
CANADA / JUDGMENT

Poursadeghian v. Hashemi-Dahaj

2006 BCSC 2115

COURT

Supreme Court of British Columbia

DECIDED

17 February 2006

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2006 BCSC 2115 Poursadeghian v. Hashemi-Dahaj

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Poursadeghian v. Hashemi-Dahaj,

2006 BCSC 2115

Date: 20060217

Docket: E021598

Registry: New Westminster

Between:

Shohreh Poursadeghian

Plaintiff

And:

Kamran Hashemi-Dahaj

Defendant

Corrected Judgment: The text of the judgment was corrected on the front page and the header on November 17, 2010

Before: The Honourable Madam Justice Gropper

Oral Reasons for Judgment

(In Chambers)

February 17, 2006

Counsel for the Plaintiff:

D. Jahani

Counsel for the Defendant:

Z. Jenab

December 15, 2005 and

January 16, 2006

Date and Place of Hearing:

New Westminster, B.C.

[1] THE COURT:

The Plaintiff's Application

[2] This is an application by the plaintiff wife for the following orders:

1. Income in the amount of \$108,976 or some other amount be imputed to the defendant as income in his financial statement does not correctly reflect his true income;
2. The order of Madam Justice Bennett dated May 12, 2005 regarding the amount of child support payable by the defendant be varied in accordance with the imputed income of the defendant, pursuant to the Federal Child Support Guidelines;
3. The defendant be ordered to pay his share of the special and extraordinary expenses related to the children of the marriage, in addition to the base amount of child support on a pro rata basis based upon his newly-imputed income;
4. The defendant be ordered to pay arrears of special and extraordinary expenses due to the plaintiff in the amount of \$148 accumulated as of May 12, 2005;
5. The defendant be ordered to pay spousal support to the plaintiff pursuant to the Spousal Support Advisory Guidelines retroactive to the date of the filing of the statement of claim, March 11, 2005;
6. The defendant be penalized under s. 98 of the Family Relations Act, R.S.B.C. 1966, c. 128 for failure to provide disclosure of financial information requested by the plaintiff within the time limit prescribed in the s. 92 demand filed on October 12, 2005 and delivered to the defendant on October 14, 2005;
7. Costs.

Facts

- [3] The parties were married in Iran on September 2, 1993. They came to Canada on November 28, 2000. They separated on November 12, 2004. This date is disputed by the defendant.

- [4] There are two children of the marriage: Carmel, born June 15, 1994; and Camilla, born October 8, 2003.
- [5] The parties met in a judicial case conference on May 12, 2005. An order was made by consent that the parties share joint custody and guardianship. The defendant agreed to pay \$150 in child support for both children as reflected in the order. The defendant also agreed to pay for school expenses, swimming lessons and eyeglasses for the children.
- [6] Carmel is a special-needs child. She has difficulties in school and is two grades behind her age group. Carmel has been assessed by the South Fraser Child Development Centre, which recommends that Carmel be involved in several activities, including challenger baseball and adaptive gym or dance to improve her physical balance. It recommends other activity to improve her fine motor skills. The plaintiff can only afford to enrol Carmel in one activity, adaptive swimming lessons.
- [7] During the marriage, the plaintiff was the primary caregiver to the children. She has not worked outside the home and is not at this time able to be economically self-sufficient due to her attending to the needs of both children, particularly Carmel.
- [8] The plaintiff is currently on social assistance and receives \$1,347 per month. Her expenses, including rent, amount to \$1,337 per month. As of January 16, 2006, the defendant was in arrears of maintenance in the amount of \$450. I ordered that he pay the arrears which had been accrued on that date. He has not paid any of the special or extraordinary expenses incurred by the plaintiff.
- [9] The defendant filed a financial statement on May 30th, 2005. In that statement, he deposed that he is a salesman for Lucky 9 Auto Limited ("Lucky 9" or "the company") and earns \$1,000 per month. The corporate records of the company show until January 2, 2005, the defendant was a fifty percent shareholder and a director. Though the company claims a loss for the tax year 2004, its financial statements disclose a shareholder's loan payable to the defendant in the amount of \$40,401.79.
- [10] In June 2004, the defendant purchased a home in Surrey for \$405,000. He obtained a mortgage from CIBC Mortgages Inc. ("the mortgagee") for a gross amount of \$372,701.23, which requires monthly payments of principal and interest of \$1,865.90. There is no co-mortgagor or guarantor of the mortgage. The mortgage does not require that part of the premises be rented or that the mortgage loan was granted based on the defendant receiving rental income. The defendant has not disclosed rental income in his financial statement.
- [11] The plaintiff served a s. 92 demand under the Family Relations Act on the defendant requesting an itemized production of documents. This Court ordered that the defendant provide the documents by November 29, 2005. There were many documents sought, including income tax returns for 2001 to 2004 with schedules and attachments, pay stubs and proof of earnings from 2003 to the present, true copies of the defendant's mortgage application, and extensive documents from Lucky 9. Some of the documents were delivered

by the first hearing date in this matter, December 15, 2005, though many have not been provided at all.

POSITION OF THE PARTIES:

The Plaintiff's Position

- [12] The plaintiff asserts that the defendant has not been forthright in his financial statements. He has failed to disclose the shareholder's loan which Lucky 9 owes him. The plaintiff says that he could not have obtained a mortgage based upon an income of \$12,000 per year with no anticipation of rental income and without a co-mortgagor or guarantor. These circumstances, along with the non-disclosure, support her position that his income should be imputed. The amount suggested by the plaintiff, \$108,976, reflects half the amount of the net sales disclosed in Lucky 9's 2004 financial statements.
- [13] There are significant documents which the defendant has failed to provide, including copies of his full income tax returns (he has provided only summaries), financial details about Lucky 9, including, but not limited to, an employee list, tax remittances, and detail of directors' fees. He has not provided the mortgage application or documents related thereto.
- [14] The plaintiff relies on applicable subsections of s. 19 of the Child Support Guidelines, which provide, at s. 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:

- (d) it appears that the income has been diverted, which would affect the level of child support to be determined under these guidelines;
- (f) the spouse has failed to provide income information when under a legal obligation to do so.

The Defendant's Position

- [15] The defendant asserts that the plaintiff's s. 92 demand for documents is a "fishing expedition" and that the defendant has produced documents to the best of his ability. Some of the documents requested are not in the defendant's possession or control.
- [16] In respect of imputing income based on the financial records of Lucky 9, the defendant has filed an affidavit from his partner in the business who deposes that the defendant has no equity interest in the company. The partner says that the defendant's participation is only because the partner cannot get approval by the Motor Dealer Council as a sole dealer.
- [17] The defendant has not provided all the corporate documents. He insists he is unable to, as he has no equitable interest in the company. The defendant says that the plaintiff's assertion that the imputed income should be based on half the net sales of the company is erroneous. The net sales do not take into account that the company is a car dealership and has significant expenses, including the purchase of vehicles for sales inventory.

- [18] In respect of the home in Surrey, the defendant says the equitable interest belongs to his brother who lives outside Canada. The brother provided the down payment of \$35,000. The brother has registered a mortgage on the title as security for the down payment.
- [19] The defendant has rented out a portion of his home since July 2004. The current tenants pay \$1500 per month. Those rental payments, along with a small contribution by the defendant, are servicing the monthly mortgage payments. The defendant did not list the rental income in his financial statement because he says, it goes directly to the payment of the mortgage.
- [20] In respect of the documents related to the mortgage, including the mortgage application, the defendant says that the mortgagee does not have those documents and, in any event, he was not required to provide the mortgagee with any information about his income.
- [21] In respect of child support, the defendant asserts that his child support payments must be based on his declared income of \$12,000 per year. He also argues that the children spend three days each week with him and, therefore, custody is shared. The child support payments ought to reflect that.
- [22] The defendant says that the claim for extraordinary expenses reflects the purchase of items which are unnecessary luxury items, such as a school sweatshirt. He further asserts that before incurring such an expense, the plaintiff should discuss it with the defendant pursuant to their joint custody agreement.
- [23] In response to the plaintiff's claim for spousal support, the defendant submits that the plaintiff has not been candid in her financial disclosure. He points out that her financial statement states no income, but she is receiving social assistance. He questions the amount the plaintiff pays for rent, credit card and car expenses.
- [24] Finally, he says that the plaintiff should be working, but has no interest in obtaining a job.
- [25] The defendant argues that an order for retroactive spousal support would be grossly prejudicial to him, as he does not have the means to pay. Ultimately, the defendant argues that it is the plaintiff's onus to prove that the defendant's financial statement is untruthful and underestimates his income. The defendant has provided all the information and documents that he can. The parties, he said, always had a meagre lifestyle and he suggests, rhetorically, that he could not "all of a sudden [come] up with enough capital to incorporate Lucky 9, as well as purchase the property."

ANALYSIS:

Imputing Income to the Defendant

- [26] When the matter concluded on January 16, 2006, I asked counsel for the defendant to file further affidavit material. I directed that the affidavits address the steps which the defendant took to obtain his mortgage application documents from the mortgagee, an affidavit from a representative of the mortgagee about why the documents were not available, when it was

asked to produce them and by whom, what guidelines the mortgagee follows in agreeing to grant a mortgage, including the debt-to-equity ratio, income requirements and whatever other relevant information the mortgagee considers essential to its determination in granting a mortgage loan.

- [27] I directed that the defendant disclose his full income tax returns with the schedules and documents attached and provide an affidavit of the steps he took to obtain those documents.
- [28] I directed an affidavit be filed from the accountant for Lucky 9 providing full disclosure of the company's financial records and describing when he or she was asked to disclose these documents and by whom. I directed that these affidavits be filed with the court by January 30th, 2006. There were no further affidavits or documents filed by the defendant.
- [29] The material which I requested that the defendant provide may have supported his contention that his income is limited to \$12,000 per year. The defendant asserted that the plaintiff has the onus of demonstrating that his income was not as he maintains in his financial statement and that a higher amount should be imputed to him.
- [30] Rule 60D of the Supreme Court Rules requires that a defendant disclose all his means of generating income. It is the defendant's duty to make full disclosure, not only to comply with Rule 60D, but as a general duty in family law matters where the relevant information is known to one party (in this case the defendant), but not to the other.
- [31] Section 21 of the Federal Child Support Guidelines specifies precisely what the respondent to a child support application must disclose. The defendant has not complied with those requirements for the most part.
- [32] The explanations which the defendant has provided for non-disclosure are not satisfactory. This is why I directed further affidavit and documentary materials be provided.
- [33] Specifically, I do not accept that the defendant was not required to advise the mortgagee of his income to obtain a mortgage of almost \$373,000, and further, that if he advised the mortgagee that his income was \$12,000 per year, the mortgage loan would have been granted. Rather, I find that the defendant advised the mortgagee that his income was sufficient to support such a mortgage.
- [34] I do not accept the defendant's explanation regarding his shareholding in Lucky 9 or concerning the shareholder's loan owed to him by the company which is disclosed in the limited financial records which have been disclosed of the company. He was a director of the company in 2004 when the marriage ended, but he is not now. The defendant says he has no equitable interest in the company. I find it implausible that the defendant would be willing to take on the obligation as a shareholder and director in order to secure a position of salesman for \$1,000 per month.

- [35] I also find that the defendant likely provided a statement of his income from Lucky 9 to the mortgagee which reflected sufficient income to support the significant mortgage which he has not produced.
- [36] I find that the plaintiff has amply demonstrated that there is reason to find that the defendant has not been forthcoming in his disclosure of his financial situation. I gave him a further opportunity to make disclosure and he did not.
- [37] Based upon the above, I find that this is an appropriate case to impute income pursuant to s. 19 of the Guidelines. I find that subsections (d) and (f) apply. It appears that the defendant has diverted income, which would affect the level of child support to be determined under the Guidelines, and that the defendant has failed to provide information when he is under a legal obligation to do so.
- [38] Because of the lack of forthrightness and lack of disclosure by the defendant, I have little evidence upon which to base imputed income. However, given all the circumstances, including the defendant's participation in Lucky 9 and his ability to have obtained a mortgage loan in 2004, I impute the defendant's income to be \$75,000 per year.

Child Support

- [39] Based on an annual income of \$75,000, the table amount payable for two children is \$974 per month.
- [40] In respect of the defendant's argument that custody is shared and that the child support which the court orders should reflect that, I refer to s. 9 of the Guidelines. It addresses these circumstances. Section 9(a) and (b) address the amounts set out in the tables for each parent and the increased costs of a shared custody agreement. Section 9(c) gives the court the broad discretion to consider the means, needs and other circumstances of each spouse and the children.
- [41] The plaintiff says that her entire monthly payment from social assistance is used to provide for her and the children. The defendant has not put forward any evidence of the costs associated with his shared custody of the children. It is important that the children enjoy comparable living standards with each parent. Based on the comparison of incomes of these parties, I find that there should not be a reduction in the amount payable by the defendant in child support.
- [42] The order of this Court of May 12, 2005 is varied to reflect that the amount of child support payable by the defendant is \$974 per month effective May 15, 2005. That amount will be varied to reflect amendments to the Federal Child Support tables for British Columbia or by further order of this court.

Special and Extraordinary Expenses

- [43] I order the defendant to pay the expenses claimed under this heading of \$148. The claims made by the plaintiff in this regard are reasonable. Future expenses will be agreed to between the parties before they are incurred and with the amount determined pro rata based on the income imputed to the defendant.

Spousal Support

- [44] Section 15.2 of the Divorce Act describes the objectives and factors to be applied. Support can be compensatory, non-compensatory or contractual, or some combination. Compensatory support was described by the Supreme Court of Canada in *Moge v. Moge*, where the court stated, at page 813:

As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution

- [45] There is also an ongoing shared responsibility for parenting. Spousal support addresses that by its consideration of an ongoing need to provide support to the children. The parent who assumes that primary role of parenting will not necessarily be in a position to earn an income.
- [46] I find that the plaintiff in this case has the primary responsibility for the children. Carmel's special needs and Camilla's young age combine to prevent the plaintiff from earning an income. The plaintiff is entitled to spousal support from the defendant.
- [47] The plaintiff has suggested that spousal support should be determined in accordance with the Spousal Support Advisory Guidelines.
- [48] In *Yemchuk v. Yemchuk*, the B.C. Court of Appeal accepted these guidelines as reflecting the current law regarding spousal support cases across the country. The court states, at paragraph 64:
- ... I am satisfied that their intention and general effect is to build upon the law as it exists, rather than to present an entirely new approach to the issue of spousal support.
- [49] The "with children" formula in the guidelines addresses the ongoing parental responsibility of both parents. The defendant has not taken a position in respect of the application of the guidelines.
- [50] I find that the guidelines ought to be applied in this case.
- [51] These parties were married for 11 years. When they separated, their youngest child was one year old. It will be 17 years from the date of separation to the date the youngest child graduates from high school.

- [52] Plaintiff's counsel has provided the Spousal Support Guidelines calculation based upon the above factors. The calculation suggests that the spousal support which the defendant should pay to the plaintiff ranges from \$1,652 to \$2,178 per month, for a minimum duration of 17 years. I find that the defendant should pay the median amount for the duration suggested by the guidelines.
- [53] As a result, I order the spousal support payable by the defendant to be \$1,915 per month to continue until further order of this court, until there is no longer a child of the marriage as defined by the Divorce Act.
- [54] The order will be retroactive to the date the plaintiff filed her statement of claim in this matter, March 11, 2005.
- [55] While the defendant maintains that this is grossly prejudicial and that the plaintiff has delayed in making this claim, I disagree. The delay is attributable to the defendant's failure to disclose and failure to be candid with the court. It would be unfair to the plaintiff not to order retroactivity. It is equally fair to both parties that spousal support be payable from the commencement of these proceedings.

Penalty Under Section 92

- [56] The plaintiff asks that the defendant be penalized for his failure to abide by the s. 92 demand. While such an order is within my discretion to make, I decline to do so in this case.
- [57] I have emphasized the requirement of the parties to a matrimonial action to be forthright in their disclosure of their income and assets. My decision in respect of imputing income to the defendant and ordering child and spousal support on the basis of that imputed income is intended to demonstrate to the defendant that it is to his extreme disadvantage to fail to disclose documents and to make suggestion to this court about his income which are not sustainable. In this regard, I am referring to his statements and lack of disclosure with regard to his participation in Lucky 9 and his failure to disclose the mortgage application documents which would disclose the income he must have proved to the mortgagee's satisfaction would be sufficient to pay the monthly payments on the mortgage. I have derived an adverse inference from the defendant's failure to disclose.
- [58] The goal of family law legislation is to ensure that each party recognize and bear the responsibilities of marriage and family after the parties themselves consider that their relationship is at an end. It is now the defendant's obligation to comply with my orders. That will achieve the purpose intended. I do not consider that a penalty is justified in addition to those orders.

Costs

- [59] The plaintiff is entitled to costs of this application at Scale 3 payable forthwith.
- [60] Are there any other matters?

- [61] MS. JAHANI: One question, My Lady. With respect to the arrears of child support that Your Ladyship ordered the last time, they have not be paid yet. Nothing has been paid, no child support at all.
- [62] THE COURT: All right. So the order that you prepare should include a term that the arrears be paid, and the amount will be different now, obviously. What amount will it be, or are you able to say?
- [63] MS. JAHANI: It will be \$450 plus another \$150, so it is \$600.
- [64] THE COURT: Six hundred dollars. So the order that you file should reflect that. Is there a difficulty in getting the defendant's endorsement on draft orders, or...?
- [65] MS. JAHANI: Well, now that he has counsel, I can definitely send it to his counsel to provide his signature. However, with respect to costs, I can understand it is on Scale 3, but would there be a possibility for Your Ladyship to fix costs? That would make matters much easier.
- [66] THE COURT: I could fix costs. What would you propose?
- [67] MS. JAHANI: I would probably propose, My Ladyship, somewhere between \$1,000 and \$1,500, considering the amount of work that has been involved.
- [68] THE COURT: Thank you.
- [69] MS. DORT: My Lady, Dort, D-o-r-t, initial D., appearing on behalf of Ms. Jenab, who is counsel for the defendant. I am at a bit of a disadvantage. I am simply here to receive the decisions.
- [70] THE COURT: Yes.
- [71] MS. DORT: I have a problem with consenting to or even being able to say much about the issue of costs on this, as I am not the primary person on it. I do not think that Ms. Jenab will be very difficult with respect to calculating costs. We all know how much time has been spent in court to deal with these matters. There is certainly room for discussion
- [72] MS. JAHANI: My Lady, the problem is that if I have to go to the registrar to show why I am seeking a certain amount of costs, my client - it is not something that I would want to state on record, but - my client is on Legal Aid and we are only allowed a certain amount of hours. I have pretty much, at this point in time, exhausted the hours, and then some. I do not want to have to come back to show why my costs -- the volume of the material is evident before the court as to how much work has been put into this file, and coming back and forth to get documents from the defendant, I think it will make life much easier if we were to just fix costs.
- [73] THE COURT: I appreciate, Ms. Dort, that you do not have any instructions, but I think fixed costs in this matter is appropriate in all the circumstances. I will fix the costs at \$1200.
- [74] MS. JAHANI: Thank you very much.

[75] THE COURT: Anything further?

[76] MS. JAHANI: No, My Lady.

[77] THE COURT: Thank you.

(EXCERPT CONCLUDED)

"Gropper, J."

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