, 2005, but according to Ms. Nessman they started living in a marriage like relationship on June 1, 2003. They separated on November 25, 2015. Mr. Nessman does not agree with the latter two dates but, for the purpose of the interim application only, he agrees those dates can be used for the calculation of spousal support; he preserves his right to challenge those dates at trial.

[5] Ms. Nessman is currently 52 years old and is not working. Mr. Nessman is 47 years old. He draws a salary and is a part owner (37%) of Driftwood and related companies, and he owns Paul Nessman Consulting Ltd. The couple also owned traplines from which they earned income.

- [6] Ms. Nessman worked in retail sales during the marriage but says she gave that up in 2013 to look after Mr. Nessman's mother, who suffers from dementia. Mr. Nessman disputes that Ms. Nessman became a caregiver for his mother.

## Repayment

- [7] With regard to the first issue, Mr. Nessman deposes that he sent post-dated cheques for spousal support for each month up to January 2017 to Ms. Nessman in early 2016. In mid-October 2016, Ms. Nessman informed him through counsel that she did not have cheques for November or December 2016. On October 31, 2016, Mr. Nessman provided replacement cheques but made them payable in trust to her counsel.
- [8] It became apparent after the fact that Ms. Nessman did cash the previously issued cheque for November's spousal support on October 26, 2016. Not knowing that, her counsel appropriately cashed the replacement cheque and forwarded that amount to her on November 1, 2016, as the parties had agreed. Mr. Nessman agrees counsel did nothing improper. Accordingly, Ms. Nessman has received double the amount of spousal support for the month of November 2016.
- [9] The day after the replacement cheque was cashed by counsel, Mr. Nessman realized both cheques for November's support had been cashed. Through counsel he demanded the overpayment be returned by 10:00 a.m. the next day with a written explanation about why two cheques were cashed.
- [10] In her third affidavit (filed November 10, 2016), Ms. Nessman states that upon receipt of Mr. Nessman's November 2, 2016 letter demanding repayment, she reviewed her bank statement and only then noticed the "photo deposit" record showing that she had deposited a cheque and then received the same amount via her lawyer. She acknowledges this is an overpayment but states the divorce has put her under a "tremendous amount of stress, worry and fear". She also states that Mr. Nessman had told her that if she ever left him, he would ensure she received nothing.
- [11] Ms. Nessman deposed she is prepared to return the money, but only if a deduction is made for \$2,200 in dental expenses she says should have been covered by insurance, but was not because Mr. Nessman removed her from his dental plan.
- [12] There is no dispute that on two occasions Mr. Nessman removed Ms. Nessman from his medical plan, but then reinstated her. Mr. Nessman produced insurance documents purporting to show that Ms. Nessman's coverage has since been reinstated and backdated such that she has had continuous coverage. Thus, Mr. Nessman's position is that Ms. Nessman is in no worse financial position since the insurance was reinstated retroactively. But that position fails to appreciate that the uncertainty about insurance coverage, and having to pay upfront without knowing if you will be reimbursed later, is a financial hardship and a source of stress for Ms. Nessman, given her limited income.

- [13] There is no evidence that when Mr. Nessman removed Ms. Nessman from his insurance plan on two occasions that he informed her either that he did so, or why. Indeed, there was no evidence as to why he removed her. This is significant because Ms. Nessman's financial situation is precarious and a \$2,200 payment is onerous in her current situation. Also, she requires medications that cost about \$700 per month.
- [14] The evidence does not go as far as Mr. Nessman says it does with respect to insurance coverage, but neither do I have a sufficient basis upon which I can decide if the \$2,200 should have been covered by insurance, as Ms. Nessman asserts. In any event, on an interim application it is not my role to adjudicate issues that will be decided at trial, such as this one. Because of that, I decline to take that expense into consideration on this issue of repayment.
- [15] I find that the overpayment to Ms. Nessman for the November spousal support was an unintentional mistake. There was no evidence to contest Ms. Nessman's explanation of what happened as contained in her third affidavit.
- [16] Given that, it is surprising that Mr. Nessman would not agree to my suggestion that the money be rolled over such that support for December 2016 be considered paid. Mr. Nessman's counsel said his client insisted on repayment "on principle" based on what he termed the "blatant" action of Ms. Nessman in receiving two November payments.
- [17] There is a lot of acrimony between the parties, and unfortunately that has led both parties to view with suspicion and distrust the other party's actions, motives and statements. I suspect that acrimony is also at the root of some of the positions taken before me. This is something that counsel should work very hard to avoid.
- [18] There is no evidence before me to back up Mr. Nessman's attribution of malice to Ms. Nessman regarding this mix-up. Nor was it Mr. Nessman's position that allowing the money to be rolled over causes him any financial hardship, and certainly the evidence suggests otherwise. He is in a comfortable financial position.
- [19] It is also unclear to me what "principle" Mr. Nessman wishes to stand upon by refusing the reasonable suggestion of rolling the amount over. Given the tenor of the submissions made on his behalf and the evident acrimony, there is the possibility that his position is motivated by a desire to punish Ms. Nessman for what he alleges was a deliberate deception. I decline to incite further acrimony in this case by granting Mr. Nessman's request for an order forcing repayment.
- [20] Instead, I order the parties to apply the \$5,200 payment cashed on November 1, 2016 as support for the month of December 2016. Ms. Nessman must refrain from cashing any cheque for spousal support for the month of December 2016. I leave it to counsel to make complementary arrangements, if necessary, regarding the money paid into Mr. Hudson's trust account.

## Disclosure

- [231] Ms. Nessman seeks further disclosure from Driftwood in order for a business valuation to be made for use in this litigation. Mr. Nessman agrees such a valuation would be helpful to the Court and the parties at trial. He does not contest that full disclosure has not yet been made.
- [222] The background is that the parties jointly engaged Blair, Mackay and Monet to provide an estimate as to the fair market value of the parties' interests in Driftwood Diamond Drilling (which includes a separate company that appears to be a Mexican company) and Paul Nessman Consulting. It is anticipated Blair, Mackay and Monet will provide an expert report that may be introduced at trial.
- [233] In its engagement letter with both parties, the business valuator stated, among other things, that the parties "will provide us, in writing, all facts (other than technical matters) that are to be assumed by us and which can be established as at the Valuation Date". It also confirms that none of the reports (draft or final) are intended for general circulation and they are not to be reproduced for any other purpose than the litigation. This is consistent with the implied undertaking attached to the exchange of any documents in litigation.
- [244] A schedule of detailed questions was sent to Mr. Nessman to answer, since he is a part owner and director of the companies. When the response was received, counsel for Ms. Nessman was concerned all information had not been provided as requested. In an email to both parties' lawyers, the business valuator agrees, stating that "critical information is missing" and that information for a number of questions was omitted. He further states: "there is no point in starting my valuation analysis until I have complete and comprehensive responses to all outstanding information requests". In follow-up correspondence, the valuator further states that without the critical information he would be required to include a scope of limitation in his report and raises the concern that such a limitation may impact the weight of his opinion in court.
- [255] The only evidence I have about disclosure is what is contained in the affidavits. Ms. Nessman attaches to her affidavit identified as Exhibit "L"[1] a document apparently sent by Mr. Nessman as a supplemental response to the valuator's questionnaire, prompted by the email correspondence to which I referred earlier.
- [266] In the original questionnaire, question 27 asked for a detailed description of various employment services that "any shareholder/employees (non-arms' length) were paid and number of hours per week that they each worked for the company". The question was not answered the first time. Mr. Nessman's counsel wrote in a letter as reply to the request for further information that: "Mr. Nessman does not have a controlling interest in this Company and the other two shareholders are not agreeable to their information being disclosed".

- [27] I pause to point out that the letter is, of course, hearsay; I cannot rely on its contents for their truth. A point too often forgotten in Chambers is that attaching a document to an affidavit does not render anything in that document admissible for its truth. At most, I can rely on the fact that the statements in the letter were made (assuming there is no objection to the authenticity of the document).
- [28] While it is true that Rule 10-4(13) of the Supreme Court Family Rules allows a court to rely on an affiant's statements made on information and belief, that is only if that source is named and a final order is not being sought. Mr. Nessman has made no statement at all in his affidavit about disclosure. That letter was attached to Ms. Nessman's affidavit. Thus, I have no first-hand evidence about why full disclosure was not made to the business valuator. Nor do I have any evidence about what efforts Mr. Nessman has made to ensure full disclosure.
- [29] Ms. Nessman's counsel delivered the request for information to the registered office of the company, but he acknowledged that delivery would not constitute proper service unless the company accepted it. He received no reply. Instead, Mr. Nessman's counsel informed me that he was contacted by the company and that the company denied it had been properly served. Because the company was not served with the application, I cannot order it to do anything.
- [30] During the hearing, Ms. Nessman's counsel offered that the information could be provided on the condition it would not be disclosed to his client and only be sent to the business valuator. Mr. Nessman's lawyer seemed confident this could resolve the issue. It was suggested that I could order the company to make disclosure, but allow it to challenge that order on seven days' notice.
- [31] Counsel for Mr. Nessman may be right to have confidence that the issue can be resolved in that fashion, but the company is not before me and it would be improper for me to make any assumptions about what it may be prepared to do, and entirely improper to make an order against it.
- [32] This situation is not satisfactory, nor is Ms. Nessman's proposal. Mr. Nessman jointly agreed to hire an expert in anticipation of that expert providing an opinion to this Court. All experts - but most certainly joint experts - provide evidence for the assistance of the court and must not be advocates in any way. Ms. Nessman ought to have been able to rely on Mr. Nessman's agreement to seek a joint expert report to be an indication not only of his cooperation, but also his confidence that he could comply with the terms in the valuator's engagement letter to provide all information necessary.

- [33] Mr. Nessman now takes the position he cannot provide all the information because he is not a majority owner. That being the case, why did he agree to the engagement letter in the first place? In doing so, he raised the reasonable expectation in Ms. Nessman that she could rely that an independent expert would provide an opinion to assist the Court in the valuation of a major asset at issue in this litigation.
- [34] In my view, the only conclusion I can draw based on the evidence before me is that Mr. Nessman has not done all that is necessary to meet his obligation for financial disclosure. Counsel tells me that one of the shareholders that has concerns about disclosure filed an affidavit in support of Mr. Nessman in this litigation. With this in mind, it is difficult to accept Mr. Nessman is put to any hardship if he were ordered to complete the disclosure.
- [35] I am not suggesting the concerns of the other shareholders are not valid. They may be; I simply have no evidence about that. Although, I point out that with regard to confidentiality and privacy concerns, Ms. Nessman, her counsel and the expert are under a legal obligation not to disclose any information except for use in this litigation.
- [36] As a party in this case, Ms. Nessman has the right to full disclosure and in the absence of evidence of why she should not see certain information I am unwilling to make an order restricting disclosure in that fashion. The parties are free to make any arrangement they feel is appropriate to safeguard confidential business information, subject ultimately to any possible concerns by the trial judge when it comes to the trial, but I am not persuaded it is appropriate to make an order limiting the extent of disclosure.
- [37] I have no authority to order the company or those shareholders to do anything because they were not properly served. The appropriate order would be to order Mr. Nessman to provide the further disclosure sought, but that was not how the application was framed. I would be prepared to hear counsel's submission on that at the end of these reasons, but as it stands now, that may not be an order I can make either.

### Amount of Spousal Support

- [38] Mr. Nessman seeks an order setting the spousal support for the period of February 1, 2017 to January 31, 2018 at \$1,720 per month. He says I should impute income to Ms. Nessman. He deposed he expects to make \$120,000 in the coming year; and says the proposed amount of support is consistent with the Spousal Support Guidelines.
- [39] Ms. Nessman opposes that application and has brought her own application seeking an order to extend the current order (which was entered by consent and without a court hearing) requiring that support remain at \$5,200 up until the trial date, which is March 2017. She says income should not be imputed to her and that it is very likely that Mr. Nessman's income will be much higher than \$120,000.

[40] The parties do not disagree on the controlling test about imputing income. That test is one of reasonableness, taking into consideration the parties' capacity to earn income in light of their age, education, health, work history and work availability, including person's ability to work or be trained to work: *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (BCCA). Imputing income on the basis that a person is intentionally unemployed or "under-employed" does not require a finding that the person intends to evade or minimize the amount of support to be paid: *Barker v. Barker*, 2005 BCCA 177.

[41] In *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (SC) at para. 14 the Court set out general principles for assessing earning capacity when considering whether to impute income for the purpose of child support. Counsel tell me these principles also apply to spousal support. They are:

I. there is a duty to seek employment if a parent is healthy and there is no reason he or she cannot work;

II. a court must consider what is reasonable having regard to the age, education, experience, skills and health of the parents in addition to availability to work, freedom to relocate, and other obligations;

III. a parent's limited work experience and job skills does not justify a failure to pursue employment that does NOT require skills, or employment where one learns on the job;

IV. persistence in unremunerative employment may justify imputing income;

V. parents cannot be excused from child support obligations by his or her unrealistic or unproductive career aspirations; and

VI. as a general rule, one cannot avoid support obligations by self-induced reduction of income.

[42] In *Newson v. Newson*, [1998] B.C.J. No. 2906, the British Columbia Court of Appeal stated interim support should be ordered without adjudicating any issues between the parties unless an action is frivolous or vexatious, which is not the case here. While the spousal guidelines are a useful tool, the Supreme Court stated a court may depart from them for an interim order, depending on the circumstances, to bridge the gap until trial: *Paisley v. Paisley*, 2014 BCSC 1752.

[43] Ms. Nessman seeks support pursuant to s. 15.2(1) of the Divorce Act and points out the objectives listed in 15.2(6) are not exhaustive, nor is any one factor paramount over others. Thus, a desire to promote independence and self-sufficiency in divorced spouses is not necessarily to be weighed more heavily than the other objectives.

- [44] She relies on *Loesch v. Walji*, 2008 BCCA 214 where it was recognized that financial information is not necessarily thoroughly disclosed at the stage of an interim application, so most will "focus on the needs of the party and the ability to pay" (at para. 17). In *Loesch* at para. 18, Kirkpatrick J.A. referred to *Grossi v. Grossi* (1993), 48 R. F. L. (3d) 413 in which Smith J. states the following at para. 2:

Where the parties have, during the course of the marriage, established a standard of living and a pattern of spending, the interim award should be sufficient to allow the applicant to continue at that level if the ability to pay warrants that.

- [45] When making an interim order, 15.2(4) of Divorce Act says to look to the length of cohabitation, functions of each spouse and "any order, agreement or arrangement relating to support of either spouse".
- [46] Mr. Nessman is correct that his agreement to pay \$5,200 does not prejudice his position at trial to argue that amount is too high, but on an interim application I am not adjudicating the issues between parties. I am allowed to take into account the fact that he agreed to that amount. He has not produced any evidence that the payments are, or are expected to cause him financial hardship.
- [47] Rather, he asks income be imputed to Ms. Nessman on the basis that he says she has not produced evidence to show she has taken sufficient steps to look for work.
- [48] I look to a number of factors to decide if it is reasonable to expect Ms. Nessman by this time to have found work such that income can be imputed to her. The uncontested affidavit evidence is that Ms. Nessman only has high school education, only worked in retail sales during the marriage (although it was not clear if this was full or part-time) and stopped working in 2013. There is no dispute Mr. Nessman was the primary income earner for the household. The parties' relationship spanned 12.5 years (I repeat that Mr. Nessman may contest that fact at trial, but agreed for it for these interim applications).
- [49] There are several factors that complicate Ms. Nessman's ability to search for work. The most significant is her claim that she suffered emotional abuse from Mr. Nessman during the marriage and specifically around the time of separation.
- [50] Mr. Nessman does not address those allegations of emotional abuse in his affidavit evidence. His counsel submitted both parties treated each other badly, but that is not evidence. I cannot rely on counsel's submission about disputed, material facts.
- [51] Ms. Nessman produced a voluminous number of text messages in which Mr. Nessman refers to Ms. Nessman with the most vulgar language, says things that any reasonable person could interpret as being threatening and displays hallmarks of bullying behaviour. He is verbally abusive and nasty. Ms. Nessman's responses to him are not of the same character. She shows remarkable restraint in her text messages in the face of Mr. Nessman's vitriol. I find Ms. Nessman's claim that she felt emotionally abused to be genuine.

- [52] Mr. Nessman has produced absolutely no evidence to substantiate his counsel's submission that they treated each other badly. Importantly, Mr. Nessman did not make a sworn statement denying the emotional abuse Ms. Nessman claims to have suffered.
- [53] I am not taking Mr. Nessman's behaviour into account to determine whether income should be imputed or the calculation of interim support; it is the impact of that behaviour on Ms. Nessman that is relevant to both issues.
- [54] In addition to that, Ms. Nessman described in her affidavits the difficulty she had living in a small community during the separation as rumours and information spread about what was going on between her and Mr. Nessman. Mr. Nessman's company is apparently a major employer in the community and she believes she was subjected to animus because of that.
- [55] She also claims she was afraid of Mr. Nessman and, based on the evidence before me, I find her fear not to be unreasonable. For those reasons, she decided to move to Victoria. Moving that distance after a financially stable married life for 12.5 years is very disruptive. Because she left the marital home, she has had to set up another household and her only source of income is the spousal support. In those circumstances, it is not unreasonable that she has not yet taken concrete steps to find work.
- [56] She states that she wants to take training/schooling, but it is clear that in her current financial situation she would be unable to pay for that independently. She also deposed she is in counselling to address what she says is the impact of the emotional abuse she suffered.
- [57] She lists her expenses and they are reasonable and amount to just under the amount of spousal support she receives, which is her only source of income. By contrast, Mr. Nessman's expenses are about the same, yet he expects to earn \$120,000. He also lives in a home completely paid for that is apparently worth over \$600,000.
- [58] I find that the breakdown of the marriage has had a drastically more negative impact on Ms. Nessman than Mr. Nessman and that unlike him, she is economically disadvantaged both by having not developed a career during marriage, and by the marriage breakdown. The orders sought are interim and the trial is relatively soon. Considering all the circumstances, I decline to impute any income to Ms. Nessman.
- [59] Mr. Nessman's application was dependent upon imputing income. I decline to do so, and therefore I deny his application.

### Maintaining Status Quo

- [60] Ms. Nessman not only opposed Mr. Nessman's application to reduce support, she also seeks an order extending the spousal support agreed to by the parties by two months, ending just before trial.

- [61] Mr. Nessman deposed he expects to make \$120,000 this year. He admits he earns income from salary and dividends from two companies. In financial information he disclosed to an expert, he admits to receiving dividends from only one company in 2015 in the amount of \$120,375. The dividends received from another company are listed as "unknown". He admits his combined income received from both companies in 2014 was apparently just over \$280,000; in 2013 just under \$400,000; and in 2012 about \$650,000. These figures do not state that they include salary. Nor do they take into account any non-monetary benefits he may incur from the companies.
- [62] I do not have confidence that his statement in his affidavit that he expects to earn \$120,000 is reliable based on the evidence before me. Mr. Nessman argued I should take into account the downturn in the local economy to explain why the dramatic drop in his income is reasonable, but I have no evidence about that. Not even Mr. Nessman provided a sworn statement to that effect.
- [63] What I do have is information Mr. Nessman provided to the expert that is not consistent with him only earning \$120,000 in any one year. Ms. Nessman has pointed to these inconsistencies to suggest that income should be imputed to Mr. Nessman, but her application is more modest and reasonable. She is simply asking for the status quo to continue for two months (February and March 2017) until trial.
- [64] Given all the evidence, I am satisfied that Ms. Nessman has demonstrated her need for support and Mr. Nessman's ability to pay amply justifies continuing the amount of \$5,200 for two more months until trial.
- [65] I therefore grant Ms. Nessman's application.
- "Sharma J."
- [1] I believe an error has been made in the body of her affidavit as the description of exhibits "K" and "L" seem to be switched.

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