

CANADA / JUDGMENT

Quinton v. Kehler

2020 BCCA 254

COURT

British Columbia Court of Appeal

DECIDED

15 September 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 254 Quinton v. Kehler

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Quinton v. Kehler,

2020 BCCA 254

Date: 20200915

Docket: CA46270

Between:

Rhonda Elizabeth Quinton

Appellant

(Claimant)

And

Gordon Joseph Kehler

Respondent

(Respondent)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

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

July 9, 2019 (R.E.Q. v. G.J.K., 2019 BCSC 1116, Vancouver Docket E-101823).

Counsel for the Appellant

(via videoconference):

R.D. Holmes, Q.C.

O. Holmes

Counsel for the Respondent

(via videoconference):

D.R. Greig

Place and Date of Hearing:

Vancouver, British Columbia

June 5, 2020

Place and Date of Judgment:

Vancouver, British Columbia

September 15, 2020

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Butler

Table of Contents

Introduction. 3

Background. 4

Judgment Appealed. 10

The Appellant's Guidelines Income. 12

Shared Parenting Expenses. 13

Section 7 Expenses. 13

Direct Reimbursement of Medical Expenses. 13

Life Insurance. 14

Canada Pension Plan. 15

Grounds of Appeal. 15

Argument. 16

The Respondent's Guidelines Income. 16

Imputing Income to the Appellant 18

Direct Reimbursement of Medical Expenses. 18

Maintenance of a Life Insurance Policy. 19

Analysis. 20

Misapprehension of the Evidence of Expert Witnesses. 20

Imputing Income to the Appellant 21

Direct Reimbursement of Medical Expenses. 21

Maintenance of a Life Insurance Policy. 22

The Respondent's Guidelines Income. 22

Applicable Law. 23

Application of the Law to this Case. 28

Summary:

On this appeal from numerous orders made by a chambers judge in a family matter there is one principal dispute: whether the judge erred in assessing the income of the payor spouse (the respondent) for the purpose of determining the amount of child support payable pursuant to the Federal Child Support Guidelines. The chambers judge held the respondent's Guidelines income for support purposes was that described by s. 16: the "total income" at line 150 of his T1 form. The appellant argued that amount does not fairly reflect all the money available to the respondent for the payment of child support, and the court should determine his annual income, pursuant to s. 18, to include all of the pre-tax income of the corporation. Held: appeal allowed in part. The Guidelines set an amount of child support as a variable percentage of pre-tax income. The choice between s. 16 and s. 18 analyses is a choice of measuring rods where the objective is to select the most accurate measure of the payor's pre-tax income. The Guidelines treat pre-tax income as an amount available to pay child support despite the fact that some portion of that amount will not be cash available after tax is paid. In this case, determining Guidelines income in accordance with s. 18 will fairly reflect all the money available to the spouse for the payment of child support.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] This is an appeal from a judgment in a family law case. Numerous grounds of appeal are advanced, but there is one principal dispute: whether the judge erred in assessing the income of the payor spouse (the respondent) for the purpose of determining the amount of child support payable pursuant to the Federal Child Support Guidelines (SOR/97-175) [Guidelines] under the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.).
- [2] The judge, for reasons indexed as R.E.Q. v. G.J.K., 2019 BCSC 1116 (the "Reasons"), held the respondent's Guidelines income for support purposes was that set out as his "total income" at line 150 of the T1 General form issued by the Canada Revenue Agency (pursuant to s. 16 of the Guidelines), with some limited adjustment for personal expenses paid by his business. The appellant says the respondent is the sole shareholder of a professional corporation, and the amount of his income as determined under s. 16 does not fairly reflect all the money available to him for the payment of child support. She says the court ought to have included all of the pre-tax income of the corporation in the respondent's income (pursuant to s. 18 of the Guidelines).

Background

- [3] The appellant and the respondent met at law school at the University of Victoria in 1987. They began to cohabit in May 1992 and were married on September 4, 1993. They have two children, now 23 and 17 years old. The parties are both qualified as lawyers and practiced law together in British Columbia for approximately 13 years. The appellant re-located to Alberta in 2012.
- [4] The parties separated on February 17, 2008. Litigation followed. On December 17, 2010, after a ten-day trial, Justice Curtis made orders dealing with most issues, including the guardianship and residence of the children, spousal support and the division of assets. The appellant's application for an order permitting her to re-locate with the children to Calgary was dismissed. Judgment in relation to some issues was reserved to May 3, 2011. The court set the parties' incomes for Guidelines purposes for 2010. The respondent's income was assessed as \$177,468; the appellant's was assessed as \$127,489.
- [5] On May 18, 2012, Curtis J. re-determined the respondent's Guidelines income for 2010 as \$160,811.
- [6] An appeal of the May 3, 2011 order made by Curtis J. was heard by this Court in February 2012. The appeal was allowed only to the extent of setting aside the equal apportionment of the certain assets inherited by the appellant: R.E.Q. v. G.J.K., 2012 BCCA 146.
- [7] In late 2014, the appellant sought orders for retroactive and prospective adjustments of the child support payable by the respondent. The application was heard in February 2015, and, on March 20, 2015, Justice Pearlman gave judgment assessing the appellant's Guidelines income for 2011 as her line 150 income plus the difference, if any, between her actual

employment earnings for 2011 and \$55,000 (an amount later determined to be \$100,781); and her Guidelines income for 2012 at \$106,453 and for 2013 at \$120,387. These figures were derived in part from line 150 the appellant's T1 General form for each year and represented a combination of employment and dividend income.

[8] He held:

[26] The claimant's practice is largely restricted to drawing and advising on wills. It will take her some time to fully develop an estates practice and a practice in real estate law.

[27] For 2011, the claimant had a line 150 income of \$63,742. For that year, in my view, it is appropriate to apply the same imputation of employment income as did Mr. Justice Curtis in his decision of May 18, 2012, for the 2010 year. Accordingly, there should be added to the claimant's declared line 150 income of \$63,742, the difference, if any, between her actual employment earnings for 2011 and \$55,000.

[28] For 2012, I fix the claimant's Guideline income in the amount of her line 150 income, \$106,453. I find her line 150 income to be a fair measure of her income for child support purposes.

[29] For 2013, I note that the claimant was in her second year of practice in Calgary. The claimant is an experienced solicitor and undoubtedly has the capacity to earn employment income from the practice of law well in excess of \$60,000. I accept that it will take her some time to do so. I am not persuaded that I should impute any additional income to the claimant for the year 2013, and accordingly fix her Guidelines income for 2013 in the amount of \$120,387.67.

[9] Pearlman J. went on to determine the Guidelines income of the respondent. The appellant had argued that since the respondent's firm reimbursed him for some expenses of a personal nature, those amounts should be added to his income. That submission was rejected as the expenses were considered to be reasonable business expenses.

[10] Pearlman J. did not address any submission with respect to the use of any figure other than the respondent's line 150 income (adjusted to take into account dividend income) as the basis for calculation of income for Guidelines purposes.

[11] He did make an order for the annual exchange of general income tax returns and ordered the respondent to produce his corporate financial statements and corporate tax return annually for the purposes of adjusting support appropriately.

[12] The appellant's mobility application was renewed in 2014. She sought a s. 211 "views of the child" report in April 2015. That application was dismissed by Master Scarth. An appeal of the Master's order was dismissed by Kelleher J. on June 15, 2015 (R.E.Q. v. G.J.K., 2015 BCSC 1407).

- [13] On a further application, an order for a s. 211 assessment was made by Justice Fleming on September 14, 2015 (R.E.Q. v. G.J.K., 2015 BCSC 1786). On August 17, 2016, for reasons indexed as R.E.Q. v. G.J.K., 2016 BCSC 1498, Fleming J. concluded that it was in the best interest of the younger child of the marriage to be permitted to move to Calgary to live with the appellant and she ordered that the child's primary residence would be with the appellant.
- [14] On November 16, 2018, the appellant filed a Notice of Application for an order seeking:
- a) an order that the respondent's Guidelines income for 2014 be set at \$320,526 for the purposes of determining child support obligations;
 - b) an order that the amount of child support payable by the respondent for 2014 be \$2,693.43 per month;
 - c) an order that the respondent's Guidelines income for 2015 be set at \$414,377;
 - d) an order that the amount of child support payable by the respondent to the claimant for 2015 be \$3,429.81 per month from January through to August and \$5,315.75 per month from September to December 2015;
 - e) an order that the respondent's Guidelines income for 2016 be set at \$593,960;
 - f) an order that the amount of child support payable by the respondent for 2016 be \$8,261.23 per month from January through to August and \$7,697.90 per month from September to December 2016;
 - g) an order that the respondent's Guidelines income for 2017 be set at \$556,328;
 - h) an order that the amount of child support payable by the respondent for 2017 be \$7,233.73 per month from January through to November and \$6953.67 for December 2017;
 - i) an order directing the respondent provide the appellant with a contribution toward the costs incurred by the appellant to implement a shared parenting arrangement;
 - j) an order directing the respondent to contribute his proportionate share to s. 7 expenses for 2014-2017;
 - k) an order that the respondent be required to endorse an order directing his current extended health care provider, Great-West Life Assurance Company ("Great-West Life"), to pay reimbursement of certain expenses to the appellant directly;
 - l) an order directing the respondent to maintain a life insurance policy of no less than \$500,000 with the appellant as the revocable beneficiary for so long as the respondent is required to pay child support;
 - m) an order that the respondent's CPP contributions accrued during the marriage be divided between the appellant and respondent; and

n) costs.

- [15] In support of her application, the appellant said the respondent was the sole shareholder and director of his professional law corporation and all the pre-tax corporate income of that corporation should be included in his income for child support purposes. She said the respondent derives a significant portion of his income from his professional law corporation through dividends that are taxed at a lower rate than employment income. In 2014 he derived 46% of his income in the form of dividends; in 2015, 42%; in 2016, 67%; and in 2017, 73%. The appellant claimed the grossed-up amount of the dividends received should be included in his Guidelines income.
- [16] In support of her application, the appellant relied upon three affidavits sworn between March and October 2018, to which were appended financial statements of the respondent's personal law corporation and the reports of Michael Nice CPA, with his assessment of the income of the respondent as calculated pursuant to s. 16 and s. 18 of the Guidelines.
- [17] In calculating Guidelines income according to s. 16, Mr. Nice adjusted the respondent's dividend income to reflect the actual dividends he received. In calculating Guidelines income according to s. 18, he added to the personal law corporation's pre-tax income all amounts paid by the corporation to the respondent as salaries, wages and management fees. In his opinion, the respondent's Guidelines income, calculated in these manners, was:

Year Section 16 Section 18

2014 \$206,376 \$307,587

2015 \$275,483 \$398,519

2016 \$396,264 \$572,915

2017 \$451,923 \$535,273

- [18] The appellant also deposed to evidence in support of her application for the remaining orders, in particular the need to have reimbursement from the insurer for medical expenses paid directly to her, and the basis for her claim to be named as the beneficiary of a life insurance policy.
- [19] In response, the respondent filed three affidavits to which were appended, among other documents, a report setting out the opinion of Ken Bulthuis CPA. In that report, Mr. Bulthuis calculates the respondent's Guidelines income "using the same basis as paragraphs 38 to 41" of the judgment of Pearlman J. (that is, by simply adjusting the dividend income to reflect the actual cash dividends received, rather than the taxable amount that is included in line 150 income). He calculated s. 16 Guidelines income as follows:

Year Section 16

2014 \$206,762

2015 \$275,813

2016 \$396,595

2017 \$452,309

[20] Mr. Bulthuis did not calculate the respondent's s. 18 Guidelines income. He justified his approach as follows:

In the 2015 Oral Reasons for Judgment [the Pearlman J. reasons] paragraphs 18 through 22 describe the approaches to determining Guideline income and include a reference to Section 18, ... It would, therefore, appear that the court at the time did consider the applicability of Section 18, but chose to determine income under Section 16.

[21] Mr. Bulthuis continued, noting that s. 18 could apply if annual income under s. 16 did not "fairly reflect all the money available". Mr. Bulthuis suggested that the corporation did not retain any excess money at the end of any year. To the contrary, he says that the respondent withdrew all available money each year.

[22] Mr. Bulthuis attributes the differential between income and cash payments in 2014-2017 to two factors: first, the existence of liabilities of the personal corporation and, second, the lag between partnership earnings reported for tax purposes and realization in the year following the tax year.

[23] Mr. Bulthuis makes another observation, which may demonstrate the approach he has taken to the question at hand. He says:

Finally, it is interesting to note, in respect of a potential application of Section 18, that it is intended to be used to determine the amount of money available for child support, yet it contemplates including pre-tax corporate earnings for the purpose of this calculation. Since the corporate income tax has been paid, then the amount of money required to pay that corporate income tax is not available to pay child support.

[24] The experts were cross-examined on their opinions before the chambers judge on February 13, 2019.

[25] In cross-examination, Mr. Nice acknowledged that corporate income does not necessarily equate to available cash. He could not say the undistributed income took the form of "cash in the bank". He had not attempted to determine whether any cash remained in the hands of the personal law corporation after the payment of tax, salaries, and dividends, which might be available to pay child support.

[26] He would not say the report of Mr. Bulthuis was wrong in any sense because "it's not my job to decide whether 18 is -- it's my job to calculate 16 or 18, not to decide if it's fair or not".

- [27] Mr. Nice could not disagree with the proposition that the respondent regularly withdraws all available cash from his personal law corporation after payment of income taxes from his corporation.
- [28] Mr. Bulthuis acknowledged that he was retained for the purpose of calculating s. 16 Guidelines income in the manner it had been calculated by Pearlman J.
- [29] In cross-examination, Mr. Bulthuis explained that if the respondent had chosen to earn income through his partnership as an individual, rather than through a corporation, he would have been taxed on the allocation of taxable income to him, not necessarily cash flow. However, his total tax obligation would have been roughly the same. There was, in Mr. Bulthuis's opinion, "no cash being dammed up intentionally in the corporation". From its gross earnings, the personal law corporation paid its expenses, primarily the respondent's salary, and the balance, after tax (taxes amounted to approximately \$82,000 in 2017), was the amount that could be paid out as a dividend to the shareholder of the company.

Judgment Appealed

- [30] In his lengthy Reasons, the chambers judge addressed the numerous issues raised by the appellant.
- [31] The judge afforded considerable weight to the opinion of Mr. Bulthuis, citing the following passages from his report at para. 71 of the Reasons:

Further, as noted, section 18 suggests that it could apply if annual income under Section 16 "does not fairly reflect all the money available". A review of the financial statements of the corporation in this case shows that there is no excess money retained at the end of any given year. Rather, the financial statements reflect that [the respondent] withdrew all available cash money in each year, whether by salary or by taxable dividends. Absent certain timing differences between the reporting date of December 31 and the actual cash flows, this is evident from the financial statements, as well as the personal income tax returns which were used to calculate Guideline income under Section 16.

Given that [the respondent] continues to regularly withdraw all available cash, after payment of corporate income taxes, from his corporation, and uses a substantial amount of that cash to ensure his personal taxes are also paid each year, the continuing use of the Section 16 approach to calculating Guideline income, as adopted by the court in 2015, appears to be fair and reasonable.

- [32] Accepting that evidence, the judge declined to depart from the approach prescribed by s. 16:
- [81] The uncontradicted expert evidence on this point persuades me that the respondent is not keeping funds in the Law Corporation that should be made available for support.

- [33] He addressed the appellant's submission that corporate expenses, including amounts deducted from income for rental of a home office, vehicle expenses and expenses for meals and entertainment should be added back onto the respondent's income, under either s. 18(2) or s. 19(1)(g) of the Guidelines as follows:
- [96] I find that a portion of the meals and entertainment expense and the vehicle expense are personal in nature. I will add back those expenses at 50%.
- [97] The rental expense is money paid to the respondent by the Law Corporation for use of his home office. Based on Mr. [Bulthuis's] evidence above, I find this rental expense effectively reimburses the respondent for a portion of his ordinary household expenses. While such a deduction may be reasonable for income tax purposes, it should be added back under s. 18(2) of the Guidelines. This conclusion is consistent with this Court's decisions in C.J.B. v. A.R.B., 2017 BCSC 1682 at para. 475 and Hadjioannou at para. 62 where rental expenses for the business use of a home office were also added back. I will add back the rental expense in full.

The Appellant's Guidelines Income

- [34] He then turned then to whether he could properly consider the submission that income should be imputed to the appellant:
- [99] The claimant's initial position in these proceedings was that her income should not be considered because there was no application by the respondent to impute income to her. She is correct that there is no such application. However, in his application response Form F32, the respondent argued that it would be reasonable to impute income to the claimant in the amount of:

2014 \$135,000

2015 \$170,000

2016 \$210,000

2017 \$390,000

- [100] The claimant, then, was not taken by surprise. There was a discussion about the alternative of the respondent bringing a new application and convening a new hearing. Determination of the claimant's income is necessary for determining child support for periods up to September 2016 and for sharing of section 7 expenses. In light of that, the parties agreed that I should determine the claimant's guideline income.
- [35] He concluded that income should be imputed to her above the amount she was earning:
- [109] In 2014, the [claimant] entered into a consulting contract with Miles Davison LLP. She is presently employed full-time with that firm.

- [110] The claimant deposed that her practice is exclusively wills and estates. She receives a base salary of \$80,000 plus a bonus based on what she bills in excess of \$160,000.
- [111] As Pearlman J. noted, [in his decision of March 20, 2015] the [claimant] is a very experienced solicitor. I accept that she is working full-time in an area that is not highly remunerative. She will not earn anything like what the respondent earns. But there is no reason to expect her income should be any less than it was in 2013. I conclude that her employment income for 2014 to 2017 is imputed to be \$120,000 per year.
- [112] I note that in some years, the claimant's total income reported at line 150 includes income from sources other than employment (for example, dividends). The parties made no submissions as to whether or not there is any source of income other than employment that should be included in the claimant's guideline income. I have found above that the 2017 capital gain should not be included. I leave it to the parties to determine whether any of the other sources of income reported by the claimant for income tax purposes should also be included for the purposes of calculating support in any of the relevant years.
- [36] The entered order provides:
2. The Claimant's imputed income for the years 2014 through 2017 is found to be \$120,000 for each year;

Shared Parenting Expenses

- [37] The appellant sought an order directing the respondent to contribute toward the costs of the shared parenting arrangement from August of 2012 until September of 2016 in accordance with s. 9(b) of the Guidelines. The chambers judge concluded there was insufficient material before him to adjudicate with respect to the effect of s. 9(b) on child support. The parties were given leave to make further submissions if they wished to do so.

Section 7 Expenses

- [38] Similarly, the appellant's claim for reimbursement of s. 7 expenses had not been adequately canvassed by counsel. The judge reasoned:
- [129] Without proper submissions and evidence on this, the court cannot make determinations about, for example, whether certain expenses are "necessary" in respect of the child's best interests.
- [130] In the circumstances, I am referring these matters back to the parties for discussion in accordance with the principles in *Clarke*. If the parties cannot agree on any particular item, they may return to court to have it adjudicated. But it is not reasonable to ask the court to adjudicate items where there is no merit to a substantial number of them, and when they are not mentioned in the Amended Notice of Application.

Direct Reimbursement of Medical Expenses

- [39] The Notice of Application referred to the appellant's complaint that she had experienced difficulty having the respondent pay the proceeds of claims made on his medical insurance policy for reimbursement of expenses she had paid for the children's health care. The chambers judge dealt with this claim summarily:
- [132] There is no mention of this aspect of the application in "Part 3: Legal Basis". Moreover, this claim was not mentioned in oral submissions by counsel for the claimant except at the beginning of his submissions when he listed the orders sought.
- [133] In these circumstances, I dismiss this aspect of the claimant's application.

Life Insurance

- [40] The judge dismissed the appellant's application for an order directing the respondent to obtain and maintain a life insurance policy of \$500,000 with the claimant as the irrevocable beneficiary. He was satisfied that he had jurisdiction to make the order pursuant to s. 15.1(4) of the Divorce Act as an appropriate term, condition or restriction of an order for child support. However such an order is discretionary and the evidence must provide a basis for it. He wrote:
- [143] Relevant factors include whether the payor has complied with court orders in the past, whether the payor is presently in arrears, and the payor's health: *D.P.R. v. L.L.R.*, 2015 BCSC 2317 at paras. 68-69, 159; *E.D.A. v. M.A.A.*, 2014 BCSC 1084 at paras. 90, 125, 135; *Buck v. Buck*, 2013 BCSC 449 at paras. 6, 8, 42; *McIntosh v. McIntosh*, 2007 BCSC 1331 at paras. 100-102; *Milligan v. Milligan*, 2001 BCSC 1059 at paras. 74, 189; *Greenwood v. Greenwood* (1998), 37 R.F.L. (4th) 422 (B.C.S.C.) at para. 45; *Kemp v. Kemp*, 2018 BCSC 381 at para. 62; *Sarro* at para. 50; *R.A.C. v. V.L.C.*, 2009 BCSC 1417 at para. 42.
- [144] The court has ordered the payor to maintain a life insurance policy and name the child or spouse as the sole beneficiary in cases where the payor had not complied with support obligations in the past or was in arrears: *D.P.R.* at paras. 68-69, 159; *E.D.A.* at paras. 90, 125, 135; *Buck* at paras. 6, 8; *McIntosh* at paras. 100-102; *Milligan* at paras. 74, 189; *Kooner* at paras. 46-47; *K.A.P. v. K.A.M.P.*, 2012 BCSC 811. However, security is not necessarily required in those circumstances. In *Pearce*, the payor had failed to comply with the interim spousal and child support order and was in arrears. The court stated that these were relevant considerations but was nonetheless satisfied that the child support obligations were a priority to the payor and that the actions of the Family Maintenance Enforcement Program were adequate to ensure that payments were made (paras. 47-49).
- [145] The court has declined to order security through a life insurance policy when the payor has a record of complying with his or her support obligations: *K.R. v. J.D.*, 2017 BCSC 182 at paras. 60-61, *aff'd* 2018 BCCA 232; *M.S. v. M.M.* at para. 396; *H.P. v. C.T.P.*, 2014 BCSC 2024 at para. 190; *Greenwood* at para. 45.

- [146] The age of the children and the importance of the payor's contribution to their financial well-being may also be relevant considerations: K.A.P. at para. 54.
- [147] Finally, the recipient spouse's own circumstances may be relevant. In Kemp, the court declined to order that support be secured by a life insurance policy on the basis that the payor was in good health and the recipient spouse was capable of supporting herself without the support payments. The court held at para. 62, "[i]f the [claimant] seeks the peace of mind that would come with coverage being in place, she can purchase a policy on his life at her own expense. That is not a cost that should be borne by the respondent."
- [148] In this case it is noteworthy that there are no existing arrears; the respondent has complied with his support obligations in the past; and there is no evidence that he is in poor health.
- [149] I agree with the claimant that the respondent does not have a lot of equity in his assets. However, that does not constitute a sufficient basis for the order sought.

Canada Pension Plan

- [41] Finally, the appellant sought a division of the parties' respective Canada Pension Plan accounts. The chambers judge found nothing in "Part 2 Factual Basis" or "Part 3 Legal Basis" of the Notice of Application that addressed the claim. Further there was no need to apply for or make the order sought. It was open to the appellant to apply to the Minister of Employment and Social Development to divide CPP credits in accordance with the Canada Pension Plan, R.S.C. 1985, c. C-8 following a divorce and without a court order.

Grounds of Appeal

- [42] The prayer for relief in the appellant's factum (like the Notice of Appeal) seeks all the relief initially sought on the Notice of Application, including: an order directing the respondent to contribute toward the cost of implementing the shared parenting arrangement; an order directing the respondent to contribute a proportionate share to the s. 7 expenses incurred by the appellant; and an order that the respondent's Canada Pension Plan contributions during the marriage be divided between the appellant and the respondent. The factum sets out no basis for making these orders on appeal.
- [43] The specific errors alleged are:
- a) an error in determining the respondent's Guidelines income for the period 2014-2017;
 - b) a misapprehension of the evidence of the expert witnesses as it relates to the respondent's Guidelines income;
 - c) an error in imputing income to the appellant without an application and without determining that the appellant was intentionally underemployed;
 - d) an error in failing to order Great-West Life to directly reimburse the appellant for claims made on behalf of the children; and

- e) an error in failing to order that the respondent designate the appellant as a beneficiary of a life insurance policy as security for child support obligations.

Argument

The Respondent's Guidelines Income

- [44] The appellant contends the chambers judge erroneously preferred the opinion of Mr. Bulthuis to that of Mr. Nice on the basis that the former expressly addressed whether the respondent's line 150 income fairly reflected all of the money available for child support, while the latter provided no opinion on "the pivotal question". She says:

The accounting experts' primary function was to explain the accounting of the Respondent's complex personal and corporate affairs. The Chambers Judge's criticism of Nice is thus misplaced. So too is his preference for what he thought Bulthuis had to say, although his failure to note that Bulthuis had disclaimed making any Section 18 accounting reinforces the view that the Chambers Judge confused matters. Section 18 states that the test is whether "the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available".

- [45] She contends the chambers judge erred (at para. 80 of the Reasons) in saying that Mr. Bulthuis had considered whether s. 18 was engaged and that his opinion was uncontradicted. She says Mr. Bulthuis confirmed that a s. 18 calculation was not within the scope of his engagement whereas Mr. Nice made the s. 18 calculations.
- [46] The appellant further contends that the chambers judge erred in failing to apply the presumption that a professional corporation's income is that of the owner-spouse, and erred in his consideration of the company's tax liabilities.
- [47] The appellant says the approach taken by Pearlman J. in 2015 became increasingly inappropriate as the income of the professional corporation grew substantially in comparison to the respondent's personal income in the years from 2014-2017. For that reason, she says the court should not have placed any substantial weight upon the approach taken by Pearlman J. in 2015.
- [48] The respondent says the assessment of his Guidelines income was not founded upon any misapprehension of the evidence. The evidence showed, and the trial judge found, that he took all available funds out of his personal law corporation each year. In the result, he argues, it is unnecessary for this court to consider whether the respondent's corporation was entitled to keep some corporate earnings for "valid business reasons".

[49] In response to the argument that the trial judge erred in concluding that Mr. Bulthuis had testified with respect to the applicability of ss. 16 and 18, the respondent says that conclusion was implicit in Mr. Bulthuis's opinion that all available corporate funds were exhausted annually, and that the respondent's disclosed personal income fairly reflected all money available to him for child support.

[50] The respondent agrees with the appellant's submission that the chambers judge erred in describing the evidence of Mr. Nice. He says:

The appellant is correct that the trial judge erred by noting that Mr. Nice was not engaged to perform a section 18 analysis (in paragraph 80 of the reasons for judgment). Clearly, reference to Mr. Bulthuis was intended. That observation, equally clearly, constitutes nothing more than a typographical or transcription error. The trial judge referred to the s.16 and s.18 analysis of Mr. Nice at paragraph 68 of the reasons for judgment, and in the end, correctly concluded that "the respondent is not keeping funds [in] the law corporation that should be made available for support". In the result, this incidental typographical error cannot support an appeal.

[51] In response to the argument that increases in the gross earnings of the corporation in the years between 2014 and 2017 should lead to consideration of the applicability of s. 18, the respondent contends that a s. 18 review is triggered only where the court has concluded that the income under s. 16 "does not fairly reflect all the money available to the spouse". He argues that did not occur here.

Imputing Income to the Appellant

[52] The appellant says the imputation of income to her was based solely upon the judge's conclusion, at para. 111 of the Reasons, that "there is no reason to expect [the appellant's] income should be any less than it was in 2013". She says her line 150 income for 2013 included declared employment income of only \$60,511. The balance of her income in that year derived from dividends, other investment income, rental income and capital gains. She says this error occurred because of the limited examination of her income, a result of the fact the respondent had not sought an imputation.

[53] She says, further, that there was no evidence she was intentionally underemployed and no finding to that effect.

[54] In the course of submissions before us it became clear that the only issue with respect to imputation of income was the chambers judge's conclusion that the appellant's "employment income for 2014 to 2017 is imputed to be \$120,000 per year" (at para. 111, emphasis added). The appellant takes no issue with the imputation of annual income from all sources of \$120,000 per year. The respondent accepts that assessment of the evidence and, in fact, as I have noted, the entered order sets the appellant's Guidelines income for child support purposes (rather than employment income alone) at \$120,000 for 2014-2017.

- [55] The respondent says no formal application is needed for the court to impute income, particularly where an earlier court has previously done so. He says a modest quantum of income was properly imputed to the appellant on the basis of evidence available to the court, and does not take issue with the order as entered.

Direct Reimbursement of Medical Expenses

- [56] The appellant says the chambers judge was under a misapprehension when he said the claim for direct reimbursement had not been pleaded. She says "the issue with respect to reimbursement was referenced at para. 15 under Part 3: Legal Basis in the Amended Notice of Application. This is true, but it is also correct to say the Notice of Application does not identify the legal basis for the order sought.
- [57] Insofar as the merits of the application are concerned, the appellant says the respondent has been enriched at her expense and the order sought should have been made.
- [58] While the respondent says the appellant's pleadings are inadequate, more importantly, he says there was no evidence he had "pocketed" money he had received as reimbursement from his insurer for the children's medical expenses. He says: "The record contains no reference to service upon Great West Life, the legal basis for the plea, or the documentary material in support". He says the appellant's counsel apparently "abandoned" this topic and never mentioned it in argument, and the judge was entitled to take that into consideration.

Maintenance of a Life Insurance Policy

- [59] The appellant contends the evidence before the chambers judge disclosed a risk that on the respondent's demise, his child support obligations would not be met.
- [60] She says evidence of delinquency in making payments is not a precondition for such an order, and that an order may be warranted where child support arrears are substantial (citing *Kooner v. Kooner*, 2015 BCSC 1880; *Ashak v. Ashak*, 2016 BCSC 941).
- [61] The appellant says that if the respondent is obliged to pay just the support described in the Reasons, he will have accumulated arrears in child support. For that reason, she says the chambers judge erred in stating in the Reasons (at para. 148) that "it is noteworthy that there are no existing arrears; the respondent has complied with his support obligations in the past". She does not suggest, however that the respondent has failed to pay amounts owing pursuant to existing orders.
- [62] She says there is the potential that child support obligations may extend for a further eight years depending on the level of post-secondary education pursued by the youngest child of the marriage. Further, she says there is evidence the respondent's income has "peaked" and may decline in years to come.

[63] The respondent, citing Kooner, properly characterizes the decision to order that a life insurance policy be obtained to secure child support as a discretionary order to which we must afford particular deference. He contends the trial judge correctly summarized the factual context, and identified and gave effect to the applicable legal principles. He says he is an established professional with some assets, no history of delinquency, and there was no proper evidentiary basis for making the order sought.

Analysis

[64] In my opinion, no ground of appeal other than the question of the respondent's Guidelines income has any substantial merit.

[65] As noted above, several grounds identified in the Notice of Appeal have apparently been abandoned by the appellant. I will deal with the remainder, those that were addressed in the appellant's factum, other than the question of Guidelines income, summarily.

Misapprehension of the Evidence of Expert Witnesses

[66] In my view, the judge did not misapprehend the evidence of the expert witnesses. The appellant misreads the reasons for judgment, and the respondent is wrong to concede that the chambers judge erred in describing the evidence of Mr. Nice. In fact, the chambers judge did not say Mr. Nice had not calculated the respondent's s. 18 Guidelines income; rather, he says (at para. 80):

Mr. Nice had not considered whether s. 18 was or was not engaged. That was not part of the terms of his engagement.

[67] That is an accurate description of the terms of Mr. Nice's engagement and is not, as the respondent suggests, a typographical error. Mr. Nice was asked to calculate s. 18 Guidelines income. He was not asked to express an opinion on the applicability of s. 18 as opposed to s. 16 or, as the judge put it, "whether s. 18 was or was not engaged".

[68] It is true to say that Mr. Bulthuis made his calculations in accordance with what he took from the oral reasons for judgment of Pearlman J., without analysing the correctness of that s. 16 approach. However, the chambers judge was correct to say only Mr. Bulthuis considered the question whether there were additional monies available in the private law corporation with which to pay child support. Mr. Nice expressly did not consider that question.

Imputing Income to the Appellant

[69] The issue of imputing income to the appellant appears to have been resolved. The parties agree that, as provided in the order, the appellant's total income for Guidelines purposes for 2014-2017 is \$120,000 for each year. Given that the judge used the prior assessment of income from all sources as the basis for his calculation of the appellant's employment income, it appears to me that the parties have made a reasonable compromise. No purpose

can be served, in my view, in revisiting the question of the appellant's employment income from 2014-2017.

Direct Reimbursement of Medical Expenses

- [70] In my view, the respondent is correct to say the claim for this relief was not made out before the chambers judge. The claim is supported by the bare assertion in one of the appellant's affidavits that the respondent has been reimbursed for medical expenses she incurred but has not repaid her. The total amounts to which reference is made are not large in comparison with the payments each party has made. In an affidavit, the appellant says "the respondent has reimbursed me for some but not all of the funds he received", without quantifying or documenting the shortfall. The appellant appends to her affidavit in which this issue is addressed correspondence to and from the respondent with respect to reimbursement of medical expenses generally. The appellant does not accuse the respondent of "pocketing" insurance payments but, rather, requests reimbursement for a number of specific expenses. He replies: "I am not prepared to deal with expenses on a piecemeal basis". He claims to have overpaid expenses previously incurred and says: "Hopefully all these adjustments can be attended [to] as soon as both counsel are available and we can move on to a more predictable system of dealing with these things".
- [71] In the light of the very limited record in support of the claim that the appellant was not being reimbursed for medical expenses, it is not surprising that the issue was not addressed in argument in chambers. I would not accede to the argument made before us that the judge ought to have found a case had been made out for the discretionary order sought, or that he erred in believing it to have been abandoned.

Maintenance of a Life Insurance Policy

- [72] In my opinion, the appellant has identified no error in the chamber's judge's consideration and dismissal of the claim for this relief.

The Respondent's Guidelines Income

- [73] The assessment of Guidelines income for child support purposes in this case requires careful consideration of the legislated scheme embodied in the Guidelines.
- [74] Many of the s. 18 cases address the need to accumulate and retain capital in closely-held corporations so as to avoid "killing the goose that lays the golden egg": (the cases are reviewed in *Evanow v. Lannon*, 2018 BCCA 208 at paras. 58-62). In these cases, the s. 18 analysis must be done in a manner that allows the payor to continue a viable enterprise. A trial judge's assessment of the propriety of such allowances is entitled to considerable deference. No such issue arises in this case. The personal law corporation does not require capital. Its viability depends entirely upon the respondent continuing in practice. The sole question is a question of principle: whether corporate income tax and actual cash flows are to be considered in determining whether a s. 18 analysis is more appropriate than a s. 16

analysis.

Applicable Law

[75] Section 15.1 of the Divorce Act provides that a court making an order requiring a spouse to pay for the support of children of the marriage shall do so in accordance with the applicable guidelines.

[76] The applicable provisions of the Guidelines with respect to the calculation of the respondent's income are as follows:

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. [Schedule III addresses, among other adjustments, dividends, carrying charges and amounts required by partnerships or proprietorships for capitalization.]

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.

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
 - (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.
- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[Emphasis added.]

[77] The objectives of these provisions are expressly described in the Guidelines:

1 The objectives of these Guidelines are

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
 - (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
 - (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
 - (d) to ensure consistent treatment of spouses and children who are in similar circumstances.
- [78] The early approach taken to these provisions, reflected in *Stamoulos v. Pavlakis* (1997), 41 B.C.L.R. (3d) 14 (S.C.), was that the adjustments contemplated by ss. 17 and 18 should be made sparingly and then only in situations where one may infer that avoidance of obligations under the Guidelines was intended (at para. 46).
- [79] In a decision that set the benchmark and has subsequently often been cited, *Baum v. Baum* (1999), 182 D.L.R. (4th) 715 (B.C.S.C.), Martinson J. discussed the purpose and effect of s. 18 of the Guidelines:
- [25] Section 18 of the Guidelines provides a mechanism for imputing income where income is earned through a corporation:
- [28] Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation. See *Bhopal v. Bhopal*, [1997] B.C.J. No 1746 (QL) (S.C.) [summarized 73 A.C.W.S. (3d) 488], *Blackburn v. Elmitt* (1997), 34 R.F.L. (4th) 183 (B.C.S.C.) and *McCrea v. McCrea*.
- [80] Section 18 was fully considered, and the approach taken on *Stamoulos* was rejected by Huddart J.A., for this Court, in *Kowalewich v. Kowalewich*, 2001 BCCA 450:
- [40] I disagree with Justice Pitfield's approach [in *Stamoulos*] to sections 17 and 18. A court need not look for signs of bad faith or undeclared personal benefits to support a conclusion of intentional avoidance of a child support obligation before reaching the opinion required to trigger an adjustment under ss. 17 or 18. Nor should it look only to the value of a payor's services to a company that parent owns or controls.
- [41] I note the use of pre-tax corporate income as a basis for the determination of child support does not strip a spouse of his available money. It is to use available money as a measuring rod for the purpose of fixing annual income and thus the amount of child support.
- [81] After approving the passage I have cited from the judgment in *Baum v. Baum*, Huddart J.A. addressed the choice of method for assessing Guidelines income--the choice between s. 16 and s. 18 assessments--as follows:

- [47] The Guidelines give no explicit guidance as to how a parent or a court might go about choosing whether to use the corporate income method or the personal services method in determining annual income. However, s. 18 suggests two considerations in the preconditions for its application: (1) which method produces an annual income that more fairly reflects "all the money available to the spouse for the payment of child support;" and (2) which method does the nature of the spouse's relationship with the corporation support. Section 18 also permits reference to the "situations described in s. 17," and thus to the spouse's income pattern over the previous three years.
- [48] In some cases, the nature of the spouse's relationship with the corporation will be decisive. Section 18 applies to a spouse who wholly controls a corporation, but it also applies to one who shares ownership and control with others. In the former case, the corporate income method is likely to be the fairer method of determining income. This is because it allows a court to include not only reasonable payment for personal services but also a reasonable return on the owner's entrepreneurial capacity and investment. These are sources of income available for child support an intact family would utilize. Moreover, it not only permits but requires the inclusion of the income of companies related within the meaning of the Income Tax Act, and of non-arms length payments made without value for the company.
- [49] There may be factors in particular cases that will recommend the personal services method to a court for a one-person company, as *Baum*, supra, illustrates. In that case, the company's only business was the provision of the personal services of its owner. There may also be cases where Mr. Kowalewich's submission about stability of income will persuade a trial judge to choose the personal services method, having regard to s. 17 situations. But this is not one of them.
- [82] Turning to the method of calculation, she held:
- [54] The Guidelines allow a court to include all of the pre-tax income of a corporation for the most recent taxation year in a spouse's annual income for Guideline purposes. They do not require it. I am not persuaded they make the inclusion of all pre-tax income the default position.
- [58] It seems to me regard should also be had to the nature of the company's business and any evidence of legitimate calls on its corporate income for the purposes of that business. Justice Drake cautioned about not killing the goose who lays the golden eggs. Monies needed to maintain the value of the business as a viable going concern will not be available for support purposes. In my view they should not be included in determining annual income. In *Hollenbach v. Hollenbach*, 2000 BCCA 620, the trial judge recognized the need for a reserve for depreciation as an appropriate factor to be considered in a real estate business. Justice Dorgan recognized Mr. Kowalewich's business expansion plan as a valid business purpose in a retail business.

- [59] I do not recite these factors to suggest this Court should tinker with a trial judge's exercise of discretion, nor that a trial judge should second guess business decisions. I do say that a trial judge must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income for Guideline purposes.
- [83] The approach to be taken in a s. 18 case was further considered by this court in *Hausmann v. Klukas*, 2009 BCCA 32, where Kirkpatrick J.A. for the Court first addressed the onus:
- [51] While the purpose and application of s. 18 were outlined in *Kowalewich*, this Court has not heretofore established an onus test. Some post *Kowalewich* authorities from this province, however, have concluded that there is an "emerging presumption" that pre-tax corporate income will be assumed to be available to a payor unless evidence is led to the contrary. These authorities state that the onus in the circumstances is on the payor. As discussed in *Jeffery v. Motherwell*, 2006 BCSC 140, 36 R.F.L. (6th) 377, at para. 13:

Kowalewich has been applied on other occasions by judges of this court and is binding authority. One of those cases *Bartkowski v. Bartkowski* (2003), 37 R.F.L. (5th) 242 (B.C.S.C. [In Chambers]), albeit dealing with very different factual circumstances in that the payor contended that his line 150 income was inflated to take advantage of tax benefits, the court said this about the authorities post *Kowalewich*:

I am of the view that these cases reveal an emerging presumption that the corporation's pre-tax income will be assumed to be available to the shareholder payor for the payment of child support unless compelling evidence is led by the payor spouse to support the conclusion that re-investment is necessary to sustain the company as a viable enterprise. ... (para. 51)

The onus is on the payor to provide the necessary evidence that the corporation's pre-tax income is not available to the payor. The court should not have to ferret out the necessary information from inadequate or incomplete financial disclosure. While *Bartkowski* says the evidence of the payor must be compelling, I prefer to use the word clear when discussing the necessary evidence of business circumstances as the former word might be taken to suggest a higher standard of proof than is called for by *Kowalewich*.

- [52] I respectfully agree with the above comments in *Jeffery v. Motherwell*.

[Emphasis added.]

- [84] This Court in *Hausmann* rejected an approach bearing some similarity to the approach taken by Mr. Bulthuis in the case at bar, there proffered by an expert accountant, Mr. Mynett: that retained earnings, rather than pre-tax corporate earnings, should be regarded as money available for child support:
- [65] Mr. Mynett's suggestion is not without precedent. Many cases indiscriminately refer to pre-tax corporation income and retained earnings and look to retained earnings in an application under s. 18 of the Guidelines. The error in that approach was discussed in *Miller v. Joynt*:

- [27] In my view the judge erred in utilizing the annual net change in retained earnings as his starting point, rather than the corporation's pre-tax income. Retained earnings are the result of subtracting from pre-tax earnings income tax and shareholder dividends, and other changes to the capital accounts.
- [28] As the Mother points out, section 18(1)(a) refers to pre-tax earnings. Likewise, Schedule I of the Guidelines uses pre-tax (Total Income from Line 150 of the T1 General form) income: s. 16. This suggests that Parliament intended pre-tax earnings to provide the starting point for determining income under the Guidelines, subject to any allowable deductions pursuant to Schedule 3 of the Guidelines.
- [29] While there are cases where retained earnings have been used as the starting point for determining the amount to attribute to the payor's income (see e.g., *Broumas, Rattenbury v. Rattenbury*, [2000] B.C.T.C. 326; 2000 BCSC 722, and *Cook v. McManus* (2006), 301 N.B.R. (2d) 372; 783 A.P.R. 372; 2006 NBQB 138, there has generally been no explanation given for the use of retained earnings.
- [30] The Father's submission that the use of retained earnings by the judge was tantamount to ascribing only part of the pre-tax income to the Father (as permitted by section 18(1)(a)) cannot be accepted. If that was the judge's intention, he should have said so. Absent such an explanation, the judge erred in principle in using the corporation's retained earnings rather than its pre-tax income as a starting point for his calculations.
- [66] I respectfully agree with the approach described in *Miller v. Joynt*.
- [Emphasis added.]
- [85] From these cases, I extract the following principles applicable to this case. First, the Guidelines should be interpreted in light of their stated objectives, including the ability to calculate child support in an objective manner that ensures consistent treatment of spouses and children who are in similar circumstances. Second, under a s. 18 approach, the corporate income method is likely to be the fairer method of determining income of an individual who wholly controls a corporation. This method allows a court to include all income available for child support an intact family would utilize. Third, where that approach is appropriate, pre-tax corporate earnings, not retained earnings or earnings after payment of taxes, are the starting point for an assessment of Guidelines income. Fourth, where a company is wholly owned by the payor, the onus is on the payor to provide evidence that his pre-tax corporate earnings are not available to him.

Application of the Law to this Case

- [86] While I do not believe the chambers judge misapprehended the evidence of the expert witnesses, I am of the view that it was an error to have relied upon the opinion of Mr. Bulthuis as a basis for determining that Guidelines income determined in accordance with s. 16 fairly reflects all the money available to the respondent for the payment of child support.
- [87] It will be recalled that Mr. Bulthuis assumed that in 2015 the court had weighed the alternative of s. 18 and "chose to determine income under Section 16". However, the 2015 reasons of Pearlman J. are not strong authority for the use of either s. 16 or s. 18 to calculate Guidelines income. At paras. 18-22 of those reasons, the judge describes ss. 15-19 of the Guidelines, but he does not address the possible applicability of s. 18. This may be because the issue was not prominent at that time. At para. 11 of his reasons, he had described the respondent's line 150 income and the gross revenues of the respondent's personal law corporation from 2011-2013. There was not a large discrepancy between the numbers. In 2013, for example, the respondent's line 150 income was \$255,270. His law corporation reported gross revenues of \$269,600. His firm allocated aggregate billings of \$266,146 to him.
- [88] It is fair to say that the growing discrepancy between the pre-tax corporate income of the personal law corporation and the taxpayer's line 150 income called for careful consideration by the chambers judge of the use of the former as a measure of Guidelines income.
- [89] Mr. Bulthuis asked whether there was "money available" in the personal law corporation to pay child support after accounting for liabilities, including, specifically, the payment of corporate income tax. In my view, that reflected a misconception of the scheme established by the Guidelines.
- [90] The Guidelines set an amount of child support as a variable percentage of pre-tax income. It is clear that the drafters of the Guidelines considered all of the payor's line 150 income, used as a reference in most cases for the setting of Guidelines income, to be money available to the spouse for the payment of child support. To use the phrase employed by Huddart J.A. in *Kowalewich*, it is "a measuring rod for the purpose of fixing annual income and thus the amount of child support" (at para. 41, emphasis added). The choice between s. 16 and s. 18 analyses is a choice of measuring rods where the objective is to select the most accurate measure of the payor's pre-tax income. It is not a search for available cash. To again use the words of Huddart J.A., the result of the exercise is not to "strip a spouse of their available money" (at para. 41).
- [91] If pre-tax corporate earnings are not considered to be available for the payment of child support, because corporate taxes are exigible, the Guidelines income of unincorporated partners and the Guidelines income of incorporated partners will be set at different levels, which might be appropriate for tax purposes (in part because the tax system is designed to equalize the taxes paid by each), but cannot have been the intention of the drafters of the Guidelines for whom consistent treatment of spouses in similar circumstances was an

objective.

[92] The "tax theory of integration" referred to by Mr. Bulthuis, and the respondent in his factum, is a means of equating the tax payable by incorporated and unincorporated professionals. As Mr. Bulthuis explained, the combination of tax at the corporate level and the amount paid on the residual after-tax retained earnings paid by the individual, once it is taken out as a dividend, should approximate the total tax paid if it were first earned as an individual. The approach taken by Mr. Bulthuis, and adopted by the judge, to determine Guidelines income does not, similarly, put incorporated and unincorporated professional payor spouses on the same footing.

[93] Mr. Bulthuis appears to recognize the question he asks when considering whether s. 18 is applicable is inconsistent with the use of pre-tax corporate earnings as a measure of Guidelines income. He says:

[It] is interesting to note, in respect of a potential application of Section 18, that it is intended to be used to determine the amount of money available for child support, yet it contemplates including pre-tax corporate earnings for the purpose of this calculation. Since the corporate income tax has been paid, then the amount of money required to pay that corporate income tax is not available to pay child support.

[94] The same may be said of the use of line 150 income of an individual; it treats pre-tax personal income as an amount available to pay child support despite the fact that some portion of that amount will not be cash available after personal income tax is paid. Simply put, in my view, where the Guidelines refer to "money available for the payment of child support" they do not mean "money available to pay child support after payment of taxes".

[95] There remains the question of how to deal with the other significant discrepancy between corporate and personal income in this case, that is, the lag in cash flow, apparently a result of the delay in collecting on bills rendered during the law firm's fiscal year but not collected until the next or a subsequent year. Mr. Nice testified that when a partnership allocates income to a professional law corporation but does not distribute that income, that fact should be reflected on the asset side of the law corporation's financial statements, either as a receivable or part of the partnership interest. It forms part of retained earnings. Mr. Bulthuis agreed that the fact the respondent's professional law corporation did not have assets sufficient to pay to the respondent as salary or dividends equivalent to the respondent's share of partnership earnings may have been because the law firm was unable to pay the allocation to the corporation at the time that it was allocated.

[96] In my view, that cash shortfall would not have justified the use of s. 16 as a measure of the payor's Guidelines income.

- [97] It might have justified a decision, as contemplated by s. 18, to use only part of the corporation's pre-tax income as the measuring rod. However, neither expert witness examined the cash flows to the payor with a view toward determining whether there was a significant lag in realization of the allocated earnings of the partnership to the law corporation such as to warrant the exercise of the discretion given to a judge to depart from the general rule.
- [98] In my opinion, and again bearing in mind the objectives of the Guidelines, including consistency, predictability and consistent treatment of spouses in similar circumstances, we should not depart from the general rule; Guidelines income in this case should be set at the corporation's pre-tax earnings plus salaries, wages and benefits paid to the respondent.
- [99] Insofar as consistency is concerned, it should be borne in mind that income allocated to an unincorporated partner should appear as "total income" at line 150 of the T1 General form, whether it is realized or not.
- [100] Insofar as consistency and predictability are concerned, the Guidelines intend to make the calculation of child support orders more objective and to give guidance to parties with a view toward encouraging settlement. These ends are not served by introducing cash flow analysis into the calculations described in the Guidelines.
- [101] For those reasons, I am of the opinion that the judge erred in setting the respondent's Guidelines income. I would allow the appeal only to the extent that I would set aside the assessment of the respondent's Guidelines income and the resultant order for child support. The Guidelines income should be set at the respondent's pre-tax corporate earnings plus all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits to or on behalf of persons with whom the corporation does not deal at arm's length, with the exception of expenses found by the chambers judge to have been reasonably incurred.
- [102] I should note that while Mr. Nice attempted to calculate s. 18 Guidelines income on this basis, he made some concessions in cross-examination with respect to some relatively small adjustments that should be made to his calculations. If the parties cannot agree on the adjustment that should be made, and the resultant Guidelines income or the consequential amount of the child support payable, I would remit the case to the trial division for a determination of those issues.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Butler"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/02/2020BCCA0254.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/quinton-v-kebler-2020>

Prepared on 26 October 2026 · Esheria