
CANADA / JUDGMENT

Stevens v. Stevens

2012 BCSC 1698

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Supreme Court of British Columbia

DECIDED

15 November 2012

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2012 BCSC 1698 Stevens v. Stevens

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stevens v. Stevens,

2012 BCSC 1698

Date: 20121115

Docket: 14745

Registry: Fort St. John

Between:

Denise Lynn Stevens

Claimant

And

Darrel Allen Stevens

Respondent

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for Claimant:

J. M. Cudmore

Counsel for Respondent:

O. L. Wilson

Place and Date of Hearing:

New Westminster, B.C.

September 11, 2012

Place and Date of Judgment:

Fort St. John, B.C.

November 15, 2012

Introduction

- [1] The claimant seeks several orders relating to children of the marriage. The claims pertain to the parties' daughter Brandi, now 20 years of age and attending post-secondary education in Alberta, and their son, Dakota, who is now 18 years of age and attending high school. Only some of the relief sought in the notice of application was argued before me and other matters are to be left for determination by the trial judge.
- [2] The application for child support for Brandi was adjourned pending confirmation of certain facts including a recent finding that Brandi qualifies for funding available to Status Indians and confirmation of certain funds which have recently been sent to Brandi directly by the respondent for the purposes of her schooling.
- [3] An application for the respondent to pay retroactive special and extraordinary expenses under s. 7 of the Child Support Guidelines in proportion to the parties' incomes was also adjourned as was an application by the claimant for the respondent to provide his 2011 T1 General form, 2011 Notice of Assessment from the Canada Revenue Agency, corporate statements to March 31, 2012 and corporate financial statements to date, all by consent.
- [4] The parties were married in 1990 and separated on April 1, 2000. In the twelve years since the separation the children have, at various times, together lived with their father or their mother, and at other times one child has lived with each parent. Dakota has been living with his mother in Fort Nelson Creek since February 2009. The respondent has continued to live in Toad Creek, B.C., which is north of Fort St. John.
- [5] The matters that were argued before me were:
 - a) Imputation of income to the respondent under the Federal Child Support Guidelines (the "Guidelines") and a resulting determination of prospective child support for Dakota from October 1, 2012.
 - b) The liability of the respondent, if any, for retroactive child support for Dakota. Currently, the claimant is seeking retroactive child support from November 1, 2011 and any liability for child support prior to November 1, 2011 is for determination at trial. The date of November 1, 2011 is significant as it was the date that the respondent began to pay \$500 per month as child support for Dakota following a Judicial Case Conference. It was understood that the

payments of \$500 per month were offered by the respondent, consented to by both parties and were without prejudice to any subsequent child support application.

A. Imputation of Income to the Respondent

[6] This issue can be divided into two parts:

- a) What are the components of the respondent's income and the amounts from those sources for Guideline purposes?
- b) When imputing income, should the court consider the most recent income as evidenced by income tax filings or should the court consider and apply averaging of incomes over the last three years as contemplated in section 17 of the Guidelines?

Facts Relating to the Imputation of the Respondent's Income

- [7] The respondent is a one-half owner of a company, Toad River Lodge Ltd. ("the Lodge") which in turn owns a lodge operation located on the Alaska Highway north of Fort St. John, B.C. The respondent has one partner who owns the other one-half interest in the Lodge. The Lodge is located on the Alaska Highway and offers lodging, a restaurant, a general store, gasoline sales and recreational opportunities for its patrons. The respondent lives full time at the Lodge.
- [8] Unfortunately, as of the date of the hearing, the respondent's personal income tax return, the income tax return for the Lodge and current financial statements for the Lodge were not available. The respondent states that the income tax returns and the financial statements were not complete, that the information was in the hands of the accountants for the Lodge and the respondent and much of the delay has been due to the fiscal year end of the Lodge which is March 31 of each year. As a result, I have available to me the financial statements and income tax returns for the respondent for the years 2008 through to and including 2010 and for the Lodge for the last three years ending March 31, 2011.

Issue 1: What are the component sources of the respondent's income?

- [9] The first source of the respondent's income is a nominal annual salary, consistently averaging \$15,000 over the last three years.
- [10] Secondly, the respondent received a pension from the Workers' Compensation Board which amounted to \$5,069 in 2010. The benefits from this pension have increased very slowly over the last three years.
- [11] Thirdly, the respondent has received a net business income from the Lodge of \$7,200 for each of the years 2009 and 2010.

- [12] Fourthly, most of the respondent's living expenses are paid by the Lodge including lodging, automobile expenses, food, utilities, vacations and more. The claimant argues that these non-monetary benefits are to be assessed and included in the compilation of the respondent's income.
- [13] Finally, the claimant argues that the respondent must include in his income his share of the pre-income tax profits of the Lodge.
- [14] The first three components of the respondent's income, i.e., his annual salary from the Lodge, the pension received from the Workers Compensation Board and his net business income from the Lodge are not in dispute and total approximately \$27,200. The fourth and fifth potential sources of income are disputed by the respondent. It is on this basis that I must turn to a consideration of the law to determine whether, and to what extent, these sources are to be considered imputable income for the purpose of assessing child support.

The Respondent's Living Expenses Paid by the Lodge

- [15] Section 19(1) of the Guidelines provides a non-exhaustive list of circumstances in which the court may impute income: *Bouroque v. Gerlach*, 2006 BCCA 157, 267 D.L.R. (4th) 304. The circumstances listed in section 19 include instances where:
- (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;
 - ...
 - (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
 - ...
 - (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;
- [16] Several authorities have supported the addition of an imputed amount of benefits received by a payor from a corporation to the payor's Guidelines income, including:
- a. *Morgan v. Morgan*, 2000 BCSC 371, where the Court determined it was "appropriate to impute income to the respondent of the additional benefit of free housing and an automobile provided at no cost" where the respondent failed to provide income information as required by law. The Court imputed an additional \$36,000 to the respondent's income.

- b. Halani v. Jeraj, 2001 BCSC 1155, where the plaintiff received free room and board, the occasional use of a company vehicle and the occasional use of company credit cards for his personal use. Master Barber, after finding that the plaintiff was purposefully under employed, imputed a total income of \$40,000 which included declared income of \$11,599 with the difference between those amounts being an assessment of the value of company-paid personal benefits.
- c. Jenkins v. Jenkins, 2012 NSSC 117, where the Court stated at para 24:

... personal benefits paid on behalf of a shareholder, officer or director by a corporation will be considered in the calculation of income, often by adding that amount back into the pre-tax corporate income that thus becomes available as income for support purposes as noted in Hrenyk v. Berden 2011 SKQB 305.

- [17] At the hearing, the respondent did not deny that many of his personal expenses are paid for by the Lodge. The financial statement filed by the respondent on January 6, 2012 makes no reference to rent or mortgage payments or food costs other than \$50 per month for food outside the home. The respondent's financial statement reports his total personal expenses to be \$1,782.25 per month. This amount includes, inter alia, internet and telephone costs as utilities totalling \$140 per month, house repairs and maintenance totalling \$100 per month, and \$345 per month for expenses incurred for Dakota for school fees, gifts and entertainment.
- [18] I find that the respondent receives considerable benefits from the payment of living expenses by the Lodge, mainly as a result of his primary residence being at the Lodge. Pursuant to the discretion set out in sec.19(1), I find that the cost of benefits including lodging, food, utilities, vacations and other expenses which are for the personal benefit of the respondent but paid by the Lodge must be considered when imputing the respondent's Guidelines income.
- [19] The claimant suggests adding the sum of \$16,000 to the respondent's income on account of the abovementioned personal benefits. This amount appears to be a very conservative estimate of the benefits. In the circumstances, and considering the remote location of the Lodge and the difficulty in being able to assess the value of the lodging in particular, I am prepared to agree with counsel for the claimant and impute an additional \$16,000 to the respondent's income as a result of the personal benefits he receives by virtue of his employment or shareholder interest in the Lodge.

Pre-Income Tax Profits of the Lodge

- [20] According to the financial statements for the Lodge which were attached to the financial statement of the respondent filed January 6, 2012, the respondent's one-half share of the pre-tax profit of the Lodge, for the taxation years ended March 31, 2009 - 2011, were as follows:

2009 \$16,218.50

2010 \$55,132.50

2011 \$106,018.50

[21] Section 18(1) of the Guidelines provides:

Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of the child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include:

- (a) all or part of the pre-tax income of the corporation, that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

[22] The issue regarding imputing pre-tax profit of a corporation to the payor's income is whether the entire amount of pre-tax profit, or some portion of the same is to be imputed into the payor's income. The central question in that allocation is whether there is a need for some or all of the pre-tax profit to be retained in the company for legitimate corporate purposes.

[23] The Court of Appeal in *Hausman v. Klukas*, 2009 BCCA 32, discussed the onus of showing the need for the pre-tax profit to be retained in the company and at paragraph 51 set out the following test:

[51] While the purpose and application of s. 18 were outlined in *Kowalewich*, this Court has not heretofore established an onus test. Some post *Kowalewich* authorities from this province, however, have concluded that there is an "emerging presumption" that pre-tax corporate income will be assumed to be available to a payor unless evidence is led to the contrary. These authorities state that the onus in the circumstances is on the payor. As discussed in *Jeffery v. Motherwell*, 2006 BCSC 140, 36 R.F.L. (6th) 377, at para. 13:

Kowalewich has been applied on other occasions by judges of this court and is binding authority. One of those cases *Bartkowski v. Bartkowski* (2003), 37 R.F.L. (5th) 242 (B.C.S.C. [In Chambers]), albeit dealing with very different factual circumstances in that the payor contended that his line 150 income was inflated to take advantage of tax benefits, the court said this about the authorities post *Kowalewich*:

I am of the view that these cases reveal an emerging presumption that the corporation's pre-tax income will be assumed to be available to the shareholder payor for the payment of child support unless compelling evidence is led by the payor spouse to support the conclusion that re-investment is necessary to sustain the company as a viable enterprise. ... (para. 51)

The onus is on the payor to provide the necessary evidence that the corporation's pre-tax income is not available to the payor. The court should not have to ferret out the necessary information from inadequate or incomplete financial disclosure. While Bartkowski says the evidence of the payor must be compelling, I prefer to use the word clear when discussing the necessary evidence of business circumstances as the former word might be taken to suggest a higher standard of proof than is called for by Kowalewich.

[52] I respectfully agree with the above comments in *Jeffery v. Motherwell*.

[24] Following *Hausmann*, Justice Dickson of this Court, in *Purvis v. Purvis*, 2009 BCSC 1794, discussed the onus on the payor spouse and the presumption that pre-tax corporate income is available to the payor in the absence of evidence to the contrary:

[47] The Court is not entitled to speculate about the legitimate business needs of a corporation in the absence of supporting evidence. Where a corporation is owned and controlled by the payor spouse, there is a presumption that pre-tax corporate income will be available to a payor in the absence of evidence to the contrary. The onus is on the payor spouse to provide clear evidence that such income is not available in order to overcome the presumption and avoid imputation of pre-tax corporate income: *Hausmann*, supra. The Court should not have to ferret out the information required from inadequate or incomplete financial disclosure: *Jeffery v. Motherwell*, 2006 BCSC 140,

[48] A corporation's pre-tax income is the starting point for determining the amount to be attributed a payor's income. It should be noted that pre-tax income and retained earnings are not the same and must not be confused in an application under s. 18 of the Guidelines. As the Court stated in *Hausmann*, supra, retained earnings in a company's financial statement represent equity, not cash.

[25] There is very little evidence of business circumstances which would require retention of the pre-tax profit in the Lodge. In his affidavit made September 6, 2012, the Respondent, presumably aware of the need to produce evidence of the need for the pre-tax profit to remain in the Lodge, did not directly address the issue but did say:

27. Since 1998, I have been a half owner of Toad River Lodge Ltd. along with my business partner, Matthew Roy, who owns the other half. Toad River Lodge Ltd. operates a gas station, restaurant, hotel and towing business in Toad River, B.C.

28. I have worked long hours for the business during this time and I have received a modest salary from Toad River Lodge Ltd. of approximately \$15,000 per year. I have worked hard to grow the business but the earnings of Toad River Lodge Ltd. have varied quite a bit from year to year. The earnings of Toad River Lodge Ltd. have increased recently as Toad River is now connected to the electricity grid and we do not have to pay to generate our own electricity.

- [26] The respondent's reference to his partner may indirectly be a reference to the need to leave money in the company so as to maintain an equal investment in the Lodge as between the partners, however, the respondent's evidence did not go so far as to clearly establish that re-investment is necessary to sustain the company as a viable enterprise. Also, the reference to earnings growing of late due to having been connected to the electricity grid indicates the Lodge may have surplus funds which would not be needed for the operations of the Lodge.
- [27] Accordingly, I find that the respondent's share of the pre-tax profits should be added to the other four components of income for the purpose of imputing income under the Guidelines. What remains is for me to make a finding as to whether the pre-tax income to be imputed to the respondent is the most recent amount of pre-tax profit attributable to the respondent or whether there should be an averaging of the pre-tax income over the taxation years of 2009-2011.

Issue 2: The Quantum of Pre-Tax Income of the Lodge to Impute to the Respondent's Guidelines Income

- [28] Section 17(1) of the Guidelines deals with the pattern of income of the payor and states:

17.(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

- [29] As set out above, the pre-tax income attributable to the respondent has increased significantly over the last three years for which financial statements are currently available, ranging from \$16, 218.50 in 2009 to \$106,018.50 for the fiscal year ending March 31, 2011. With income varying widely over the past three years, although growing consistently in that time, it would normally be difficult to determine if the income will continue to climb or is more likely to fluctuate up and/or down. The only evidence before me regarding incomes post fiscal 2011 is that of the respondent who has stated that "earnings have increased recently as Toad River is now connected to the electricity grid and we do not have to pay to generate our own electricity."
- [30] Is the most current pre-tax income attributed to the respondent, i.e. \$106,018.50, or an average of the last three years, which I calculate to be \$59,123, or possibly some amount in between those figures, the fairest determination of pre-tax income to be imputed to the respondent?
- [31] On this issue, counsel for the claimant has referred me to the Court of Appeal decision in *Jakob v. Jakob*, 2010 BCCA 136. Madam Justice D. Smith, writing the unanimous decision of the Court stated, commencing at paragraph 46:

- [46] The calculation of income for the payment of support is based on a payor's capacity to pay; it is a payor's income or earning capacity that determines the amount of support he or she will be required pay. Actual income may not always reflect a payor's capacity to pay. Where income has fluctuated in previous years, in the sense that it has increased and decreased over a fixed period of time, and it is anticipated that it will continue to fluctuate in that manner, it may be appropriate to take an average of fluctuating income for a fixed number of years to calculate a payor's income or earning capacity.
- [47] Those were not the respondent's circumstances. Between 2005 and 2008, his income had steadily increased from \$15,276 in 2005, to \$22,454 in 2006, to \$35,333 in 2007. Based on the new evidence, his actual income at the time of the application was about \$35,000, or at least three times higher than his 2005 income. Therefore, his capacity to pay spousal support was materially greater than the \$23,029 found by the chambers judge.
- [48] ... In my view, the chambers judge erred in law by calculating the respondent's income based on an average of his previous three years' annual income, when his income was increasing over that period of time. Given the steady increase in the appellant's income, his 2007 income (being the last year of the three-year period) more closely reflected his actual income or income capacity. In my view, based on the new evidence, the chambers judge also erred in fact in finding the respondent's income for the payment of spousal support was \$23,029, when his actual income was \$35,000.
- [32] In this case, there has been a significant and steady increase in income over the last three fiscal years for which financial statements have been provided. As well, the respondent's evidence of a reason as to why profits have increased in recent years, that is, access to the B.C. Hydro grid reducing costs, leads me to believe that profits will remain, at least for the year ending March 31, 2012 and likely thereafter, in the range of the profits for the year ending March 31, 2011. In these circumstances and considering the words of Madam Justice D. Smith in Jakob, I impute the pre-tax income of the respondent from the Lodge to for Guideline purposes to be \$110,000. In light of my earlier finding regarding the personal benefits that the respondent receives from the Lodge, that amount of imputed income should be subtracted from the \$110,000 income from the Lodge. Accordingly, the imputed income pursuant to 18(1)(a) is \$94,000 (\$110,000 - \$16,000).
- [33] The total imputed income of the respondent is as follows:
- a) Salary from the Lodge
\$15,000
 - b) WCB pension
5,069
 - c) Net business income from Lodge

7,200

d) Living expenses paid by Lodge

16,000

e) Pre-tax income from Lodge

94,000

Total income

\$137,269

[34] The amount of child support payable to the claimant on account of Dakota based on the respondent's income of \$ 137,269 is, according to my calculations under the Federal Child Support Guidelines, \$1,253 per month, commencing December 1, 2012.

B. Retroactive Child Support

[35] The claimant seeks child support for Dakota from November 1, 2011 which is the date when the respondent agreed at a Judicial Case Conference to commence payments for child support in an amount of \$500 per month on a without prejudice basis. Without evidence to the contrary, I find that the "without prejudice" basis relates to both liability and quantum.

[36] In *L.S. v. E.P.*, 1999 BCCA 393, 67 B.C.L.R. (3d) 254, Madam Justice Rowles discussed factors that a court should consider in exercising its discretion to award retroactive maintenance. At para. 66-69 inclusive, Madam Justice Rowles stated:

66 A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.

67 Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.

...

69 Before retroactive child maintenance is ordered, a court must be satisfied that the child was in need of support, and that the non-custodial parent had a corresponding ability to pay support over the period of time in question. If these factors cannot be established, then retroactive maintenance will generally be refused: see *Yiannitsopoulos v. Patseas* (1997), 28 R.F.L. 246 (B.C.C.A.); *Pritchett*, supra; and *Hoar v. Hoar* reflex, (1993), 45 R.F.L. (3d) 105 (Ont. C.A.). Where these factors are present, the discretion to make a retroactive child support order has been exercised in favour of making the order: see *T.(E.)*, supra; *MacNeal*, supra; and *Chrintz*, supra.

[37] The Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231 provides the leading authority on whether retroactive child support should be ordered; while that case arose in the context of child support under the Divorce Act, the factors outlined by the Court are nonetheless informative. At paragraphs 96-114 the Court outlined the following factors to be considered:

1. Reasonable Excuse for Why Support Was Not Sought Earlier;
2. Conduct of the Payor Parent;
3. Circumstances of the Child;
4. Hardship Occasioned by a Retroactive Award.

[38] In the case before me, the evidence is clear that the respondent's imputed income was largely comprised of a recent increase in the Lodge's pre-income tax profits. This accounting information within the knowledge of the respondent no later than January 6, 2012 when these financial statements were filed.

[39] As mentioned above, the respondent has been paying the agreed amount of \$500 per month since the Judicial Case Conference in November 2011. In addition, the respondent claims \$345 per month for Dakota's miscellaneous expenses; this amount was not disputed by the Claimant. Absent any disagreement, I find that the cumulative amount that the respondent has been paying since November 1, 2011 is \$845 per month. As part of my assessment as to whether a retroactive award should be made, it is useful to note the difference between the prospective award, \$1,253, and the paid amount of \$845; this difference is \$408 per month.

[40] I am of the view that the respondent has acted in good faith in paying the amount agreed by him at the Judicial Case Conference. I find no blameworthy conduct on his part. There is no evidence of a specific need for retroactive support beyond what has already been paid as I believe that Dakota's needs have largely been met through the cumulative contributions of his parents. Having said that, the above mentioned cases make it clear that child support is the right of the child. Furthermore, *Tedham v. Tedham*, 2003 BCCA 600, 20 B.C.L.R. (4th) 56, establishes that a lack of blameworthy conduct does not in itself preclude a retroactive order: para 61. However, in this case the respondent's under payment of child support has resulted in a situation where the claimant has had to bear more than her fair share of Dakota's support because the parties did not have all of the financial disclosure available to them in November of 2011.

- [41] I find that when all the circumstances are taken into account, the amount of retroactive support that is reasonable and appropriate in the circumstances is \$200 per month from January 1, 2012 to the date of this order. This amounts to a lump sum payment of \$2,200 payable to the Claimant by December 1, 2012.
- [42] The other relief claimed in the notice of application will be dealt with at the upcoming trial.
- [43] The claimant is entitled to her costs of this application on the family tariff at the average level of difficulty.

"Jenkins J."

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