

CANADA / JUDGMENT

SGW v. JDF

2023 BCSC 1851

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 1851 SGW v. JDF

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

SGW v. JDF,

2023 BCSC 1851

Date: 20231025

Docket: E15041

Registry: Campbell River

Between:

SGW

Claimant

And

JDF

Respondent

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Claimant:

A. Mujtabah

Counsel for the Respondent:

I. Won

Place and Date of Trial/Hearing:

Campbell River, B.C.

September 26-27 & 29, 2023

Place and Date of Judgment:

Campbell River, B.C.

October 25, 2023

Table of Contents

Issues.. 4

Background Facts.. 4

Imputation of Income.. 6

Factual Basis. 8

Discussion. 11

Parenting Schedule including Holidays.. 14

Access to Former Family Property.. 17

Divorce.. 17

Summary.. 17

Costs.. 18

[1] This family law claim came on for trial in Campbell River for three days in September 2023.

[2] In the period leading up to the trial, through hard work and compromise, the parties were able to settle the majority of the issues in the litigation. The areas of agreement were discussed on the first day of trial. I note that counsels' written submissions suggest that there may be some disagreement on those terms. I will let the parties sort out any confusion in that regard. I am not in a position to make findings on whether issues were settled. I can say, however, that based upon the oral submissions, I understood that there was agreement on issues that fall into the following broad categories:

- a) Division of assets, debts, and pension;
- b) Arrears of spousal and child support;
- c) Parenting decisions;
- d) Conduct orders.

[3] The only issues that were addressed in evidence and submissions were:

- a) Imputation of income to the claimant;
 - b) Parenting schedule, including holidays; and
 - c) Exclusive access to the former family home to November 30, 2023.
- [4] Because the last issue (access to the former family home) required an answer on a short turnaround, I gave oral reasons on that issue at the close of the trial. As a result, these reasons only address the first two issues: imputation of income and parenting schedule.
- [5] The parties also agree that they should be divorced. I deal with that order at the close of these reasons.
- [6] I have anonymized these reasons in the best interests of the child.

Issues

- [7] The issues for me to determine are:
- a) Is the claimant's current income properly found to be zero? If so, then at what point will it be reasonable for the claimant to become employed? Should an income be imputed to her, and if so, when and in what amount?
 - b) Should the respondent's parenting time be increased from the current two overnights out of an eight-day cycle? If so, then what should the schedule be? What should the holiday schedule be?

Background Facts

- [8] The claimant and the respondent are 43 and 44 years old respectively.
- [9] The respondent has two older children from a prior relationship. He pays child support in relation to those children.
- [10] The parties met in 2015 and began living in a common-law relationship in March 2016. At that time the claimant moved from the Lower Mainland to the mid-island area where the respondent was living. In June 2016 they purchased the family home together. As noted, the issue of the division of assets and debts has been resolved through settlement.
- [11] The parties were married on March 17, 2018. They have one child together, "V", born August 25, 2021.
- [12] At the beginning of the relationship, the respondent was employed as a truck driver, but was pursuing his goal of a career as a firefighter.
- [13] Upon arriving in the Campbell River area, the claimant cycled through three or four full-time jobs within a few months. She was then hired by the Vancouver Island Health Authority ("VIHA").

- [14] The claimant says that, starting in 2017 she was employed by VIHA on a casual basis. Her hours varied, but she was at the bottom of the seniority ladder. Over time, her work increased to almost full-time. She says that, during that time, in order for the respondent to pursue his goal of becoming a firefighter, she encouraged him to stop working (as a truck driver) in order to complete his university degree. Thus, in the spring of 2018, she was working full time and financially supporting the couple. The respondent accepts that premise, but says that the period of her supporting the couple was between September 2018 and January 2019. Nothing turns on this discrepancy.
- [15] The respondent was ultimately hired as a firefighter by Campbell River in early 2019. He continued in that employment at trial.
- [16] In mid-2019, the claimant suffered a repetitive strain injury due to her work at VIHA. That injury led to a claim against the Workers' Compensation Board (WCB). That claim is ongoing, although the injuries have resolved. The claim continues due to the fear of a repeat injury.
- [17] As a result of the 2019 work-related injury, and with the support of WCB, the claimant began a program of retraining as a medical lab assistant. She commenced that program in December 2020. By coincidence, that was the same month she learned that she was pregnant with V. The reasonable period of time to complete that course of study, and the claimant's future return to employment, are in issue. I discuss them in detail below.
- [18] Since he was hired as a fireman, the respondent has had a fixed work schedule. At present and for the foreseeable future, he works around an eight-day cycle. He works "four-days-on" and "four-days-off". His first two days-on are "day shift", and his second two days are "night shift". I return to the nature of the shiftwork when discussing the parenting schedule below.
- [19] The respondent's income is not in dispute. He is a firefighter for the Campbell River Fire Department. He earns approximately \$99,000 per year and pays union dues of approximately \$1,740. As noted, he also pays child support in relation to two children of a prior relationship as well as V. The total amount of his monthly child support (for three children) is \$2,348.
- [20] The parties separated on September 16, 2022. At first, the claimant left the family home and the respondent stayed in it with V. However, that situation reversed on October 3, 2022. The claimant and V moved into the former family home, and the respondent went to live with his parents. That was the situation as of the date of trial. However, the respondent has since purchased the claimant's interest in the family home, and she is scheduled to move out on November 30, 2023.

Imputation of Income

- [21] The authority to impute income to a former spouse derives from s. 26.1(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), which authorizes the Governor in Council to establish guidelines respecting orders for child support.

[22] The Federal Child Support Guidelines (SOR/97-175) provide:

Imputing Income - The Law

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;

[23] In addressing the issue of imputation of income, I am guided by the Court of Appeal's decision in *Watts v. Willie*, 2004 BCCA 600:

[16] In *Donovan v. Donovan* (2000), 190 D.L.R. (4th) 696, 2000 MBCA 80, Madam Justice Steel gave the judgment of the court and wrote at para. 21:

The following guidelines may be considered when determining whether to impute income. (See Dr. Julien D. Payne, *Imputing Income, "Determination of Income, Disclosure of Income," Child Support in Canada, Danrab Inc.*, August 3, 1999.)

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor" (*Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.)).
2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
4. Persistence in unremunerative employment may entitle the court to impute income.
5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[24] The analytical framework in imputation cases was described by Majawa J. in *R.T.C. v N.M.C.*, 2021 BCSC 2273:

[133] *Drygala v. Pauli* (2002), 61 O.R. (3d) 711, 219 D.L.R. (4th) 319 (O.N.C.A.) is the leading case in regard to the imputation of income under s. 19(1)(a) and stipulates three questions that the court must answer when deciding whether to impute income to a spouse:

1. Is the spouse intentionally under-employed or unemployed?
2. If so, is the intentional under-employment or unemployment required by virtue of the spouse's reasonable educational or health needs or the needs of a child of the marriage?
3. If the answer to question #2 is negative, what income is appropriately imputed in the circumstances?

[25] As discussed below, the claimant relies on the reasoning in *MacCarthy v. MacCarthy*, 2015 BCCA 496, for the proposition that the respondent bears the evidentiary burden. I accept that proposition. I also accept that I have broad discretion to impute income for the purposes of determining child and spousal support.

[26] I have held all of this guidance in my mind while addressing this issue.

Factual Basis

[27] The respondent's income is not in dispute. It is only the claimant's ability to earn income that is in dispute.

[28] The respondent seeks to impute an income to the claimant commencing on January 1, 2024. As noted above, the claimant is currently enrolled in a program to qualify as a medical lab assistant. The claimant submits that it would be reasonable for the court to find that she will finish the program, plus workshop and practicum, and obtain employment by September 2024.

[29] The evidence establishes that the medical lab assistant course is undertaken online through Thompson Rivers University ("TRU"). It consists of five separate courses, followed by a four-day workshop, and then a five-week practicum. Evidence was tendered from a TRU publication regarding the course. The university advises prospective students that they should expect to commit 15-20 hours per week toward their studies in order to complete the program in one year. The brochure further states:

The program is equivalent to 20-24 weeks of full-time study. You have a maximum of 30 weeks to complete each course and an overall maximum of two years to complete the entire program. However, you are encouraged to complete in under one year. Note that extensions are not granted

[30] Hence, TRU advertises to prospective students that the program will take:

- a) less than six months of full-time study;

- b) one year if studying at half-time;
- c) a maximum of two years.

[31] Although TRU literature states that extensions will not be granted, the claimant has obtained extensions.

[32] As of the date of trial, the claimant had completed three of the five courses, and she was enrolled in the fourth. Based upon her last extension, she is required (and therefore expects) to complete the fourth course by November 23, 2023.

[33] As noted, the claimant commenced the program in December 2020. Hence, she will have been in the course for three years to complete four courses. Her submission regarding a reasonable time for her to become employed is equivalent to 46 months of study.

[34] The claimant testified to the following reasons for delays in her completion of the program:

- a) She started the program the same month she learned she was pregnant. She then went on to have a difficult pregnancy which delayed her progress through the first eight months of the program.
- b) She then delivered V by caesarean-section operation, which required recovery time.
- c) V was a colicky and fussy baby.
- d) She testified that she has a learning disability, and some degree of Attention Deficit Hyperactivity Disorder. This condition, or these traits, are self-diagnosed. No expert evidence was adduced.
- e) There were illnesses, both her own and V's, including COVID and the flu.
- f) She was less able to study due to the downturn in her relationship with the respondent, leading up to their separation in September 2022. She alleges that he would start arguments with her when she was preparing for exams.
- g) Following the separation, her studying has been limited, in part, because she has V with her most days (i.e., parenting time).
- h) More recently, her time has been occupied with the stress and preparation for this trial.

[35] The claimant also notes the respondent's evidence (or admission) that the claimant is a hard worker and that she was trying her best in the course.

[36] Although the claimant says she hopes to obtain employment by September 2024, she says that she cannot guarantee that she will have full-time employment as of that date. She accepts that it would be reasonable to impute an income to her at that point in time. However, she says that she may only have part-time employment.

- [37] The respondent's primary position is that the claimant should already be employed as a medical lab assistant. He notes that it is a (maximum) two-year course of study. In the alternative, he submits that she should complete it sooner than she proposes. His alternative position is that the court should impute an income to her of \$35,000 per year commencing January 1, 2024. He also seeks a review of her income as of March 1, 2024. He submits that at an hourly wage of \$28.17 per hour, she could be earning \$56,000 per year.
- [38] The respondent's position is primarily based on his submission that the course can (or should) be completed in less than two years. He acknowledges that the claimant faced headwinds in the program. Despite those problems, he submits that she should be finished. He notes that, on the claimant's schedule, she would complete the course in just under four years.
- [39] The respondent's position is, in part, driven by financial necessity. His net bi-weekly paycheque is in the range of \$2,600. From that amount he pays \$1,082 in child support for his three children, plus a \$710 in mortgage. That leaves him with a small amount for spousal support and the expenses of daily living.

Discussion

- [40] As of the date of trial, the claimant has completed three of the five courses. She is in the middle of the 4th course. TRU requires her to complete the 4th course by November 23, 2023, and she expects to meet that deadline. That will leave her with the 5th course to complete, plus a 4-day workshop and a 5-week practicum.
- [41] As noted, the claimant expects to be employed as a medical lab assistant by September 2024.
- [42] I return to the reasoning in the R.T.C. case, the central issue relates to the "reasonable" educational needs of the claimant.
- [43] Having considered all of the reasons given by the claimant for the delays in her completion of the medical lab assistant course, I am unable to conclude that a reasonable completion and employment date is September 2024.
- [44] In my opinion, the claimant has not been as diligent as she could have been in pursuing her course of study.
- [45] I say that, in part, because in my opinion the claimant provided excuses for the delays in her schooling that were concocted for the purpose of trial. In addition to the impediments listed above, the claimant also testified that she would lose study time whenever V returned from the respondent's care. She testified that, on those days, V was fussy and would not go to bed on time. She suggested that this problem was created by V oversleeping while in the respondent's care. Hence, the claimant testified that she would lose study time because V was not going to bed.

- [46] If that allegation is true (which it may be), that would provide a possible reason for a child being fussy, and the claimant losing a couple of hours of study time, during one day over an eight-day cycle. I find it informative that the claimant's testimony ignored the fact that, during the preceding two-day period (wherein the respondent had V), the claimant would have had no child-care duties at all. I juxtapose that with TRU's literature indicating that a person can complete the program in one year if they commit 15-20 hours per week. It stands to reason that a person attempting to complete the course in two years would be required to commit eight-10 hours per week. Hence, the claimant should be able to complete those study hours over a two-day period.
- [47] Further, I am taking into consideration the fact that, since separation, the respondent has been seeking additional parenting time with V. The claimant's position has been, up to the date of trial, that she should have the majority of the parenting time. In my opinion, the claimant cannot take that position while at the same time arguing that her ability to study is impaired by caring for V.
- [48] As to the claimant's concern that she may not obtain full-time employment immediately upon graduation, I note that she is retraining under the auspices of WCB, her union, and VIHA. VIHA, as her employer, has a duty to accommodate the claimant in relation to her employment by providing a lighter occupation. The claimant has a liaison worker to assist in her placement. Hence, I infer that a position, both in the practicum and ultimately in employment, will be made available at VIHA without delay.
- [49] The claimant says that she is only guaranteed the amount of work (i.e., hours) that she had before the WCB claim. I cannot assess that evidence or the availability of work next year. However, on a related note, if I were considering a hypothetical job that the claimant might obtain in the future, I cannot ignore the fact that if she was earning minimum wage and working full-time hours, she would earn approximately \$36,000 per year. The average income for graduates of the medical lab assistant programs is \$46,000.
- [50] When the claimant completes the program, she will require the scheduling of a workshop and a practicum. Hence, whenever she completes the fifth course, she will require a few more weeks to be ready for the job market.
- [51] I accept, as the respondent does, that the claimant has faced obstacles in her pursuit of her studies. I further accept that her pregnancy and early care for V would have made studying more difficult. However, I do not accept the claimant's position is that she should be given 46 months to complete the program. In my opinion, that time-span is simply too long. The course is designed to be completed in one year.
- [52] Obviously, the claimant cannot change what has happened in the past. To the extent that unreasonable delays have already occurred there is no method to cure that problem. However, that does not mean that the respondent must bear the financial burden of those delays.

- [53] In my opinion, given the obligations on parents to provide for their children, the claimant should reasonably complete her current course of study, and be available for full-time employment, by April 1, 2024.
- [54] I noted above that the respondent submits that the claimant should be earning approximately \$56,000 per year. However, based upon the advertised hourly rate for starting positions with VIHA and private labs, an income of \$56,000 would require her to work 2,000 hours per year. The advertised jobs (and the TRU literature) estimate the earnings at \$46,000 per year, which equates to 1,600 hours. I find that the correct figure is \$46,000 per year.
- [55] I do not accept the claimant's submission that it may take time for her to achieve full-time employment. To the extent that VIHA, or another employer, only has part-time work available, the claimant is not entitled to simply accept what is offered. She owes an obligation to her daughter to earn sufficient income.
- [56] On the basis of all the evidence and submissions, I find that an income of \$46,000 should be imputed to the claimant commencing April 1, 2024, for the purpose of both spousal and child support.
- [57] I further order that, should she obtain employment before April 1, 2024, the claimant is obligated to disclose to the respondent the date upon which she becomes employed and the rate of her pay.
- [58] Either party is entitled to review the child and spousal support beginning January 1, 2025.

Parenting Schedule including Holidays

- [59] At present, the parties are following the interim parenting schedule ordered by Master Dick on August 8, 2023. The respondent has parenting time with V for two overnights out of an eight-day cycle. Hence, the claimant has her six nights out of eight.
- [60] The respondent seeks to increase his parenting time by adding:
- one further overnight, and
 - an additional "day" to the schedule.
- [61] As noted, his employment has him working on a 4-on, 4-off schedule. His "4-on shifts" start with two day-shifts followed by two night-shifts.
- [62] The respondent proposes a schedule as follows (based upon his eight-day schedule with "Day 1" being his first day off work, Day 5 being his first "day-shift", and Day 8 being his second "night-shift"):
- The respondent would have parenting time on Day 1 commencing at 2:00 pm and ending on Day 4 at 6:00 pm (three overnights).

- b) The claimant would have parenting time overnight on Day 4 through to 2:00 pm on Day 1 (five overnights) except:
- i. On Day 7 (when the respondent has worked 2 day-shifts and is about to start on night-shifts), the respondent would have parenting time from 8:00 am to 5:20 pm.
- [63] The respondent indicates that he will be responsible for drop-off and pick-up.
- [64] The claimant opposes the increase in parenting time on the basis that the respondent is "a mess" and "grumpy" when he finishes his two night-shifts. She submits that their daughter is very active and needs full-time attention. She says that the respondent is not able to provide sufficient care on the mornings after his night shifts. She also says that the respondent relies on his mother to provide care for V. On the basis of those submissions, her position at the start of trial was that the interim parenting order of Master Dick (which provided the current schedule) is in the child's best interests. That position softened to some extent during the course of trial.
- [65] In response to these submissions the respondent denies that night-shifts have a negative affect upon him. He says that, on most nights, he is able to get a good sleep on his overnight shifts. However, as with any such overnight job, there will be nights with substantial work. He also denies that his mother provides any substantial care for V.
- [66] I note that the claimant does not make any allegation that the respondent is an unfit parent. She admits that his current "2-days in 8-days" parenting time is appropriate. I also note that, although the spectre of family violence was raised at trial, accusations and denials came from both sides. I am unable to make any finding in that regard and certainly there was no violence that affected the child in any way.
- [67] In my opinion, the claimant has not articulated any actual reason to limit the respondent's parenting time to two days out of eight. In my opinion, it is simply her feeling that he will be tired and grumpy during the first day. In my opinion that is no basis at all. Further, as discussed below, the proposed schedule will address those nights when the respondent's work prevents him from sleeping.
- [68] I note that the claimant does take the reasonable position that the parties should be considered to have equal parenting time for the purposes of calculating child support and child tax benefits.
- [69] On the respondent's proposed schedule, V will spend five nights with the claimant and three with the respondent. As to "days spent" with each parent, if the Day 1 exchange occurs at 2:00 pm (and represents a day divided between the parents), then, in an eight-day cycle, each party gets approximately even parenting time.

[70] In addressing this issue, I am focussed on V's best interests. In my opinion, the schedule proposed by the respondent, with one small tweak, fulfills that objective. The respondent's proposed schedule provides that V's time will be divided in a manner that allows good parenting time for each party.

[71] The one tweak I would make with the respondent's suggested schedule is as follows:

On Day 1, the respondent's parenting time should commence at 5:00 pm (instead of 2:00 pm). I make this change to allow for the possibility of the respondent having a busy night on Day 8.

[72] Hence, I order that the following parenting schedule be instituted commencing November 1, 2023:

- a) Based upon the respondent's eight-day work schedule (with "Day 1" being his first day off work, Day 5 being his first "day-shift", and Day 8 being his second "night-shift"):
 - i. the respondent has parenting time on Day 1 commencing at 5:00 pm and ending on Day 4 at 6:00 pm, and
 - ii. the claimant will have parenting time overnight on Day 4 through to 5:00 pm on Day 1,
 - iii. except on Day 7 (when the respondent has worked two day-shifts and is about to start on night-shifts), the respondent will have parenting time from 8:00 am to 5:20 pm.

[73] Although my only focus is the best interests of the child, I further note that the increase in the respondent's parenting time should free up further studying time for the claimant in her course of study.

[74] Further, given that V is only two years old, and is not yet in pre-school (and is not tethered to any schedule), I order that each of the respondent and the claimant are entitled to take V on an eight-day vacation at any point in the year that does not overlap with a holiday. Unless otherwise agreed by the parties, the respondent is to provide the claimant with a minimum of 60 days' notice of the period during which he intends to exercise this eight-day vacation time. Conversely, the claimant will provide a minimum of 30 days' notice of the same. (The idea of these notice provisions being that neither party will seek to book vacation time at the same time as the other parent.)

[75] Because of V's young age, the other parent will have the opportunity to conduct at least two video-calls with V during the course of the eight-day vacation.

[76] Unless the parties reach another form of agreement regarding specific holidays:

- a) Parenting time for Easter and Thanksgiving should go to alternating parents in alternating years (i.e., neither parent gets both holidays in the same year). The parties are to arrange the time of exchange.

- b) In 2023, the claimant will have parenting time commencing Christmas Eve at 6:00 pm, and the respondent will have parenting time on Boxing Day commencing at 9:00 am (with alternating years thereafter).
- [77] In the relatively near future, the claimant will return to work. If she works in the hospital, then her hours may be irregular. In addition, V will begin pre-school and then kindergarten. I invite the parties to renegotiate this parenting schedule in a manner that continues the intent of this order, but recognizes the realities of parents' working schedules. Failing agreement on those issues, the parties are entitled to seek to vary (not review) this parenting schedule.

Access to Former Family Property

- [78] As noted, I addressed the access to the former family home in oral reasons at the close of trial. I will not repeat them here.

Divorce

- [79] The parties also seek a divorce, by consent. I grant that divorce.

Summary

- [80] On the basis of all the evidence and submissions, I make the following findings and orders:

- a) An income of \$46,000 should be imputed to the claimant commencing April 1, 2024.
- b) I order that the claimant disclose to the respondent, immediately upon the occurrence, the date upon which she becomes employed.
- c) I vary the interim parenting time arrangement on the following basis:
- i. Based upon the respondent's eight-day schedule (with "Day 1" being his first day off work, Day 5 being his first "day-shift", and Day 8 being his second "night-shift"):
- (1) the respondent has parenting time on Day 1 commencing at 5:00 pm and ending on Day 4 at 6:00 pm, and
- (2) the claimant will have parenting time overnight on Day 4 through to 5:00 pm on Day 1,
- (3) except on Day 7 (when the respondent has worked two day-shifts and is about to start on night-shifts), the respondent will have parenting time from 8:00 am to 5:20 pm.
- ii. Holidays and vacations will be addressed according to my reasons discussed above.

Costs

- [81] Although the respondent has been primarily successful at trial, I note that many of the issues in the litigation were resolved by agreement. In my opinion, each party should bear their own costs.

"A. Ross J."

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