
CANADA / JUDGMENT

Phillips v. Saunders

2020 BCCA 265

COURT

British Columbia Court of Appeal

DECIDED

22 September 2020

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2020 BCCA 265 Phillips v. Saunders

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Phillips v. Saunders,

2020 BCCA 265

Date: 20200922

Docket: CA45433

Between:

Dianne Kathleen Phillips

Respondent

(Claimant)

And

Robert Charles Saunders

Appellant

(Respondent)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated

June 12, 2018 (Phillips v. Saunders, 2018 BCSC 960,
New Westminster Docket E048998).

Oral Reasons for Judgment

Counsel for the Appellant:

P. Sheppard

Counsel for the Respondent:

A.E. Thiele

D.C. Stark

Place and Date of Hearing:

Vancouver, British Columbia

September 22, 2020

Place and Date of Judgment:

Vancouver, British Columbia

September 22, 2020

Summary:

This appeal arises from a lump sum award as compensatory spousal support. The appellant says the trial judge erred in law by determining his Guideline income for support purposes to be the average of his income for four previous years, despite finding that his income from his medical practice had steadily declined and was expected to continue to decline as a result of his advancing age and his medical condition. Held: Appeal allowed. The trial judge accepted that the appellant had reasonable and legitimate reasons to slow down his practice. She imputed income of \$200,000 to the appellant for 2017 and then used what she regarded as a "standard approach" to estimate income going forward, by using an average from prior years, a significantly higher figure. It was an error to do so. Using that average ignores the reality of declining income.

WILLCOCK J.A.:

Introduction

[1] The parties to this appeal are medical doctors who lived in a common-law relationship for over 22 years until they separated on May 24, 2014. The respondent then commenced an action seeking a division of family property and an order for spousal support. At the conclusion of a six-day trial, the judge, for reasons indexed as 2018 BCSC 960, found the respondent to be entitled to one half of the value, on the date of separation, of the professional corporation into which the appellant deposited his professional fees. She found the respondent to be entitled to a lump sum of \$110,000 as compensatory spousal support

(the equivalent of monthly support of \$5,600 for 36 months from the date of trial, after discounting for tax).

- [2] The appellant says the trial judge erred in law by determining his Guideline income for spousal support purposes to be the average of his income for the four previous years, despite finding that his income had steadily declined and was expected to continue to decline as a result of his advancing age and his medical condition.
- [3] The respondent says the trial judge did not average the appellant's income in accordance with the method set out in s. 17 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines] (which provision is also referred to for the purpose of setting Guideline income for spousal support) but, rather, imputed income under s. 19, which affords trial judges broader discretion unfettered by the restrictions contained in s. 17. That decision, to impute income to the appellant, was not based solely on a finding that his income was declining, but upon the totality of the evidence and upon the trial judge's conclusion that that the sharp decrease in the appellant's income may have been caused by his fundamental opposition and animus to the notion of paying spousal support.
- [4] The respondent contends the question before us is not whether a "fair and reasonable result" was obtained, but whether the trial judge erred in principle, significantly misapprehended the evidence or made a decision "so clearly wrong as to amount to an injustice": *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 11. In that case, L'Heureux-Dubé J., for the Court, cautioned at para. 12:
- [12] 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.
- [5] For reasons that follow, I am of the view the judgment is affected by an error in law. I would allow the appeal and substitute for the award made by the trial judge a lump-sum award for spousal support of \$46,310; an amount equivalent to 36 months of the mid-range of support recommended by the Guidelines where the payor's Guideline income is \$200,000 and the recipient's is \$131,616, after discounting for tax.

The Judgment Below

- [6] The evidence before the trial judge was that the respondent's average earnings for the years 2014 to 2016 were \$131,616. The appellant's corporate and personal income over those years was:

\$364,399 in 2014;

\$339,594 in 2015, and

\$272,023 in 2016.

- [7] The appellant estimated his income for 2017 at \$187,275, and sought to have this figure used as his Guideline income for calculating spousal support.
- [8] The respondent submitted the appellant had chosen to take fewer shifts at work and to pay himself by dividend, rather than income, to reduce his income "not only for tax purposes, but also for spousal support purposes".
- [9] The trial judge held as follows:
- [90] As to his reduction in shifts, I am not satisfied he has done so for any other reason than the expected and natural slowing down of his career commensurate with his age. I find his testimony credible when he described how it is getting harder for him to keep up the same pace he did as a younger man, especially with his most recent medical complications. No adjustment to his income is warranted for his reduced capacity to work. [Emphasis added.]
- [10] The trial judge rejected the submission that the court should gross up the appellant's dividend income (the approach to dividend income embodied in s. 19(1)(h) of the Guidelines) so as to treat dividend and employment income consistently.
- [11] She then turned to the question of setting the appellant's Guideline income, using what she referred to as the "standard approach". The rationale for setting Guideline income at a three-year average is entirely set out in the following passages:
- [97] The respondent relied on tables prepared by counsel, which I presume are properly based on his income tax returns. His average income for the same period is \$325,338. However, he submits only his anticipated 2017 earnings of \$187,275 should be used. While I have accepted Dr. Saunders' legitimate reasons to slow down his practice and change his method of compensation, there is a stark reduction in his income between 2016 and his estimated 2017 income (\$272,023 and \$187,275). Given my findings above that Dr. Saunders' opposition to the notion of spousal support (see above para. 45), I am concerned whether this reduction may have been motivated to some degree by his animus about spousal support.
- [98] However, I have also accepted that it is reasonable for him to be slowing down. His income has declined from 2014 to 2017, although not at a steady rate. His 2015 income was about 6.8% lower than his income for 2014; his 2016 income was about 20% lower than his income for 2015. His estimate for 2017, however, represents about 31% decrease from his 2016 income. I do not find that the evidence supported that he would earn about 1/3 less in 2017, than in 2016, even taking into account all the factors I have mentioned here.
- [99] For that reason, rather than rely on his estimate, I prefer to use the figure suggested by Dr. Phillips: \$200,000. Using that estimate, and averaging over four years, comes to about \$294,000 annual income.
- [Emphasis added.]

- [12] The spousal support called for by the Guidelines, where the payor's Guideline income is \$294,000 and the recipient's Guideline income is \$131,616, is in the range of \$4,670 to \$6,225 per month. Support was set by the judge at the mid-range: \$5,600 per month. The judge noted as follows:
- [101] That recognizes a 23-year-long spousal relationship with large differences in the parties' gross income, but also my acceptance that Dr. Saunders is entitled to a decreased trajectory of earnings since separation, and both of them are within a decade of a reasonable retirement age. [Emphasis added.]
- [13] It should be noted that the resultant award is entirely prospective. It was not intended to measure the appellant's capacity to pay spousal support in the three years prior to trial.

Argument

- [14] The appellant says s. 17(1) of the Guidelines provides that "[i]f the court is of the opinion that determination of a spouse's annual income under section 16 would not be the fairest determination of that party's income", then the court "may" have regard to a spouse's income over the last three years and determine an amount that is "fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years".
- [15] He says the judge made no finding that calculation of his Guideline income under s. 16 would not be the fairest determination of his income for spousal support purposes. He says the trial judge's discretion to set Guideline income at some amount other than that set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency must be exercised judicially. Averaging is intended to address the unfairness that may arise from setting support on the basis of anomalous annual income. He says the judge here erred by considering herself to be bound to apply averaging to the previous years' earnings as the "standard" method of calculation, stating in her reasons that she had "no reason to depart" from that method.
- [16] The appellant says, like the payor spouse in *Smith v. Smith*, 2016 BCSC 1709, he is nearing retirement age and there are legitimate reasons for his declining income. He says he is "on the downward arc of his career", and urges upon us the conclusion of Butler J. (as he then was) in that case: that it would be an error to average the payor's income in setting support because his income fluctuation is "going in one direction - downward - and that will likely continue".
- [17] The respondent says the appellant's arguments respecting s. 17(1) are not applicable as the trial judge "did not and could not have calculated the Appellant's income under s. 17". The appellant says the judge imputed income to the appellant over a four-year period, something that cannot be done under s. 17(1) of the Guidelines: *Ouellette v. Ouellette*, 2012 BCCA 145.

- [18] The respondent submits the trial judge used a four-year average and that "she rejected the Appellant's estimated income and made key factual findings that the sharp decrease in the Appellant's income may have been caused by his fundamental opposition and animus to the notion of paying spousal support":
36. In the instant case, Madam Justice Sharma makes a series of factual findings that the Appellant's sharp decrease in income may be explained by his animus towards paying spousal support. She rejected the Appellant's estimated income for 2017 and imputed him with a Guideline Income of \$294,000 to calculate prospective spousal support.
- [19] The respondent points to instances in the reasons and supplemental reasons where the judge notes the appellant's "animus towards paying support" and places some weight upon the fact she rejects the appellant's estimate of his 2017 income.
- [20] The respondent argues:
46. With reference to the significant evidence before her and heard directly by her, Madam Justice Sharma was in the best position to exercise the broad discretion afforded to trial judges when determining support orders. As stated by the Supreme Court of Canada case of Hickey at para 12, "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 hopes that the appeal court will have a different appreciation of the relevant factors and evidence".
- [21] In reply the appellant says, in part:
- [9] [E]ven if the Trial Judge had relied on s.19(1) to impute income a second time to the Appellant, the use of an average of the his income in the circumstances of this case would still be an error in principle. The Respondent provides no authority for her assertion that the general principles considered by the court in Harras and Jakob with respect to whether it is appropriate to use an average apply only to s.17(1) and not to s.19(1).

Analysis and Discussion

- [22] Section 6.1 of the Spousal Support Advisory Guidelines provides that the expansive definition of "income" for child support purposes in Federal Child Support Guidelines is used for both child support and spousal support purposes. Sections 15 to 20 of the Child Support Guidelines, along with Schedule III, create a framework for income determination. The relevant sections of the Child Support Guidelines, for our purposes, provide:

16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[23] The averaging provision in s. 17 was considered by this Court in *Harras v. Lhotka*, 2016 BCCA 246, where Garson J.A. wrote as follows:

[24] While s. 17 allows the court to examine income over the previous three years, there is nothing in the language of the section that requires the use of averaging in setting income. This makes sense; accepting that one of the goals of the Guidelines is the fair determination of the amount available to pay child support, fairness is unlikely to be achieved by the mechanical application of averaging. The remarks of the Alberta Court of Appeal in *Ewing v. Ewing*, 2009 ABCA 227 at paras. 37-38 on this point are apposite:

But we would point out, for future cases, that section 17 does not suggest that the way to establish fair income is to average. It merely directs the court to set a fair and reasonable amount taking into consideration the past three years' income and any patterns of income, fluctuations in income and non-recurring gains. The court has the discretion to elect the fairest method, and that could be done by averaging the three years prior to the gain, or a court could remove part, or all, of the non-recurring gains, or take whatever steps it determines are appropriate to arrive at an income figure that is fair for the purposes of support.

although setting a fair income is highly discretionary, there should be a logical basis for the method chosen and averaging will not always be appropriate.

[24] The discussion that follows in *Harras* supports the view that s. 17 averaging is appropriate where there are large annual fluctuations in income (*Dornik v. Dornik*, 1999 BCCA 627; *Cornelissen v. Cornelissen*, 2003 BCCA 666) and inappropriate where there is evidence of consistently declining or consistently increasing income (*de Bruijn v. de Bruijn*, 2011 BCSC 1546; *Jakob v. Jakob*, 2010 BCCA 136). In *de Bruijn*, Fenlon J. (as she then was) said as follows:

[35] With respect, I do not accept Ms. de Bruijn's submission that Mr. de Bruijn's income should be fixed at an average of his 2008, 2009 and 2010 earnings under s. 17(1) of the Guidelines. This is not a situation in which Mr. de Bruijn's income regularly fluctuates up and down. For the past four years his income has been in decline. To ignore that reality and base his support obligations on a number greater than his current earnings would, in my view, be unjust.

[Emphasis added.]

[25] In my view, the appellant is correct to say that the judge imputed income of \$200,000 to the appellant for 2017 and then used what she regarded as a "standard approach" to estimate income going forward, by using an average from prior years. In my opinion, it was an error to do so.

[26] I cannot see in the judgment, or the evidence, a basis for "imputing" income for the three years following the trial at levels above the level imputed for 2017. The trial judge expressly accepted that the appellant had legitimate reasons to slow down his practice. She accepted that he was "entitled to a decreased trajectory of earnings". That finding is inconsistent with setting his income in future years substantially above the amount he was likely to earn. Using the average of his better years to set Guideline income is, for reasons set out in de Bruijn, "[t]o ignore that reality and base his support obligations on a number greater than his current earnings", and here, as in de Bruijn, would be unjust.

[27] I agree with the appellant that after having imputed income of \$200,000 to the appellant in 2017, it was inconsistent to impute annual income of \$294,000 to him in 2018, 2019 and 2020. In my opinion, it was an error in law to do so, even if the judge did so pursuant to the broad discretion afforded to her by s. 19(1).

[28] I would allow the appeal.

[29] NEWBURY J.A.: I agree.

[30] MACKENZIE J.A.: I agree.

[31] NEWBURY J.A.: Thank you counsel for your submissions. The judgment is allowed as indicated.

"The Honourable Mr. Justice Willcock"

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