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CANADA / JUDGMENT

## S.K.R. v. K.S.R.

2015 BCSC 914

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COURT

Supreme Court of British Columbia

DECIDED

1 June 2015

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2015 BCCA 914 S.K.R. v. K.S.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.K.R. v. K.S.R.,

2015 BCSC 914

Date: 20150601

Docket: E45053

Registry: New Westminster

Between:

S.K.R.

Claimant

And

K.S.R.

Respondent

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

Counsel for Claimant/Applicant:

K.E. McNeilly

Counsel for Respondent:

J.S. Virk

Place and Date of Hearing:

New Westminster, B.C.

May 5, 2015

Place and Date of Judgment:

New Westminster, B.C.

June 1, 2015

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I: INTRODUCTION

[1] The claimant seeks the following orders pursuant to the summary trial provision of Supreme Court Family Rules, Rule 11-3:

(i) determining the respondent's income for child support purposes;

(ii) varying the terms of a separation agreement made November 24, 2011 (the "Agreement") such that the respondent pay child support in accordance with the Federal Child Support Guidelines, S.O.R./97-175 (the "Guidelines");

(iii) determining the amount of arrears of child support; and

(iv) payment of the respondent's proportionate share of the children's extraordinary and section 7 expenses.

[2] The respondent's position is that it is appropriate for the application to be heard summarily pursuant to this Rule. He also agrees that the court can determine his income for child support purposes and fix the amount of arrears notwithstanding the fact that the Agreement provided for a lump sum payment of \$40,000 for child support.

[3] According to the claimant, the amount of arrears is approximately \$100,000.

## II: BACKGROUND

- [4] The pertinent factual background is not in dispute, and I am able to find the facts necessary to decide the issues of fact and law on this summary trial.
- [5] The parties were married on May 30, 1998 and were divorced on February 8, 2001.
- [6] Following the divorce, the parties reconciled and separated on several occasions but did not remarry. In particular, they were separated for approximately one year, from 2008 until December 2009. The respondent paid no child support during that year.
- [7] In December 2009, the parties again reconciled, and the claimant returned to the Lower Mainland with the children.
- [8] The parties have four children, the youngest born in 2010 during the final period of reconciliation:
- A.R., born November 16, 2001;
  - M.R., born February 15, 2003;
  - G.R., born February 7, 2004; and
  - N.R., born January 9, 2010.
- [9] The parties separated in January 2011 for the final time.
- [10] At the time of separation, the respondent operated a proprietorship called Good Star Building Maintenance ("Good Star"), which provided janitorial services. The Agreement allocated certain of the janitorial contracts to each of the parties. It was anticipated that the claimant's contracts would result in income of approximately \$70,000 per year.
- [11] The Agreement includes the following provisions:
- each party will be self-sufficient and not in need of support from the other;
  - the children will reside primarily with the claimant;
  - the respondent will have time with the children as follows:
    - (i) week one: Wednesday at 3:00 p.m. to Thursday at 8:30 a.m. and Friday at 3:00 p.m. to Monday at 8:30 a.m.
    - (ii) week two: Wednesday at 3:00 p.m. to Friday at 8:30 a.m.;
  - the respondent declared his income to be \$98,953; and
  - the respondent would pay a lump sum of \$40,000 for all past arrears of child support, and all future child support.
- [12] The respondent's declared income for 2010 was \$98,953, and this was the amount upon which the lump sum payment of \$40,000 for child support was based in the Agreement.

- [13] The respondent remarried in October 2012. His new wife resided in England. Thereafter, he traveled regularly to that country to spend time with her. They have a daughter born March 10, 2014. The respondent's wife then moved to live with his family in India where she and their daughter wait for her immigration to Canada to be finalized, the daughter having Canadian citizenship. The respondent estimates this should occur in the next few months.
- [14] Since his remarriage, the respondent has been either in England or India to be with his new family for extended periods of time being three weeks to a month at a time, the most recent absence being from late November 2014 to early January 2015. During these times, the children resided with the claimant.
- [15] The parties agree that, when he is in Canada, the respondent has access to the children in accordance with the Agreement.
- [16] In May 2013, the claimant commenced proceedings in the Provincial Court of British Columbia relating to child support issues but that action was not proceeded with. She commenced this action in September 2013.
- [17] At some point in 2013, the respondent incorporated his sole proprietorship, being Goodstar Building Maintenance Ltd. (the "Company").
- [18] On a without prejudice basis, the respondent consented to an order in March 2014 (the "Consent Order") that he pay child support of \$2,266 per month for the four children. This amount was also based on Guidelines income of \$98,953 being his 2010 declared income upon which the Agreement lump sum support had been based. At that time, the respondent had not yet provided a financial statement. A judicial case conference was held on April 20, 2014. I am advised that nothing of substance occurred at that time since the respondent had still not provided a financial statement.
- [19] A week after the judicial case conference, the respondent filed and served a financial statement dated April 28, 2014 ("Financial Statement #1"). Attached to Financial Statement #1 were various Revenue Canada documents including his 2011 income tax return which indicated a line 150 income of \$225,000.
- [20] The respondent did not voluntarily make payments pursuant to the Consent Order. It was only when the claimant involved the Family Maintenance Enforcement Program that the respondent commenced making regular child support payments.
- [21] In July 2014, a views of the child report was prepared by Dr. Susan Goldsmith with respect to A.R. who was then 12 years of age. A.R.'s views were that she did not wish the current access/parenting schedule to change.
- [22] This application was filed on January 28, 2015. On April 24, 2015, a response was filed together with the respondent's updated financial statement ("Financial Statement #2"). The Company's financial statements for the year end December 2014 were included.

[23] As of the time of the hearing of this application, the respondent had not provided any evidence of his 2015 income.

[24] From the respondent's financial statements, his declared and Guidelines income is as follows :

Year

Gross Business Income

Net Business Income

Declared Income

Child Support Guidelines as submitted by claimant

Monthly/Annual

2010

\$ 98,953

\$ 96,790

\$ 96,790

\$2,208/\$26,696

2011

\$966,884

\$225,083

\$172, 866

\$4,589/\$55,068

2012

\$857,724

\$149,677

\$ 107,371

\$3,232/\$38,784

2013

\$861,427

\$ 108,966

\$2,463/\$29,556

2014

\$786,653

\$ 87,383

\$2,032/\$24,384

### III: THE LEGAL FRAMEWORK

[25] This application entails a consideration of the following sections of the Guidelines:

- s. 2(3) - "most current information to be used";
- s. 9 - shared custody;
- s. 10 - undue hardship;
- s. 16 - calculation of annual income;
- s. 17 - pattern of income;
- s. 18 - where spouse is shareholder, director, or officer of a corporation;
- s. 19 - imputing income;
- s. 21 - financial disclosure;

and sections 147-152 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"), being the child support provisions.

[26] In light of the circumstances of this case, the following well-known principles established by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37, should also be considered:

- (a) no child support analysis should ever lose sight of the fact that support is the right of the child: paras. 60, 104, 158;
- (b) "[i]n most circumstances agreements reached by the parents should be given considerable weight. In doing so, courts should recognize that these agreements were likely considered holistically by the parents, such that a smaller amount of child support may be explained by a larger amount of spousal support for the custodial parent. Therefore, it is often unwise for courts to disrupt the equilibrium achieved by parents. However, as is the case with court orders, where circumstances have changed (or were never as they first appeared), and the actual support obligations of the payor parent have not been met, courts may order a retroactive award so long as the applicable statutory regime permits it": para. 78;
- (c) "a payor parent who adheres to a separation agreement that has not been endorsed by a court should not have the same expectation that (s)he is fulfilling his/her legal obligations as does a payor parent acting pursuant to a court order": para. 77;

- (d) "[i]t will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed": para. 95;
- (e) retroactive awards "need not be seen as exceptional. It cannot only be exceptional that children are returned the support they were rightly due. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself. A retroactive award can always be avoided by appropriate action at the time the obligation to pay the increased amounts of support first arose": para. 97;
- (f) "it is entirely conceivable that retroactive support could be ordered where a payor parent engages in no blameworthy conduct." In fact, retroactive support has been ordered where an interim support award was based on incorrect financial information, even though the initial underestimate was honestly made. "At all times, a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix": para. 99;
- (g) "[d]elay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application": para. 101;
- (h) "[a] payor parent who informs the recipient parent of income increases in a timely manner, and who does not pressure or intimidate him/her, will have gone a long way towards ensuring that any subsequent delay is characterized as unreasonable [A] recipient parent who accepts child support payments without raising any problem invites the payor parent to feel that his/her obligations have been met": para. 102;
- (i) "unreasonable delay by the recipient parent is merely a factor to consider in deciding whether a court should exercise its discretion in ordering a retroactive award. This factor gives judges the opportunity to examine the balance between the payor parent's interest in certainty and fairness to his/her children, and to determine the most appropriate course of action on the facts": para. 104;
- (j) courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. They should take an expansive view of what constitutes blameworthy conduct which is anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support: para. 106;

- (k) "[n]o level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct": para. 107;
- (l) "[n]ot disclosing a material change in circumstances - including an increase in income that one would expect to alter the amount of child support payable - is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments": para. 124;
- (m) "[i]n this context, a court could compare how much the payor parent should have been paying and how much (s)he actually did pay; generally, the closer the two amounts, the more reasonable the payor parent's belief that his/her obligations were being met. Equally, where applicable, a court should consider the previous court order or agreement that the payor parent was following": para. 108;
- (n) "courts should consider the present circumstances of the child - as well as the past circumstances of the child - in deciding whether [a retroactive] award is justified": para. 110;
- (o) "the quantum of retroactive awards is usually based on past income rather than present income; in other words, unlike prospective awards, the calculation of retroactive awards is not intrinsically linked to what the payor parent can currently afford": para. 115;
- (p) "payor parents may have new families, along with new family obligations to meet. On this point, courts should recognize that hardship considerations in this context are not limited to the payor parent: it is difficult to justify a retroactive award on the basis of a "children first" policy where it would cause hardship for the payor parent's other children [R]etroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not. Courts should be attentive to this fact": para. 115;
- (q) courts ordering a retroactive award must ensure that the quantum of the award fits the circumstances. Blind adherence to the amounts set out in the applicable tables is not required, nor is it recommended: para. 128; and
- (r) the general rule insofar as the date of retroactivity is concerned is that of effective notice: para. 118.

#### IV: THE PARTIES' POSITIONS

**A: The Claimant**

- [27] The claimant's position is that the respondent has failed to provide full disclosure of his financial situation and/or explain what appear to be material discrepancies. I will refer to certain of these alleged deficiencies below.
- [28] She also argues that the respondent has not properly explained the discrepancies in his income from 2011 onwards and that an application of sections 18 and 19 of the Guidelines should result in a greater income being imputed to the respondent for child support purposes.
- [29] She also says that, in any event, the respondent's lengthy absences from British Columbia after his remarriage have likely resulted in a reduction of his income. The respondent could and should have been earning more had he properly attended to Good Star and the Company's business affairs in British Columbia.
- [30] Accordingly, the claimant requests that the respondent's income be imputed at \$247,000 for 2011 and at \$172,000 for 2012. This includes "add backs" for 50% of vehicle and telephone expenses and 100% of the capital cost allowance (CCA) deduction for certain business expenses which the claimant submits were really personal in nature. These add backs amount to approximately \$22,000 for each of those years, that is a total of \$44,000. The claimant argues that the respondent's income should be imputed at \$150,000 for each of 2013 and 2014.

**B: The Respondent**

- [31] As I have noted, the respondent accepts that his obligation to pay child support is not limited to the lump sum amount of \$40,000 which he paid pursuant to the Agreement.
- [32] His position is that the effective date for retroactivity is May 2013 when the claimant filed the Agreement for enforcement purposes in the provincial court.
- [33] The respondent submits that, according to the Agreement, there was a shared parenting plan in place from January to October 2012 when he remarried. He accepts that, as a result of his subsequent absences from British Columbia, there was no shared parenting until the end of December 2014.
- [34] Insofar as his income is concerned, he submits that there has been proper financial disclosure and that there should only be modest "add backs" for a portion of business expenses that had a personal benefit. He disputes the 100% CCA add back and points to the documentation which has been disclosed to the effect that there is only one vehicle and the CCA was primarily related to equipment used in the janitorial business.
- [35] The respondent accepts that his income for 2011 should be imputed at \$225,000, but says this amount was unusually high in that he had to borrow a substantial amount to make the payments to the claimant required at the time pursuant to the Agreement.

- [36] From May 2013 to April 2014, being the date of the Consent Order, he submits that his income for support purposes should be that indicated at line 150 of his income tax returns for those years. He says that from April 2014 until April 2015 there are no arrears since he has made the payments required by the Consent Order.
- [37] From January 2015 onwards, he says there has been shared parenting which will continue prospectively since he anticipates his wife and daughter will soon arrive in British Columbia. Therefore, his support obligations should be pursuant to the Guidelines on a shared parenting basis.

## V: DISCUSSION

- [38] The court has the authority pursuant to s. 148(3) of the FLA to set aside or replace all or part of an agreement respecting child support: see *Young v. Young*, 2013 BCSC 1574 at paras. 12-13.
- [39] Underlying the respondent's position is that there was a shared parenting plan in effect during those time frames when he was in British Columbia.
- [40] He submits that the children were then residing with him three nights a week which satisfies the 40% requirement of section 9 of the Guidelines.
- [41] The claimant submits that the issue of shared parenting was first raised by the respondent when this application proceeded on May 5, 2015. She points to the fact that her application was filed and served in late January 2015 and there is no mention of a shared parenting arrangement in the response filed to her application on April 24, 2015.
- [42] The following principles can be taken from certain authorities which have considered this issue including *Green v. Green*, 2000 BCCA 310, *Berry v. Hart*, 2003 BCCA 659, *Mehling v. Mehling*, 2008 MBCA 66, and *Maultsaid v. Blair*, 2009 BCCA 102:
- (a) the assessment is not intended to be a process of meticulous mathematical accounting;
  - (b) access orders and, potentially, access agreements between the parties, are strong indicators of what the actual access percentage is for the purposes of s. 9 of the Guidelines regardless of the de facto access being exercised by the parties;
  - (c) conversely, the lack of specific "right of access" orders requires a court to adopt a more nuanced contextual analysis of physical custody as per the s. 9 considerations;
  - (d) the court may properly take into account whether access or physical custody has, in fact, been exercised in accordance with a governing custody or guardianship order or agreement;
  - (e) the court may properly take into account future variables and expectations for access or physical custody in determining the 40% threshold; and

- (f) overall, the discretionary findings of fact by the judge should be tailored to the circumstances of the family involved.
- [43] It is for the respondent to establish the existence of a shared parenting arrangement.
- [44] There are different ways in which the 40% issue can be viewed. One is on a "number of overnight visits" basis which the respondent suggests is appropriate. Another would be on an hours per two week basis per the Agreement. This analysis would result in the children being with their father less than 40% of the time and I note that the Agreement provides that the children will ordinarily reside with the claimant. There is also the claimant's evidence that she is the parent who is contacted if there is an emergency at school.
- [45] In any event, the process is not one of a precise mathematical accounting of time.
- [46] The respondent has also not provided any evidence to substantiate that his expenses for the children - be it for accommodation or otherwise - have been affected by what he now asserts is a shared parenting arrangement.
- [47] When I consider the particular circumstances of this case, I conclude the respondent has failed to establish there is a shared parenting arrangement in place such that the child support issues should be decided within the context of section 9 of the Guidelines.
- [48] If I were to impute the respondent's income in the amounts submitted by the claimant in paragraph 30 above, the amount of arrears would be \$169,045 from which would be deducted the \$40,000 (paid pursuant to the Agreement) and \$29,458 (paid pursuant to the Consent Order). This would leave a gross balance owing of \$99,587 as of April 30, 2015.
- [49] I will now turn to what I consider to be certain of the key issues on this application.
- [50] In my view, there has been a systematic pattern of an ongoing lack of candor and financial disclosure by the respondent from the date of the Agreement onwards.
- [51] It is not disputed that the lump sum child support amount of \$40,000 in the Agreement was based on the respondent's 2010 taxable income of approximately \$100,000. In fact, in 2011, the respondent's line 150 income was approximately \$225,000. When the respondent signed the Agreement in late November 2011, he must have known that his income for that year was going to be well in excess of \$100,000.
- [52] The respondent must also have known what his line 150 income was for 2011 to 2013 inclusive when he agreed to the Consent Order in April 2014. And yet it was not until Financial Statement #1 was provided that the claimant first became aware of what the respondent's declared line 150 income was for 2011 and 2012, being \$225,000 and \$150,000.
- [53] It was not until a year later in April 2015, when Financial Statement #2 was provided, that the claimant became aware of the respondent's declared income for 2013 and 2014 and the fact the Company had been incorporated in 2013.

[54] There has also been insufficient financial disclosure or explanations provided to date, which include:

- T4s have not been provided. Furthermore, in 2014 the Company declared management wages of \$67,000 and yet the respondent declared employment income of \$80,000. There is no explanation for the extra income;
- the respondent has also not provided disclosure of wages, salary, or other payments made to persons with whom the Company does not deal at arms' length, as required by s. 21(1)(f) of the Guidelines; and
- he has also failed to disclose the particulars of subcontracts entered into by the Company. See *Volken v. Volken*, 2001 BCSC 970.

[55] One of the consequences of this non-disclosure or inadequate disclosure is that the claimant and the court are not in a position to properly consider whether the income which the respondent says he has received "fairly reflect[s] all the money available for the payment of child support" in accordance with s. 18 of the Guidelines. See *Baum v. Baum* (1999), [1999] B.C.J. No. 3025 at paras. 27-28, 182 D.L.R. (4th) 715 (S.C.). The respondent bears the consequences of this inadequate and, at times, confusing financial disclosure. It is not the court's role to "ferret out" the necessary information: *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-52.

[56] The respondent says that the fact he has financial responsibilities to his new family should be taken into account. That is one of the factors to which I referred above. However, another is that no level of blameworthy behaviour by payor parents should be encouraged and a payor parent who knowingly avoids or diminishes his support obligation to his children should not be allowed to profit from such conduct.

[57] I also do not accept the respondent's submission that the effective date of the calculation of arrears should be May 2013 when the provincial court proceedings were commenced. That is because failing to disclose a material change in circumstances, including an increase in income, that one would expect to alter the amount of child support payable is itself blameworthy conduct.

[58] As I noted in paragraph 26(l) above, the presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. The respondent cannot use his informational advantage to justify his deficient child support payments. In that regard, I conclude that his blameworthy conduct commenced at the time the Agreement was entered into. The respondent has only himself to blame if he now has a significant amount to pay in arrears of support. He could have avoided the situation in which he now finds himself had he been candid with the claimant over the years as to his income and paid the appropriate amounts in support during that time frame.

[59] In reaching my conclusion as to the appropriate amount of arrears, I have also taken the following into account:

- the respondent's explanation as to his unusually high income for 2011, with respect, makes no sense. There is no reason why borrowing to pay his obligations arising from the Agreement would be treated as income to his proprietorship. In addition, the statement of business or professional activities which forms part of his 2011 income tax return shows \$1.083 million for gross sales or commissions;
- when the Company was incorporated, the respondent continued to operate its business from his home but started charging it rent. This resulted in a \$12,900 expense for the Company in 2013 and \$18,000 in 2014. The net rental, which formed part of his personal income for those years, was considerably less than that, an obvious financial benefit to him;
- the respondent's income from employment in 2013 was \$40,000 and yet the Company's total revenue was approximately \$860,000;
- he submits that his employment income decreased in 2011 to \$80,000 "because I lost a very valuable subcontract because I was underbid in a tender process" and yet the gross business income for that year of \$967,000 was \$100,000 more than the previous year;
- he has failed to provide a satisfactory explanation as to why his income for support purposes should have been significantly reduced when compared to the gross sales of the proprietorship/Company at relevant times;
- the respondent has failed to provide current financial information;
- his lengthy absences from British Columbia to be with his new family likely impacted his income as of October 2012;
- incorporation did not change the nature of the income earned or who earned it. There should be an "add back" for personal expenses paid by the proprietorship/Company; and
- on the one hand, the respondent submits that the claimant has not established that the children's lifestyle has been affected by his failure to pay the appropriate amount of support, and yet he says that it is his intention to seek an equal parenting arrangement, in part due to the fact that he wants to see the children involved in more sports and activities.

[60] For the reasons I have outlined, I do not accept that the respondent's income for support purposes was as declared in his income tax returns for 2013 and 2014.

[61] I do, however, accept the respondent's argument that there should not be \$44,000 of "add backs" for 2011 and 2012. There is evidence from which I can conclude that the CCA deduction related to equipment used in Good Star's business. But the respondent has not provided the necessary documentation to substantiate the amounts claimed. He also concedes that a portion of his telephone and vehicle expenses had a personal use aspect to them.

- [62] The quantum of the award must be fair and fit the circumstances. When I apply the Guidelines and the principles to which I have referred to the circumstances I have described, I conclude that the amount of arrears as of April 30, 2015 should be fixed at \$75,000 which takes into account a significant reduction in the "add backs" of approximately \$44,000 sought by the claimant.
- [63] I also impute the respondent's income for child support purposes as of May 1, 2015 at \$130,000. The respondent has liberty to apply to vary this amount as of January 2016 on the condition that he provide the claimant with full disclosure as to his personal and the Company's financial circumstances 30 days prior to bringing any application.

#### VI: CONCLUSION

- [64] There will be judgment for the claimant for arrears in child support up to and including April 2015 in the amount of \$75,000.
- [65] The respondent's income is imputed at \$130,000 as of May 1, 2015.
- [66] The respondent is also to pay the claimant his proportionate share of section 7 expenses from the date of the Agreement to April 30, 2015 onwards. If the parties are unable to agree as to that amount, they have liberty to set that issue down for hearing before me. Section 7 expenses from May 1, 2015 onwards are based on the respondent having an imputed income of \$130,000.
- [67] The claimant has achieved substantial success and is entitled to her costs of the application at Scale B.

"Abrioux J."

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