

CANADA / JUDGMENT

S.F.B. v. B.M.M.

2020 BCSC 510

COURT

Supreme Court of British Columbia

DECIDED

2 April 2020

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2020 BCSC 510 S.F.B. v. B.M.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.F.B. v. B.M.M.,

2020 BCSC 510

Date: 20200402

Docket: E18495

Registry: Nelson

Between:

S.F.B.

Claimant

And

B.M.M.

Respondent

Before: The Honourable Mr. Justice T.J. Crabtree

Reasons for Judgment on Application

In Chambers

Counsel for the Claimant

(Respondent on the application):

J.T.E. Gelber

The Respondent, appearing in person

(Applicant on the application):

B.M.M.

Place and Date of Hearing:

Rossland, B.C.

November 18, 2019

Place and Date of Judgment:

Nelson, B.C.

April 2, 2020

INTRODUCTION

- [1] The claimant and the respondent entered into a consent order [the "Order"] resolving the outstanding family claims following their separation. There is one child of the relationship: C.A.M., born [D.O.B.], 2005 ["the Child"]. The Order was filed on December 30, 2015, and included a term with respect to child support.
- [2] Paragraph 15 of the Order incorporated the term that "For so long as the Child is a 'Child' within the definition provided by the Federal Child Support Guidelines, SOR/97-175 [the "Guidelines"] ... the parties shall exchange their [financial information] each and every year", in order that the child support obligations can be adjusted, if and when necessary to do so.
- [3] This application centres on whether the current child support payment is calculated in accordance with the Guidelines, or requires adjustment. Within this context, the parties have raised questions with respect to the other party's income, upon which child support order ought to be based.
- [4] Mr. B.M.M.'s application filed on June 7, 2019, requests the following:
1. An order pursuant to s. 212 of the Family Law Act that [Ms. S.F.B.] file a Form 8 Financial statement forthwith.
 2. An order pursuant to s. 212 of the Family Law Act that [Ms. S.F.B.] provide [Mr. B.M.M.] with her statements of credit cards and banks for all open credit cards and bank accounts from January 1, 2016 to current, and the last three financial statements of [Ms. S.F.B.'s] trust so that her income can properly be determined.
 3. An order pursuant to s. 149 of the Family Law Act that [Ms. S.F.B.] pay to [Mr. B.M.M.] child support calculated pursuant to s. 3(1)(a) of the Federal Child Support Guidelines SOR/97-175 (the "Guidelines") based on the first portion of her income being \$150,000 per annum.

4. An order pursuant to s.149 of the FLA that [Ms. S.F.B.] pay to [Mr. B.M.M.] child support calculated pursuant to s. 4 of the Guidelines based on the remaining annual income earned by [Ms. S.F.B.] of \$200,000 per annum.
 5. An order pursuant to s. 149 of the FLA that upon [Mr. B.M.M.] providing receipts to [Ms. S.F.B.] for Guidelines section 7 expenses, [Ms. S.F.B.] will reimburse the entirety of the expense to [Mr. B.M.M.].
 6. An order for retroactive child support, and special activities costs, retroactive to January 1, 2016 based on [Ms. S.F.B.]'s actual income at that time.
- [5] In an application response filed on June 28, 2019, Ms. S.F.B. seeks the following:
1. An order pursuant to s. 19(1)(a) of the Guidelines, imputing income to [the applicant, Mr. B.M.M.] for the purpose of determining child support obligations.

BACKGROUND

- [6] The parties were married in October 2003 and separated in January 2014. The Child of the marriage is currently 14 years of age. Pursuant to the Order, the parties have equal parenting time with the Child on a one week on/one week off basis, and share times over the holidays, the summer months, and on special occasions, such as birthdays.
- [7] When the parties resolved the outstanding issues in December 2015, each of the parties' incomes was deemed to be \$20,000 per annum. Neither party was required to pay child maintenance to the other, given the parenting plan and the similarity in their incomes.
- [8] This arrangement continued in 2016, through to 2018. I understand that each year relevant financial information was exchanged in compliance with the Order.
- [9] The financial information for the application is based upon information available for 2018. Mr. B.M.M.'s 2018 line 150 total income is \$7,392 and Ms. S.F.B.'s 2018 line 150 total income is \$29,955.63. In light of the parenting plan, this suggests that child maintenance would be reviewed and adjusted in accordance with the new income.
- [10] Each party is opposed to an adjustment on that basis. Mr. B.M.M. asserts that Ms. S.F.B.'s income is underreported for the purposes of determining child support; whereas Ms. S.F.B. submits that a higher amount of income should be imputed to Mr. B.M.M.
- [11] I will first address the applicant's position that Ms. S.F.B.'s income is underreported on the basis that:
1. the rental income derived from the former family home in Nelson, B.C. and the rental property, also in Nelson, is underreported;
 2. the expenses related to the rental of the properties are inflated, or unrelated to renting the premises; and

3. Ms. S.F.B. is in receipt of undisclosed income from two trusts to which she is a beneficiary.
- [12] Ms. S.F.B.'s 2018 income is comprised of income received from the two properties, received in the resolution of the family issues in 2015. Rental income is derived from the part of the former family residence rented out and the residence located next door. The properties were rented out during the course of the marriage; as a result, Mr. B.M.M. has some prior knowledge of the potential rental income from each property.
- [13] In his material, Mr. B.M.M. presents information suggesting that the gross rents should be \$73,800, not the figure reported by Ms. S.F.B. in her 2018 tax return. Mr. B.M.M. based his estimate on specific rental information and made assumptions regarding occupancy rates.
- [14] Ms. S.F.B. disputes some of the rental calculations provided, stating the rental amounts and occupancy rates are inaccurate. She further states that all rental income, regardless as to the method of payment, is recorded, reported to her accountant and included in her annual tax return. A summary of the rents received for each property for 2018, is set out in Exhibit "F" to her affidavit sworn June 25, 2019.
- [15] Ms. S.F.B.'s 2018 tax return contains detailed statements of rent for each property prepared by her accountant. This statement includes:
- a) the gross rents;
 - b) a summary of the expenses; and
 - c) an allocation for Ms. S.F.B.'s personal living in the property that she resides in.
- [16] Mr. B.M.M. submits the gross rental income should be approximately \$23,000 higher than reported. Reviewing the documentation presented, it has not been established that Ms. S.F.B. has either overestimated the rental expenses or underreported the rental income for 2018.
- [17] I now turn to Mr. B.M.M.'s submission that Ms. S.F.B. has failed to accurately, or properly, disclose or report income received in 2018. The submission in this regard is two-fold. First, he submits that Ms. S.F.B. has an interest in property, both real and corporate, capable of producing annual income and this ought to be included in her taxable income.
- [18] In this regard, Mr. B.M.M. (at para. of 31 of his affidavit sworn July 8, 2019) sets out a number of Ms. S.F.B.'s parents' assets which, as a result of their passing, would have made their way to one of the two trusts which she has a beneficial interest in. Ms. S.F.B. acknowledged that there are two trusts to which she has a beneficial interest: [Trust 1] and [Trust 2], (collectively the "Trusts").
- [19] The total value of the Trusts, based on Mr. B.M.M.'s estimates, should be in the range of \$8 million. Based on an annual projected return of 5%, this would produce \$400,000 annual income between the Trusts. Alternatively, and if the foregoing assets have not become part of either Trust 1 or Trust 2, then Ms. S.F.B. would have directly acquired and now owns, an

interest in her parents' former family residence and a company holding investment properties in Williams Lake. Either way, Mr. B.M.M. submits Ms. S.F.B. is receiving, or has the opportunity to earn, greater income than is currently being reported.

DISCUSSION

- [20] The applicant, Mr. B.M.M., submits that Ms. S.F.B. has an interest in real or corporate property by way of a trust; or, in the alternative, owns property directly that is capable of producing an annual income and should be included in her income for the computation of the amount of child support.
- [21] Mr. B.M.M. submits that Ms. S.F.B. is a beneficiary or has an interest in her parents' former family residence in North Vancouver, valued in excess of \$3 million. Mr. B.M.M. submits that on the death of the survivor of her parents, Ms. S.F.B. would have acquired an interest in that property. In response, Ms. S.F.B. states this property was owned by her parents and it was bequeathed to her brother, [Mr. T.B.] She denies inheriting or owning any interest in this property.
- [22] Mr. B.M.M. further submits that Ms. S.F.B.'s parents had an interest in a triplex [address redacted] in Vancouver, B.C., to which she would have acquired an interest in upon the passing of her parents. Ms. S.F.B. confirmed that she bought a 10% interest in that property in 1992 and subsequently, sold her interest to her parents in 2007. The proceeds of which were used to acquire one of the properties in Nelson, B.C.
- [23] Finally, Mr. B.M.M. submits that Ms. S.F.B.'s parents owned a company which owned commercial and residential property in Williams Lake. Ms. S.F.B. deposed that she never inherited and does not now own an interest in her parents' former company; and that all such property devolved to her brother after her parents' death. She has no legal or beneficial interest in any of those assets.
- [24] Ms. S.F.B. deposed that all of the foregoing was disclosed and discussed during the course of the divorce settlement.
- [25] Ms. S.F.B. does not dispute that she is the beneficiary of the Trusts established by her parents; however, Ms. S.F.B. disputes the value of her interest in the Trusts as described by Mr. B.M.M.
- [26] Ms. S.F.B. submits the combined value of the Trusts to which she is a beneficiary total \$839,386.71. In support, Ms. S.F.B. submits as Exhibits "C" and "D" to her affidavit sworn June 25, 2019, the account statements for both Trust funds for the period ended ending March 29, 2019. In addition, attached as Exhibit "E" to the same affidavit is an email from the Trust Officer at the Trust Company, dated June 10, 2019, wherein he indicates as follows:

...

Both [T]rusts are fully discretionary trusts;

Both [T]rusts are the successive trusts arisen from [Trust names redacted] respectively;

...

[The Trust Company] has been acting as the sole trustee for both [T]rusts since [date redacted], 2018;

[Ms. S.F.B.] is not entitled to any income or capital payment from the [Trusts] until such time that [The Trust Company] exercises the discretionary decision for [Ms. S.F.B.]'s benefit; and

[The Trust Company] has not exercised such discretionary decision to benefit [Ms. S.F.B.].

[27] Reviewing Ms. S.F.B.'s tax returns from 2016 to 2018, she received the sum of \$3,672 in 2016, which amount was incorporated into her 2016 line 150 total income.

[28] Mr. B.M.M.'s, submissions are based on assumptions, as opposed to facts. On the evidence presented, there is no basis on which to conclude Ms. S.F.B. has an interest in the real property or corporate property previously owned by her parents, as claimed by Mr. B.M.M., from which she receives income which has not been reported.

[29] It is accepted that Ms. S.F.B. is a beneficiary to the Trusts, with a present value of approximately \$839,000. However, there is no evidence to suggest that she has recently received either a payment of capital or interest. As noted by the Trust Officer, it is a discretionary trust from which no benefit was received in 2018.

[30] I do not find that Ms. B.M.M. has underreported her income for the purposes of determining child support, as between the parties.

[31] I pause here to make the following comments. It was suggested during the submissions that the applicant, Mr. B.M.M., was seeking to reargue or reopen the division of family assets previously agreed to in the Order of December 2015. I did not interpret Mr. B.M.M. to be doing so. In the event that it was his intention to do so, the review of an existing child support order is not the appropriate form in which to re-address such issues. During the course of Mr. B.M.M.'s submissions, he made reference to Ms. S.F.B.'s training, education, and current work as an artist. He referenced the fact that last year she spent considerable time travelling abroad. The inference being that she could be earning greater employment income than she is at present.

IMPUTATION OF INCOME

[32] Ms. S.F.B., in her cross-application, seeks an order pursuant to the Guidelines imputing income to Mr. B.M.M. for the purpose of determining child support obligations.

[33] Pursuant to the Guidelines, the court has a broad discretion to impute income. Section 19 provides that the court may impute any income it considers appropriate in the circumstances, and sets out examples of such circumstances.

[34] Section 19 of the Guidelines provides:

Imputing income

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.

[35] The Form 8, together with Mr. B.M.M.'s 2018 tax return, provide that he is self-employed, working as an artist, earning \$7,392 annually.

[36] Financial information for previous years indicates Mr. B.M.M.'s income to be:

2016

\$12,411

2017

\$7,026

[37] Mr. B.M.M. deposed that he is currently working part-time, engaged as an artist, constructing and installing distinctive commercial signs. He had a major fire in his workshop in 2018, wherein he lost thousands of dollars of equipment and was unable to work for approximately three months.

- [38] Mr. B.M.M.'s tax returns prior to 2016 were not part of the material on this application. However, his 2018 income is less than what his income was deemed to be for the purposes of calculating child support in 2016. At that time, each party's income was agreed to be equal, despite the fact that each party's reported income was less than this amount. No details were provided as to why either party adopted this particular position in coming to the agreement they did.
- [39] Ms. S.F.B. submits that if Mr. B.M.M. were to take a position paying minimum wage, he could earn approximately 3½ times what he earned in 2018.
- [40] Information as to the parties' projected incomes for 2019 was not available at the hearing.
- [41] Mr. B.M.M. seeks an order for retroactive child support, based on what he submits is Ms. S.F.B.'s actual income. I see no basis for an order for retroactive child support. The parties agreed to the income for determination of child support in 2016. In the Order, each party's income (by agreement) was deemed to be \$20,000 per year. The 2017 income for Ms. S.F.B. is similar to the amount agreed for 2016; and the 2018 income amount was, on the basis of this application, found to be \$29,955.
- [42] The applicant, Mr. B.M.M., has failed to establish Ms. S.F.B.'s income is an amount greater than reported on her 2018 tax return. Accordingly, this is the amount to be used for determination of Ms. S.F.B.'s child support obligation for 2019.
- [43] As for Mr. B.M.M., his 2018 self-employed income was \$7,392. This amount is similar to earnings in 2017, but less than 2016.
- [44] Ms. S.F.B. submits that Mr. B.M.M. is not working to capacity; that he is a capable, experienced and skilled worker that could be earning more than minimum wage. In the circumstances, it is submitted that Mr. B.M.M.'s income should be imputed to an amount equal to that earned by Ms. S.F.B. If this was to be done, it would result in a set off, such that no maintenance would be payable by either party.
- [45] When looking at the parties' circumstances, both have skills which appear to be presently underutilized. Both are artists, pursuing their interests and developing their art. Both have education backgrounds, which would enable them to pursue other opportunities. Ms. S.F.B. is trained as a licensed practical nurse and has worked as such, in the past. Mr. B.M.M. is trained as a teacher.
- [46] Both parties have the capacity, experience and skill to work in positions other than the pursuits that they are currently engaged in. Mr. B.M.M. chooses to work part-time and devote other portions of his time to caring for the children of his new relationship. Ms. S.F.B. travels extensively.
- [47] In the current application, Mr. B.M.M. seeks the imputation of income to Ms. S.F.B. Mr. B.M.M.'s income was imputed as part of the Order agreed to in 2015. For 2016 and 2017, Mr. B.M.M.'s child support has been based on the imputed amount. At the same time, his actual

income has decreased. I am not prepared to impute income for 2018, in part due to a lack of detail of the circumstances surrounding the agreement reached in 2015; and due to damage suffered to this workshop, which had an impact on his ability to generate income for part of the year.

- [48] For 2018, Mr. B.M.M.'s income for the purposes of determining child support is the 2018 reported income of \$7,392.
- [49] In light of the equal parenting arrangement of the Child, the set off shall be Ms. S.F.B. paying to Mr. B.M.M. \$268 per month. This is based on the Guidelines requiring Ms. S.F.B. to pay \$268 on an income of \$29,955; and Mr. B.M.M. not having to pay support due to his current level of income. Child support in the amount of \$268 per month will be effective July 1, 2019.
- [50] As a result, arrears of maintenance from July 2019 to the end of March 2020 now total \$2,412, less any amount that has been paid during this period. The arrears shall be paid to Mr. B.M.M., in equal monthly instalments over the course of the next 10 months, together with the monthly child support ordered. Special expenses are apportioned one-quarter to Mr. B.M.M. and three-quarters to Ms. S.F.B., based upon the difference in the reported incomes of the parties.
- [51] While this puts in place the child maintenance payable until the next scheduled review, I note the obligation to support a child is a joint one and both parties have an obligation to pursue reasonable remunerative work. In the event this cannot be done through their chosen craft, the parties may have to consider other available alternatives to ensure the Child is appropriately supported.
- [52] With respect to Mr. B.M.M.'s request for an order for Ms. S.F.B. to disclose certain financial documents, I decline to do so. I do not see the relevance of disclosing credit cards and bank statements for the purpose of the child maintenance review. The most recent Trust statements, provided in the course of this application, indicated no payment was made to Ms. S.F.B. in 2018.
- [53] Special activity costs shall continue to be governed by the 2015 Order.
- [54] Ms. S.F.B. is entitled to costs in regard to the initial application.

"T.J. Crabtree J."

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