

CANADA / JUDGMENT

Riecker v. Parton

2024 BCCA 114

COURT

British Columbia Court of Appeal

DECIDED

25 March 2024

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2024 BCCA 114 Riecker v. Parton

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Riecker v. Parton,

2024 BCCA 114

Date: 20240325

Docket: CA48825

Between:

Florian Riecker

Appellant

(Respondent)

And

Mary Kathryn Parton

Respondent

(Claimant)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

The Honourable Madam Justice DeWitt-Van Oosten

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

December 16, 2022 (M.K.P. v. F.R., 2022 BCSC 2361, Kelowna Docket E122474).

Counsel for the Appellant:

J.W.T. Robinson

Counsel for the Respondent:

T. Moore

S.N.G. Potter

Place and Date of Hearing:

Vancouver, British Columbia

February 29, 2024

Place and Date of Judgment:

Vancouver, British Columbia

March 25, 2024

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Abrioux

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Appellant appeals, with leave, an interim spousal support order. He submits chambers judge below erred in refusing to reduce his investment income for SSAG purposes by the amount of bank carrying charges the appellant says were reasonably incurred to earn income. Held: Appeal dismissed. Onus was on the appellant to justify the deduction of expenses from his imputed income. It was open to the chambers judge to find that the Court was not given adequate information to determine which portion of the appellant's bank carrying charges were incurred for purposes of earning income and which were not. The judge's decision to impute all of the carrying charges to the appellant's income was within his discretion.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] This appeal is brought, with leave, from an order for interim spousal support made under the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). As noted by this court in *Loesch v. Walji* 2008 BCCA 214, such appeals are rarely entertained and indeed are discouraged. In the Court's words:

This Court has repeatedly discouraged appeals from interim support awards. In *Haigh v. Haigh*, (1987), 9 R.F.L. (3d) 301 at 304 (B.C.C.A.):

The principles applicable to a review by this court of an order providing interim maintenance for a spouse and a child have been enunciated in a number of cases. In particular, this court had occasion to consider the matter of the case of *Phillips v. Phillips* (1984), 43 R.F.L. (2d) 462 (B.C.C.A.), where Chief Justice Nemetz, speaking for the court, said [p. 463]:

As we have said on many occasions, we are not in the advantageous position of the trial judge, and particularly in respect to the consideration of interlocutory orders of this nature. Furthermore, we do not wish to encourage the bringing of appeals from interim alimony orders unless the trial date is so far in advance that the matter must be reviewed. This can only redound to the detriment of litigants, adding unwarranted costs. [At para. 15.]

- [2] The issue raised on this appeal, however, is a technical one -- whether a portion of bank carrying charges of approximately \$100,000 which the chambers judge below found the appellant Mr. Riecker had "legitimately incurred and appropriately deducted" from his 2021 investment income for tax purposes, should nevertheless be imputed or 'added back' to his income in determining the amount of interim support payable to the respondent Ms. Parton under the Spousal Support Advisory Guidelines.

Factual Background

- [3] The facts of the case are fairly unusual. The appellant Mr. Riecker and Ms. Parton are now ages 78 and 69 respectively. They have cohabited since 1994. The appellant has a large investment portfolio and real estate holdings from which he draws a comfortable income; the respondent is largely dependent on his financial support and since her retirement in 2004 earns only a small income of her own. Mr. Riecker has agreed that until the parties' claims are decided at trial, some support should be provided to the respondent -- without prejudice, however, to the existence of an indefinite permanent support obligation, which he opposes.
- [4] In 1996, the parties entered into a Cohabitation Agreement under which each agreed to share household and living expenses equally. Each would be responsible for all other expenses incurred for his or her exclusive benefit, and each purported to "quit claim" all real and personal property owned by the other at the time the Agreement was signed. With the exception of jointly-acquired property (to which each would contribute equally), any property acquired by either of them was to remain the property of the acquiring party.
- [5] With respect to income, each party agreed to be responsible for his or her own support and maintenance and not to make any claim against the other or the other's estate for "support, maintenance or alimony pursuant to the Family Relations Act [R.S.B.C. 1996, c. 128] or the Divorce Act (1985) of Canada [R.S.C. 1985, c. 3], or any other enactment or common law provisions." Each forever discharged and released the other from all such claims. Each was to be solely responsible for his or her own debts and liabilities and to obtain and to use

separate credit cards.

- [6] Each party received independent legal advice before signing the Cohabitation Agreement.
- [7] Ms. Parton deposes that from the beginning, she and Mr. Riecker did not conduct themselves strictly in accordance with the terms of the Agreement and that, for example, he paid for all extra-curricular activities such as travel, and expenses relating to their properties.
- [8] In early 2004, Mr. Riecker was diagnosed with Parkinson's Disease. Ms. Parton says that at his request, she retired from her work as an interior designer and took on responsibility for most of his care and for the management of their properties. Since the diagnosis, she has been entirely dependent on him financially, except for earnings of about \$10,000 per year from her own investments. According to Ms. Parton, her responsibilities increased further when Mr. Riecker fell and broke his hip in 2016.
- [9] In October of 2004, the parties executed an Amending Agreement under which the appellant transferred to Ms. Parton half of his beneficial interest in the property where the couple resided. In the event they separated, they agreed that the property would be immediately listed for sale and the sale proceeds would be divided equally between them. Again, each party had independent legal advice before signing the Amending Agreement.
- [10] In early 2017, Mr. Riecker added Ms. Parton's name to the title of three properties in Vernon (the "Vernon Properties.") She deposes that she had overseen the renovation and furnishing of all three, and was by this time managing them.
- [11] The parties separated in February 2019. Ms. Parton immediately filed a Notice of Family Claim, which was later amended. She sought an order for spousal support as well an equal division of family property and family debt, including all personal and real property, business interests, and bank accounts wherever held, owned by Mr. Riecker.
- [12] In his Response, Mr. Riecker relied on the terms of the Cohabitation Agreement as amended, and claimed that neither the Family Relations Act nor the FLA was applicable. He filed a counterclaim seeking a division of family property and debt in accordance with the Agreement, or in the alternative, an equal division of those assets in accordance with s. 95 of the FLA, taking the terms of the Agreement into consideration and subject to the exclusion of excluded property. He also asserted various other wrongs which need not be described for purposes of this appeal.
- [13] In April 2019, the parties reached an informal interim agreement under which the appellant began paying Ms. Parton spousal support of \$11,000 per month. This agreement was stated to be without prejudice to any existing obligation to pay spousal support. However, as of August 1, 2022, the appellant decided unilaterally to reduce the monthly payment to \$4,618 per month. Ms. Parton applied in September 2022 for an order that Mr. Riecker pay her \$17,500 per month retroactive to August 1, until further agreement or further court order.

- [14] The respondent recounted in her application that her previous acceptance of \$11,000 per month had been based on "estimated needs and expenses at that time, of approximately \$14,000 per month in 2019." However, her monthly expenses, including legal fees, now approximated \$16,700. She noted that one of the three Vernon Properties had been sold and that the sale proceeds of approximately \$1,255,130.90 were being held in trust by her lawyer. The other two Vernon Properties had assessed values of \$536,000 and \$765,000 respectively. (Evidently, the appellant is challenging the transfer of half interests in the latter Properties to Ms. Parton.) Ms. Parton contended that Mr. Riecker's capital could be taken into account and that the Court was not limited to considering income alone in deciding the quantum of interim support.
- [15] With respect to compensatory support, Ms. Parton submitted that she had withdrawn from the workforce at Mr. Riecker's request and had played a role as his primary caregiver, particularly following his Parkinson's diagnosis. Because of the demands he imposed on her, she was now at retirement age and "essentially unemployable". She said she had been financially disadvantaged as a result of her responsibilities for homemaking and caretaking, whereas Mr. Riecker had received a corresponding advantage throughout their lengthy relationship.
- [16] In his Response, Mr. Riecker agreed with respect to interim spousal support that he should pay an amount at the midpoint of the applicable Guidelines range, "with his income determined after accounting for payment of carrying charges and repayment of social benefits." He contended that a retroactive award would not be appropriate, given that he had encroached on capital to "overpay" support when the parties first separated. While disputing many of the allegations made by Ms. Parton, he did agree that both parties were at an advanced age and had no realistic prospects for gainful employment; that he had greater assets and income than she; and that he had paid a greater share of costs of their lifestyle throughout their relationship. He submitted that his payment of \$11,000 per month tax-free in the form of 'without prejudice' monthly interim support between April 2019 and July 2022 had permitted Ms. Parton to maintain a standard of living "at least as high" as that she enjoyed before separation. Although her first F8 financial statement had attested to monthly expenses of some \$14,000, her latest statement showed expenses of \$16,703. From this Mr. Riecker inferred that she had increased her spending despite not being able to make ends meet on her own income.
- [17] With respect to his own means, Mr. Riecker stated that his income tax returns disclosed a mixture of interest and investment income, capital gains, pension and other benefits and was reduced by carrying charges, interest and the repayment of social benefits. From a total line 15000 income of \$328,335.70 in 2021, he deducted carrying charges and interest (line 22100) of \$102,351.74 and repayment of social benefits (line 23500) of \$7,486.71, resulting in taxable income (line 26000) of \$218,497.25 in 2021.

[18] Finally, Mr. Riecker asserted that a consideration of his means should take into account the fact he is now paying approximately \$10,125 monthly for his own healthcare costs and pays for the upkeep of the Vernon Properties.

Agreed Statement of Facts

[19] The hearing of Ms. Parton's claim for interim spousal support began on October 13, 2022, at which time she also sought a term to the effect that any order would survive Mr. Riecker's death and be binding upon his estate. As I understand it, the hearing was adjourned after a day to permit the parties to provide further evidence concerning the carrying charges paid by Mr. Riecker to his bank. The parties then provided an Agreed Statement of Facts to the chambers judge, who resumed the hearing of this matter on December 15, 2022. The judge issued his Reasons on December 16, 2022.

The Chambers Judge's Reasons

[20] The new Agreed Statement had attached to it a "Carrying Charges Summary" and an annual tax summary issued by Mr. Riecker's bank. As noted at para. 9 of the document:

9. A detailed annual tax summary issued by [the bank] is attached as Schedule 2. This summary reports that Mr. Riecker's 2021 income reported for tax purposes comprises:
 - (a) \$194,569.25 of "income" received from "equities" and "funds" (specifically, bond funds, equity funds and ETFs); and
 - (b) \$25,555.29 of "gains and losses" generated from "derivatives", "equities", "structured products" and "funds" (specifically, ETFs).
10. The figure reported as "income" corresponds to dividends and interest income, and the figure reported as "gains and losses" corresponds to "capital gains".
11. The parties have not determined how much "income" and how much "gains and losses" come from each of Mr. Riecker's three portfolios (portfolio 01, portfolio 02, portfolio 03). [Emphasis added.]

[21] From the first Schedule to the Agreed Statement of Facts, the chambers judge found that the carrying charges or fees could be broken into three categories, namely:

- a) administration fees, these are akin to fees for having a bank account and are relatively nominal, \$738 per year;
- b) custodian fees, also referred to as access fees, these are charged quarterly and were approximately \$17,119 for 2021;
- c) finally, there are what are referred to as "all in fees" or "mandate fees", these are fees for active account management and are charged as a percentage of assets under management. These totalled \$80,979 in 2021. [At para. 35.]

The total of the bank charges in 2021 was \$98,836.96.

[22] Under the heading "Incomes", the chambers judge wrote:

The claimant has virtually no income, less than \$10,000, other than support from the respondent. She has approximately \$500,000 in investments.

The respondent is a wealthy man. He has financial assets of approximately \$22 million and his recent tax returns indicate the following level of income over the preceding years:

2021

2020

2019

Interest and other investment (line 12100)

\$233,765.73

\$250,132.97

\$350,575.63

Taxable capital gains (line 12700)

\$69,029.31

\$108,127.32

\$27,543.25

Pension and benefits (lines 11300, 11400 and 11500)

\$25,040.66

\$25,149.32

\$25,125.69

Total Income (line [15000])

\$328,335.70

\$383,409.61

\$403,426.57

Carrying charges and interest (line 22100)

\$102,351.74

\$85,794.70

\$99,687.30

Social benefits

Repayment (line 23500)

\$7,486.71

\$7,364.19

\$7,271.67

Taxable income

(line 26000)

\$218,497

\$290,250

\$296,468

(At para. 9.)

[23] Moving to "Legal Principles", the judge cited Robles v. Kuhn 2009 BCSC 1163, where the Court set out the principles that normally govern interim spousal support. These principles included the following:

1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: Gibb v. Gibb, [2005] B.C.J. No. 2730 (S.C.);
2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: Grossi v. Grossi, [1993] B.C.J. No. 878 (S.C.);
3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: Randhawa v. Randhawa, [1999] B.C.J. No. 3299; Newson v. Newson, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);
6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: Ladd v. Ladd, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.); [At para. 12.]

[24] The judge noted that the \$17,500 per month sought by Ms. Parton equated "in rough terms" to the amount required to generate \$11,000 per month after payment of income tax. Her calculation of expenses included \$3,500 per month for legal fees, but the parties had consented to an interim distribution of family property in the amount of \$50,000, presumably for the purposes of legal fees in the action. (At para. 13.)

[25] As the judge observed at para. 15, the Court in Robles had affirmed that the parties' means and needs play a greater role in interim applications than on final ones. (See also Santelli v. Trintetti 2019 BCCA 319 at para. 121; Anand v. Anand 2016 ABCA 23 at paras. 56-57.) As well, he noted the following passage from Chutter v. Chutter 2008 BCCA 507:

If the appellant must encroach upon her capital to maintain a standard of living comparable to that which she enjoyed during the marriage, then arguably she is suffering hardship from the breakdown of the marriage and experiencing the loss of marital standard of living, since her capital would deplete over time and eventually she would be in a worse position than had the marriage continued. If that is so, whether the respondent has the means to assist her financially to live a lifestyle closer to what they shared as a couple is a relevant question (Allaire, at para. 21; Hodgkinson). The appellant submits that the respondent's income, which he controls through draws from the business, is such that he can provide spousal support, and further, that the respondent has many more years of earning life ahead of him, whereas she has less than ten. [At para. 90; emphasis added.]

[26] Whilst acknowledging that the first Robles principle is often more "aspirational" than real, the judge found that in the case at bar, each party could enjoy a reasonable standard of living based on income that is available, even if not identical, to the standard the couple was able to enjoy as a single household. (At para. 19.) With respect to the other Robles principles, he saw nothing exceptional about this case that would necessitate an amount outside the scope of the Guidelines. (At para. 20.)

[27] The judge then turned to the question of the bank charges that had been deducted by Mr. Riecker in the calculation of his income. The judge set out the following relevant Federal Child Support Guidelines, SOR/97-175 provisions:

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.

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

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

- (e) the spouse's property is not reasonably utilized to generate income;
 - (f) the spouse has failed to provide income information when under a legal obligation to do so;
 - (g) the spouse unreasonably deducts expenses from income;
 - (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
 - (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.
- (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

In addition he referred to the following from Schedule III to the Child Support Guidelines, headed "Adjustments to Income". It directs a court to:

Capital gains and capital losses

6 Replace the taxable capital gains realized in a year by the spouse by the actual amount of capital gains realized by the spouse in excess of the spouse's actual capital losses in that year.

Carrying charges

8 Deduct the spouse's carrying charges and interest expenses that are paid by the spouse and that would be deductible under the Income Tax Act.

[28] The judge found that none of the circumstances set out in s. 19 of the Child Support Guidelines applied, with the possible exception of subparagraph (g), underlined above, relating to the unreasonable deduction of expenses from income. After referring to s. 19(2) of the Child Support Guidelines and *Bockhold v. Bockhold* 2010 BCSC 214, he found that there was little doubt that Mr. Riecker's carrying costs had been legitimately incurred and appropriately deducted for tax purposes. The question, however, was whether the carrying costs were an "out of pocket expense for the purposes of determining the respondent's available income for support purposes." (My emphasis.) The judge continued:

The respondent's income includes some capital gains, but an appreciation to his investment portfolio does not fall into income for tax purposes unless the assets are liquidated. However, the carrying costs are paid annually.

The respondent does not act unreasonably by choosing not to crystallize gains, as that may well be a prudent business decision, but it may render the reasonableness of the deduction of the carrying cost as an expense worthy of further inquiry. [At paras. 33-34; emphasis added.]

[29] Returning to the Agreed Statement of Facts, the judge rejected Ms. Parton's argument that the bank's carrying charges were "too high". The judge said he had no evidence to suggest that was so and had no basis to conclude fees aggregating approximately \$100,000 per year on assets of approximately \$17 million were unusual in any way. While it appeared that Mr. Riecker's capital (much of which had originated in a family inheritance) had been reduced over the years, that fact was not sufficient to conclude that increases and decreases in his capital should be characterized as income for support purposes on an interim application. In short, the judge said, he did not know why the capital had been reduced and he declined to speculate on that issue. (At paras. 38-39.)

[30] With respect to Mr. Riecker's argument that the charges had been appropriately deducted for tax purposes, the judge observed, correctly, that that was not "necessarily the end of the matter." In his analysis:

Rather, the focus is on whether it is reasonable to deduct an expense when determining a payor's income for support purposes. Unreasonable in this context does not mean that the expense itself is unreasonable. I am satisfied, for the purposes of this application, that the respondent's carrying costs are reasonable. The reasonableness inquiry in s. 19(2) is directed at its deduction from income for support purposes, not whether it ought to have been deducted for tax purposes or incurred at all.

The word "unreasonable" tends to have a pejorative connotation akin to bad or improper conduct. That is not the intention of the word in the analysis under s. 19(1)(g) and 19(2) of the Child Support Guidelines and I am satisfied that the respondent is doing nothing untoward.

Here the respondent pays carrying charges to [his bank] for their management and general oversight of his investment portfolios. The value of the portfolios will grow, either because income is earned or because of capital appreciation. The lion's share of the carrying charges pertain to the 'all in' fees for the active account management where [the bank] actively trades on the respondent's behalf. The assets include equities, hedge funds, and private market investments with the objective of growth. [At paras. 42-4; emphasis added.]

[31] What did make the deduction of the carrying charges unreasonable for support purposes in the chambers judge's view was that although the carrying charges were incurred annually, capital appreciation was recognized for tax purposes only on the disposition of investments and indeed might not be realized at all. The carrying charges were deducted from the appellant's capital annually regardless of whether the assets or growth thereof were realized for tax purposes. (At para. 45.) The judge reasoned as follows:

In this case, I conclude that the respondent's income ought to be determined without deduction of the carrying costs, even though they are legitimate expenses. They are legitimate expenses because they are paid to manage his investment portfolio, but they are not paid out of his annual income because they are automatically deducted. His entire income is therefore available for support purposes without regard to those carrying costs.

I therefore conclude that support should be determined based upon the claimant's income of \$9,664 and the respondent's income of \$328,337. The DivorceMate calculations provide for a low of \$9,759, mid of \$11,386, and a high of \$13,012. While I recognize the respondent has medical expenses and is also covering all of the expenses associated with two jointly owned properties, I note that his ability to pursue some leisure activities is substantially reduced or eliminated as a result of his unfortunate medical circumstances, and since he is seeking to set aside the transfer of the two jointly owned properties, it is not unreasonable that he continue to pay those expenses.

I therefore award interim spousal support in the amount of \$12,000 per month, which represents an approximate mid point between the mid and the high amounts. [At paras. 46-7; emphasis added.]

[32] The judge also declined to order that the obligation to pay interim support be binding on Mr. Riecker's estate, given that there was no evidence to the effect that his death prior to the trial was likely. In that event, Ms. Parton would be at liberty to apply under s. 171(3) of the FLA.

On Appeal

[33] Mr. Riecker's sole ground of appeal is that the chambers judge erred in law by imputing income to him under s. 19(1)(g) of the Child Support Guidelines on the basis that the carrying charges were unreasonably deducted for purposes of determining interim spousal support. At the same time, the appellant acknowledges that the imputation of income under s. 19(1)(g) is a discretionary matter, citing *Marquez v. Zapiola* 2013 BCCA 433 at para. 36. Both parties agree that as stated in *Marquez*, the applicable standard of review is a deferential one:

An appeal from an order for support, custody and/or access typically begins with acknowledgement of this Court's narrow appellate review jurisdiction. That jurisdiction requires an appellate court to give "considerable deference" to the trial judge's exercise of discretion in making such orders based on the following test: absent an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong (i.e., cannot reasonably be supported by the evidence), appellate courts should not intervene. See *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at 525-6, and *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014. [At para. 26; emphasis added.]

(See also *Loesch v. Walji* 2008 BCCA 214 at para. 14.)

[34] The argument advanced by Mr. Riecker at the hearing of this appeal departed substantially from the argument in his factum. Counsel framed the task before the chambers judge in this case as ensuring that to the extent Mr. Riecker's carrying charges were expended for the production of income as opposed to capital appreciation, they would be recognized as properly deductible from his income for purposes of spousal support. Since the portfolio accounts in question here included both income items such as dividends and unrealized capital gains and losses, he submitted that the judge had erred in disallowing the entire

amount of carrying charges. He suggested there were two possible "tracks", or pathways, to estimate fairly which portion of the charges properly related to income -- either the judge should have followed the methodology used by Madam Justice Fenlon (as she then was) in *N.P. v. M.C.P.* 2012 BCSC 1843, or expert evidence should have been adduced for the assistance of the judge.

- [35] *N.P.* was a trial judgment concerning inter alia the indefinite support obligation of the respondent husband, Mr. P. In the Court's words, he had chosen to "work very little in order to maximize his time with his daughter. He could afford to do so because he had inherited a substantial portfolio." Like Mr. Riecker's portfolio, the portfolio was located in Europe. When Mr. P.'s line 150 (now line 15000) income was adjusted in accordance with s. 6 of Schedule III to reflect all capital gains realised when investments were sold (even though the proceeds were reinvested in the portfolio), his income varied widely between some \$954,000 in 2004 and \$16,337 in 2009. (See para. 39.) Both parties were of the view that this result was unfair. As Fenlon J. observed:

Both parties agree, however, that this method is not a fair determination of Mr. P.'s income for two reasons. First, it will exaggerate the respondent's income in those years in which stocks were sold (resulting in a large capital gain) but reinvested in the portfolio by purchasing other stocks. Hinkson J. (as he then was) concluded in *Plett v. Plett*, 2009 BCSC 227 at para. 51, that it would be unfair to include in income capital that is simply being reinvested in another income earning asset. Second, the parties acknowledge that even in years in which capital losses exceeded capital gains (resulting in no Line 150 income at all), Mr. P. continues to use the portfolio to support himself. [At para. 40.]

- [36] The wife in *N.P.* submitted that determining "return on investment" was a fairer way to assess the money available to Mr. P. from his portfolio, given that it reflects annual changes in the market value of investments that included capital gains and losses realised and unrealised. However, the Court observed that this approach did not correspond to income as set out in the husband's tax returns. It would also produce a figure that ignored the fact that much of his gains had been reinvested back into his company, and did not take into account the fluctuations in the value of the Canadian dollar against the Euro.
- [37] An expert business valuator, Mr. Blair, offered the methodology set out in paras. 43-46 of the Court's reasons in *N.P.* for the determination of return on income. His calculations resulted in "available income" figures that varied widely from year to year, but yielded an average of \$298,000 when carrying charges, interest and "social benefit contributions" were deducted.
- [38] Mr. P. disagreed with this methodology, arguing that the Court should simply impute a reasonable rate of return of, say, 2-5% on the approximate value of his portfolio. This would have yielded a figure between \$80,000 and \$200,000. The Court rejected this, given there was no evidence to support a 2-5% rate of return on the investments and that it was "neither necessary nor appropriate to impute a rate of return when actual rates of return are available." (At para. 48.) Alternatively, Mr. P. submitted that the actual withdrawals made in

each year should be used -- a suggestion also rejected by the Court as not representing a fair determination of income available to the husband. (At paras. 50-55.)

[39] The Court in N.P. then returned to the 'return on investment' methodology suggested by Mr. Blair, with which the respondent's expert also agreed. Using roughly the same approach, this expert found that Mr. P.'s average income in the years in question had ranged between a loss of \$266,982 and a gain of \$176,033. However, the second expert had been instructed to assume certain facts not known to Mr. Blair, and these assumptions had not been confirmed by the underlying documents relied on in support. The trial judge then continued:

In my view the most reliable evidence before the Court is rates of return on income for 2004 to 2010. That evidence provides the best approximation of income available to Mr. P. from his portfolio.

However, in determining a fair income, I also take into account the following factors. First, the rate of return on the portfolio has been generally lower since the 2008 downturn in the global economy, the three most recent years for which information is available (2008, 2009, and 2010).

Second, I conclude that in determining a fair income, I should not impute to Mr. P. an income that would require him to deplete the underlying asset. Mr. P. is a careful and prudent financial planner who has consistently managed his portfolio before, during, and after the parties' marriage in order to preserve the underlying asset.

Third, while the evidence before me is that inflation has been low over the past eight years, it is not non-existent, and Mr. P. should be able to retain some of the return on his investment in order to offset inflation and preserve the value of the portfolio in real terms. I note that, even without taking inflation into account, the dollar value of the portfolio as set out in Mr. Blair's report has fallen from \$4.966 million in December 2004, when the support agreement was entered into, to \$4.647 million in December 2010.

Fourth, I take into account Mr. P.'s decision to work less as a journalist, and impute to him another \$5,000 in income from that source.

Taking all of this into account, I conclude that a fair and reasonable income to attribute to Mr. P. for child support purposes is an average income of \$270,000 per year from 2004 through 2012. [Emphasis added.]

Clearly, then, even the 'return on investment' approach required significant adjustments.

[40] In the case at bar, Mr. Robinson on behalf of Mr. Riecker argued in favour of an approach based on return on investment. At our request, he provided us after the hearing with a calculation that began by setting out the annual "Total Weighted Return" ("TWR") on all three of Mr. Riecker's 'portfolios' over the years 2015-2022. (The term "TWR" was taken from the bank statements and was not defined in counsel's calculation. It is, however, defined in the bank statements not as "Total Weighted Return" but as "Time weighted rate of return" -- an inconsistency with which we were unable to question counsel given the nature of the

post-hearing submissions.) These figures were drawn from the appellant's full bank statements (not filed in evidence before the chambers judge below but appearing in some 70 extra pages of bank statements accompanying counsel's calculation). The present value of each portfolio was then multiplied by the average of the TWRs to arrive at an "expected annual return" in each portfolio. These came to a total of \$543,701.20.

- [41] Counsel then added together the total of interest and dividends plus capital gains included in his income by the bank, which came to a total of \$220,124.54 (referred to by counsel as "SSAG income") -- which was 40.5% of the expected annual return. Applying the 40.5% proportion to the bank's carrying charges of \$98,836.96 for 2021, Mr. Robinson contended that the trial judge should have included only \$40,015.44 in carrying charges in Mr. Riecker's imputed income. Although Mr. Robinson's calculations did not go this far, I take it that he would say Mr. Riecker's income for purposes of the Guidelines ought to be approximately \$260,139.98.
- [42] It is worth noting that counsel for Ms. Parton suggested that it was inconsistent for Mr. Robinson to use an average of several years to impute expected annual return while relying on a single year of carrying charges to complete the calculation. On an interim order application, the judge is given some measure of latitude to apply a 'rough and ready' approach. However, I agree with Ms. Moore that inconsistencies of the kind she identifies have the effect of eroding the confidence that a judge might have in applying the methodology suggested by counsel.
- [43] In his oral submissions, counsel also submitted that once the average annual TWR is calculated, the average inflation rate for the period should be subtracted from that figure. (On this point it was said the judge could have taken judicial notice of the rate of inflation by referring to the Consumer Price Index produced by the Bank of Canada.) In his submission, this suggestion is supported by case law (including N.P.) that has recognised that an investor should be able to increase the value of his or her investment portfolio at a rate that matches inflation. I note, however, that this step was not included in counsel's calculation and that depending on which years are taken into consideration, a negative expected annual return can result. Yet the bank would continue to take its quarterly carrying charges. I note also that counsel omitted the 2014 TWR from his calculation, reasoning that the statements for 2014 reflected a partial year. However, the 2022 return was included in his calculation, despite the fact that the records for that year were current to September only. Since the TWR of Mr. Riecker's account has fluctuated significantly year-over-year, the choice of whether to include a single year can have a major impact on the outcome under Mr. Robinson's proposed methodology.
- [44] Counsel for Ms. Parton objected generally to Mr. Riecker's use of a methodology that had not been advanced in his factum and was not necessarily supported by documents in evidence. Although expert evidence might well be adduced at trial on behalf of each respective party, Ms. Moore argued that Ms. Parton had been obliged to bring her application quickly after Mr. Riecker unilaterally reduced her interim maintenance to \$4,618 per month in August

2022. As she suggested, chambers applications for interim support are not generally accompanied by expert opinions, which take time and money to prepare. The chambers judge noted that such applications are generally determined on a more 'rough and ready' basis, focusing on the 'means and needs' of the parties. In the case at bar, the parties have not yet to my knowledge been examined for discovery; nor have expert opinions been prepared; nor have Guidelines income reports been exchanged. As it was, the chambers judge had to adjourn the first day of hearing of the application in order to obtain further information on the question of the computation of Mr. Riecker's income for Guidelines purposes. The calculation of 'return on investment' described above was not provided to the chambers judge at any point.

[45] In my view, counsel for Mr. Riecker had no good response to these submissions. He did contend that in any event, the chambers judge had erred by taking an 'all or nothing' approach and that it was an error in law for him to have imputed the entire amount of carrying charges paid by him in the calculation of income for Guidelines purposes. In the end, however, how the judge should have found what proportions of the fees related to income and which to unrealized appreciation on the basis of what was before the Court, was not made clear.

[46] According to the case law, the obligation to justify the deduction of expenses from a party's income lies on that party: see *C.M. v. V.M.* 2016 BCSC 2144 at para. 39; *Sobiegraj v. Sobiegraj* 2014 ONSC 2030 at paras. 65-67; *Barry v. Davis* 2021 BCSC 546 at para. 42-44; *Wiebe v. Treissman* 2017 BCSC 1523 at para. 90, citing *Cunningham v. Seveny* 2017 ABCA 4. In the words of Kent J. in *Wiebe*:

It is the obligation of that spouse to fully disclose the financial information and documentation relied upon to justify the deduction of each expense. It is not the other party's responsibility to hire, nor is it the court's obligation to appoint, an accountant or other professional to assess and challenge the reasonableness of the deduction, although of course both are at liberty to do so in appropriate circumstances. [At para. 94.]

(See also *M.T. v. J.S.* 2023 BCCA 64 at para. 8.)

[47] If a payor is unable to make a clear and comprehensive argument before the chambers judge in an interim application without expert reports and supporting evidence, it does lie within the Court's discretion to make an estimate of what proportion, if any, the amount claimed represents the true cost of earning income. But in my respectful view the Court is not required to do so and it is open to the judge simply to rule that the payor did not discharge his burden of proof. That is what occurred in this case.

[48] This brings us to para. 46 of the chambers judge's reasons, which I reproduce again here for convenience:

In this case, I conclude that the respondent's income ought to be determined without deduction of the carrying costs, even though they are legitimate expenses. They are legitimate expenses because they are paid to manage his investment portfolio, but they are not paid out of his annual income because they are automatically deducted. His entire income is therefore available for support purposes without regard to those carrying costs. [Emphasis added.]

[49] On one reading, this might be taken to suggest that the judge's conclusion turned on the fact the deductions were made 'automatically' -- i.e., the fact that the bank did not send a separate invoice to the appellant for carrying charges every year and expect him to return payment of that amount, but instead simply deducted them from his accounts. In my opinion, the chambers judge would have erred if that was the basis of his conclusion. The method of payment cannot determine whether the amount paid is properly deductible. As I read para. 46, however, the judge was pointing out that the fees were not taken out of Mr. Riecker's income, but were, as stated at para. 45, "simply deducted from his capital." There was no attempt to "match" the charges with his income; the fees were incurred and payable "regardless of whether the assets or growth are realized for tax purposes." (At para. 45.)

[50] In summary, this was an application for interim support only. The chambers judge cannot be faulted for finding that he was not given adequate information to determine which portion of the carrying charges were incurred to earn income and which were not. He was not asked to carry out a "return on investment" analysis such as that done by the trial judge in N.P.; and he was not given the tools and evidence with which to do so. The parties themselves made no attempt in the Agreed Statement of Facts to determine "how much 'gains and losses' [came] from Mr. Riecker's three portfolios." The judge declined to settle on some proportion taken 'out of the air' and apply it to the charges.

[51] In my view, it was fully open to the chambers judge to impute the carrying charges to the appellant's income given that he, Mr. Riecker, did not discharge the burden on him, in the context of an interim support application, to provide some basis on which to characterize the proportion of carrying charges that should be attributed to the earning of income for support purposes. The judge's order was fully within his discretion.

[52] I would therefore dismiss the appeal.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Abrioux"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

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