

CANADA / JUDGMENT

R.D.B. v. A.N.B.

2024 BCSC 2251

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2024 BCSC 2251 R.D.B. v. A.N.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.D.B. v. A.N.B.,

2024 BCSC 2251

Date: 20241212

Docket: E48428

Registry: Kamloops

Between:

R. D. B.

Claimant

And

A. N. B.

Respondent

Before: The Honourable Madam Justice Murray

Reasons for Judgment

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Place and Date of Hearing:

Kamloops, B.C.

August 7-9, September 17, October 10 and 17, 2024

Place and Date of Judgment:

Kamloops, B.C.

December 12, 2024

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INTRODUCTION

- [1] The respondent Ms. A.N.B. seeks to increase child support payable by Mr. R.D.B. retroactive to January 1, 2021.
- [2] By way of brief background, the parties began living together in November 2001, married on July 30, 2005, separated on July 7, 2009, and divorced on May 1, 2013. They have three children together - N.B., born March 14, 2005 (now 19 years of age), H.B., born December 23, 2006 (17), and J.B., born November 11, 2008 (15).
- [3] In July of 2013, Mr. R.D.B. remarried. He and his wife, B.B., have two children together. They are also business partners in the B. group of companies, which is at the centre of this application. For ease of reference, in this judgment I will refer to any and all of the companies as "the Companies" and not single any of them out.
- [4] There was no order for child support until April 14, 2020, when the parties entered into a Consent order, the following passages of which are relevant to this application:
- a) Mr. R.D.B. was imputed an annual Guideline income of \$82,500. Ms. A.N.B. was imputed an annual Guideline income of \$101,514;

- b) Mr. R.D.B. agreed to pay child support of \$1,667 per month commencing December 1, 2019, until the children are no longer children of the marriage within the meaning of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.);
 - c) Parties are to exchange personal tax returns, and Mr. R.D.B. shall provide financial statements for each of his companies on July 1 of each year;
 - d) Mr. R.D.B.'s imputed income was not reviewable until after January 1, 2021;
 - e) After January 1, 2021, either party could apply to review the amount of child support payable.
- [5] Mr. R.D.B. voluntarily increased child support in January 2021 (increasing his Guideline income from \$82,500 to \$120,000) and again in January 2024 (raising his Guideline income to \$137,000). The evidence shows that Ms. A.N.B. was, at the time, content with these increases.
- [6] N.B. began working for the Companies full-time in July 2023, earning upwards of \$50,000 per annum. Although it is Mr. R.D.B.'s position that N.B. ceased being a child of the marriage once he started working full-time, he did not vary child support to reflect that. If Ms. A.N.B. is successful in having a higher income imputed to Mr. R.D.B., she will be seeking retroactive child support to January 1, 2021. The question of whether N.B. was a child of the marriage between July 2023 and his 19th birthday, March 14, 2024, and thus eligible for child support, will then become a live issue.
- [7] Ms. A.N.B. filed this application to revisit child support on December 13, 2023. She seeks an increase in child support to be paid retroactive to the day child support was eligible for review - January 1, 2021. She takes the position that Mr. R.D.B. is and has been underpaying child support as he has not been taking enough income from his companies. She asks this Court to impute a higher income to Mr. R.D.B. In support, Ms. A.N.B. relies on the Guideline Income report prepared by chartered business valuator Michael Smith dated November 19, 2023.
- [8] Mr. R.D.B. responds that he is unable to take more money from his companies. He relies on the Limited Critique and Guideline income report of financial expert and chartered business valuator Patti Daum dated March 4, 2024, and updated August 1, 2024.
- [9] Both Mr. Smith and Ms. Daum testified as experts at the hearing of this application. I refer to them together as "the experts" throughout this judgment.

ISSUES

- [10] The issue for this Court is whether Mr. R.D.B. should be paying more child support. If the answer is yes, the Court will have to determine retrospectivity, that is, when an increase should occur. That will lead to a calculation of arrears, which will involve a determination of whether N.B. ceased being a child of the marriage when he began working for his father full-time.

[11] The preliminary question that must be answered in order to guide the analysis is which method should be employed to determine Mr. R.D.B.'s income. I will begin by considering that.

WHAT METHOD SHOULD BE EMPLOYED TO DETERMINE MR. R.D.B. GUIDELINE INCOME?

[12] The following sections of the Federal Child Support Guidelines, SOR/97-175 (the Guidelines) apply to this application:

Calculation of annual income

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.

.

Shareholder, director or officer

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.

.

[Emphasis added.]

[13] As can be seen, s. 18 sets out two options to determine a payor's income:

- a) under s. 18(1)(a) by examining pre-tax income (the corporate income method) or
- b) under s. 18(1)(b) by imputing income based on value of services provided to the corporation (value of services method).

[14] While counsel agree that s. 18 applies in this case, they disagree on which option applies. Mr. R.D.B. submits that the corporate income method applies while Ms. A.N.B. urges the Court to employ the value for services method.

[15] I am satisfied that the corporate income method is fairer for a number of reasons. First, Mr. R.D.B. and Ms. B.B. wholly own and control the Companies. Second, Mr. R.D.B. does not provide services that can be quantified as Ms. A.N.B. suggests. His role is not akin to a crane

operator or a tradesperson. He does not work shifts and get regular days off. I find support for my conclusion in *R.E.Q. v. G.J.K.*, 2020 BCCA 254, where our Court of Appeal found that in most cases, the corporate income method "is likely to be the fairer method of determining income of an individual who wholly controls a corporation" (para. 85).

SHOULD MR. R.D.B. BE PAYING MORE CHILD SUPPORT?

Background

[16] The basis for Ms. A.N.B.'s application to review child support, as set out in her Notice of Application, is that the Companies' annual revenues have increased steeply and that Mr. R.D.B. and Ms. B.B. bought a new house in July 2022.

[17] As stated above, Mr. R.D.B. and Mrs. B.B. are co-owners of the B group of companies, which provides heavy construction services, including mobile crane work, pile driving, bridge contracting, and industrial construction. The Companies are still in early stages, having been formed about seven years ago.

[18] The experts agree on how to calculate available income. More specifically, they agree that the following factors must be considered in determining available cash:

- a) The company's ability to distribute cash to its shareholders is key;
- b) Covenants from the banks require significant funds to be maintained in the Companies;
- c) Surety bonding requires that a certain level of working capital must be maintained;
- d) Capital expenditures were made by the Companies in an effort to stay viable and competitive;
- e) The Companies must keep working capital in the Companies in order to weather upcoming financial challenges, including the cyclical nature of the industry, delayed payment of receivables, increased competition in the market, increased wages, and overhead costs;
- f) The Companies are experiencing an increased collection rate for accounts receivable and repayment of long-term debt which leads to issues with cash flow.

[19] In this application, Ms. A.N.B. concedes:

- a) that Ms. B.B. is a controlling force in the Companies and that only 50% of the available income ought to be attributed to Mr. R.D.B.; and
- b) that corporate debt covenants should be deducted. This includes the debt covenants of two financial institutions.

[20] Applying these two concessions, Ms. A.N.B. takes the position that Mr. R.D.B. available income is as follows:

2019

\$81,000

2020

\$143,000

2021

\$313,000

2022

\$733,000

2023

\$303,000

[21] According to Ms. Daum, the Companies could pay out in income the amounts above and stay in line with the lending requirements. However, if they did so their business would not survive as these amounts do not take into account the following requirements:

- a. Bonding requirements;
- b. Cash Flow restrictions;
- c. The need to maintain debt ratios; and
- d. Working capital requirements.

[22] Ms. A.N.B. maintains that these deductions should not be considered when determining available cash.

[23] The latter two requirements are commonplace and apply to every business. Ms. A.N.B.'s contention that there is more cash available is centered on the first two factors. I will address them in turn.

Bonding Requirements

[24] Ms. A.N.B. argues that taking bonding requirements into consideration is "stacking" the deductions made for loan covenants. I disagree. Ms. Daum's report makes clear that they are two completely separate requirements.

[25] Companies must be bonded in order to bid on most projects, particularly the bigger jobs. In order to be bonded, they must maintain certain levels of working capital and profitability. If Mr. R.D.B. and Ms. B.B. paid out the income as proposed by Ms. A.N.B. (in the table above), the Companies would be offside the bonding requirement. As stated by the managing partner of the company that has provided the Companies with surety support since 2020: "Strong working capital, along with many other factors, are key factors in proving to the surety company that CEC [Cutting Edge] has the business acumen and cash flow to successfully complete multimillion-dollar government projects. Without maintaining the

levels of working capital they have over the past 5 years, CEC would have never managed to grow and would never qualified for their current bonding facility, which is crucial to the current existence of their company."

- [26] Ms. Daum states that if the available income was removed from the Companies, working capital would be a negative value of \$194,565 by the end of 2024. She opines that "this level of working capital would not be sufficient to maintain the bonding levels (and resultant income levels) the Companies are currently enjoying."
- [27] Ms. A.N.B. argues that there is no need to withhold funds for bonding requirements since the Companies are already offside. I find no support in the evidence for that proposition. Neither of the experts suggests that as a prudent course of action if the Companies are to remain viable and competitive. In fact, it seems to be a path to killing the goose that lays the golden egg.
- [28] I am satisfied that bonding requirements must be factored into the determination of available income.

Cash Flow

- [29] Ms. A.N.B. submits that the Companies' cash flow problems should not be factored into the calculation of Guideline income. She claims support for this proposition in the Court of Appeal's decision of *Quinton v. Kehler*, 2020 BCCA 254 at paras. 85, 90, 95-100.
- [30] I do not read *Quinton* as stating that cash flow should not be factored in. Rather, I take from the following passages that, when considering corporate income, as we are in the present case, it is within the judge's jurisdiction whether to take cash flow into account:
- [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. . . .
- ...
- [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.

[Emphasis added.]

- [31] Unlike in Quinton, above, Ms. Daum did examine the Companies' cash flows. She noted in her report that the reason for reduced cash flows are primarily attributable to:
- a) An increasingly slower conversion rate of accounts receivable (an industry-wide issue);
 - b) A general industry slow down;
 - c) The Companies acquired new property, equipment and leasehold improvements which are not fully financed with debt. Further the Companies must continue to meet payment obligations on existing long-term debt and leases.
- [32] With respect to the first two factors above, Ms. Daum testified that in her research, the interest rate environment is having a drag effect on both residential and commercial development, which affects the entire construction industry. She further noted that debt collection periods have significantly worsened since 2022, adding that banks do not like old receivables. Ms. Daum knows that the increasing receivables and high interest rates are a big factor in the construction industry. She is also aware that there is a shortage of skilled workers in the industry. In order to retain workers, the Companies need to pay them well - and pay them even when there is no work. These issues in the industry put stress on business owners like Mr. R.D.B. and Ms. B.B. They must fund upfront costs - buying product and equipment for projects - but they are not getting paid promptly. Projects have been halted due to high interest rates. They must retain employees.
- [33] Ms. Daum notes that there was an increased cash flow in fiscal 2024 due to positive earnings and collection of accounts receivable. This positive cash flow was then used in large part to acquire capital assets. Ms. Daum points out that although the Companies have positive earnings, if funds were withdrawn for support, because cash flow is negative, debt would have to be serviced by means outside of the operations of the Companies.
- [34] In this application, Ms. A.N.B. focusses on the capital acquisitions made by the Companies, arguing that the decision to spend "ALL (sic) \$8,000,000 of otherwise available income on new cranes was certainly a corporate decision, but also it was a reckless decision that created an unjustified imbalance between corporate objective, and family responsibilities." Ms. A.N.B. takes the position that Mr. R.D.B. has put the interests of the Companies before the best interests of the children.
- [35] The purchases are:
- a) Three properties in Kamloops - the first for the Companies' main shop, yard, and office; the second for storage of equipment and material; and the third to house out-of-town workers and for use as a training facility;
 - b) Three new cranes for a total cost of approximately \$15 million. According to Mr. R.D.B. and Ms. B.B., without the new equipment, the Companies will be left behind in a very competitive market.

[36] As set out above, as per s. 18 of the Guidelines, the Court on this application is concerned with funds from the Companies that is available to be paid in child support.

[37] Elwood, J succinctly set out the principles that guide the determination of available income in Kargl-Fluckiger v. Fluckiger, 2022 BCSC 1609:

[52] The Court of Appeal explained the reason for considering corporate income, when it is available in Namdarpour v. Vahman, 2019 BCCA 153, at para. 121 [Namdarpour]:

Where a person owns or controls a corporation, the income actually paid by the corporation may not represent the total income available to be paid. By underpaying him or herself, an owner could artificially reduce the income available to pay support unnecessarily or arbitrarily--i.e., reduce income by choice. A corporation could be used as a vehicle to accumulate savings, which would depress support payments. Section 18 allows the court to "lift the corporate veil" to ensure that money received as income by the payor spouse fairly reflects all the money available for payment of support.

[53] While the Guidelines allow a court to include all of the pre-tax income of a corporation in the payor's income, they do not require it. Put another way, the Guidelines do not make the inclusion of all pre-tax income a default rule: Kowalewich v. Kowalewich, 2001 BCCA 450, at para. 54 [Kowalewich].

[54] Whether to use any, part or all of a corporation's pre-tax earnings depends on the circumstances of each case. The case law provides the following principles to guide the assessment:

- a) It is not necessary for the claimant to show bad faith or an intent by the payor spouse to defeat the Guidelines to demonstrate that all or part of the corporation's pre-tax income is available for distribution: Kowalewich, at para. 40;
- b) The onus is on the payor spouse to "present clear evidence showing that part of the pre-tax income is not available": Namdarpour, para. 124; Quinton v. Kehler, 2020 BCCA 254, at para. 83-84;
- c) However, there is no requirement for the payor spouse to demonstrate "that the business could not be run in a fashion that generates more available income": McKenzie v. McKenzie, 2014 BCCA 381, at para. 102 [McKenzie];
- d) In assessing whether to include corporate income in Guideline income, the court is not required to "second guess business decisions"; nor is it required to "place the largest available shovel in the company store": Kowalewich, at para. 44;
- e) Instead, the court must assess "a spouse's allocation of pre-tax income between business and family purposes for fairness on priorities as [parents] would in an intact family": Kowalewich, at para. 44.

- f) In doing so, the court "must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income": Kowalewich, at para. 58-59;
- [55] In the end, the quantification of a payor's income for support purposes is a question of common sense in which "a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business ... having regard to the objectives of [the Guidelines and] the underlying parental obligation to support children": McKenzie, at para. 102, quoting Kowalewich, at para. 45.

[Emphasis added.]

- [38] In *Evanow v. Lannon*, 2018 BCCA 208, our Court of Appeal clarified the test to be applied:
- [61] This test was succinctly restated by the Court in *McKenzie v. McKenzie*, 2014 BCCA 381. In that case, the contested corporate income involved principal payments on mortgages, and the s. 18 question was phrased as "whether [the payor] has provided clear evidence that the amounts paid in respect of the mortgage principal were "necessary to sustain the company as a viable enterprise" and were "not available" to him to pay spousal support" (para. 99). As tailored to the facts of the present appeal, this inquiry becomes whether the contested capital reserve was necessary to maintain Mr. Evanow's companies as viable enterprises and whether the amount in question was unavailable to him for the purposes of child support.
- [62] Mr. Evanow's business provides maintenance services for medical imaging technologies used by healthcare professionals. I agree with Mr. Evanow that based on the nature of his business, the comments made by this Court in *Teja v. Dhanda*, 2009 BCCA 198, are relevant. In that decision, the Court indicated that the s. 18 analysis must "allow the payor to maintain value in the company and permit the company to continue as a viable enterprise and, at the same time, also permit a reasonable amount of income to be available for child support" (para. 12). Teja also acknowledges that corporate income is used to "take advantage of business opportunities, for expansion, to protect against the possibility of business downturns and the like" (para. 13).
- [63] There was evidence before the Court that it was necessary to accumulate a capital reserve in the circumstances of Mr. Evanow's business, which was accepted by the judge. Mr. Evanow deposed to the developments within the medical imaging field, including the creation of the Health Authorities, that changed the interface with clientele, the need to transition from analog to digital equipment, the special requirements for housing and displaying such equipment, as well as increased competition from equipment suppliers.
- [64] Mr. Evanow submitted that the combination of these factors necessitated the acquisition of a building in the Lower Mainland. His companies could only continue to be viable if they were able to sell digital equipment, and in order to sell digital equipment the manufacturers and providers of such equipment demand a location in the Lower Mainland from which to conduct sales.

- [65] In his reasons, the judge below correctly turned his mind to the s. 18 framework. He accepted the evidence of Mr. Evanow that "a building is required to enable the Companies to be competitive in the marketplace" (OD, para. 178).
- [Emphasis added.]
- [39] Applying that law to this case, the test is whether Mr. R.D.B. has provided clear evidence that the amounts spent on cranes and property were necessary to sustain the Companies as viable enterprises and were therefore not available to him to pay child support.
- [40] It is clear from the above that each case turns on its facts, which includes the nature of the business. It is also clear that judges are not to second guess business decisions made by the Companies.
- [41] The Companies' biggest expenditure was the purchase of three cranes for a total of approximately \$15million. It takes about a year for cranes to be delivered after they are purchased. Mr. R.D.B. explains that one crane was purchased to replace an ailing older crane, the second is a new addition to the standard fleet (mid pack size), and the third is a very large industry-leading crane. The large industry-leading crane will primarily be used for bridge/infrastructure and mining.
- [42] According to Ms. Daum, the Companies are young and must prove that they are a safe bet in order to win contracts. The evidence before me is that the up-to-date equipment is required to keep the Companies viable and competitive. The large, industry-leading crane will allow the Companies to bid on bigger, more profitable jobs. Without the big crane, the Companies would be left behind. Ms. Daum is of the opinion that the purchases were not unreasonable. There is no evidence to the contrary.
- [43] The properties are a small expenditure in comparison to the heavy equipment. All of them are heavily mortgaged. Regarding the house for out-of-town workers, Ms. B.B. states that it is more cost-effective to purchase the property than pay for hotels. The Companies have saved over \$30,000 in hotel expenses since acquiring it. Ms. B.B. stresses the importance of having workers available to work. Finding workers is a challenge. Having housing available is essential. Ms. Daum agrees.
- [44] As stated above, it is not for the Court to second guess bona fide decisions made by Mr. R.D.B. and Ms. B.B.
- [45] I am unable to find on all of the evidence that the purchases made by Mr. R.D.B. and Ms. B.B. to purchase the properties and equipment were unreasonable. At the time the purchases were made, I am satisfied that they were prudent decisions, necessary to maintain the viability of the Companies while still leaving a reasonable amount of income for child support.

CONCLUSION

[46] This application comes down to whether the capital expenditures were necessary to maintain the business while maintaining a reasonable amount of income for child support. I find that Mr. R.D.B. has provided clear evidence that they were. Accordingly, I find that there is/was no additional available cash for spousal support for the years in issue.

[47] Ms. A.N.B.'s application is dismissed.

[48] Costs to Mr. R.D.B.

"The Honourable Madam Justice Murray"

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