
CANADA / JUDGMENT

T.A.J. v L.M.T.

2022 BCSC 1358

COURT

Supreme Court of British Columbia

DECIDED

10 August 2022

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2022 BCSC 1358 T.A.J. v L.M.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.A.J. v L.M.T.,

2022 BCSC 1358

Date: 20220810

Docket: E172516

Registry: Vancouver

Between:

T.A.J.

Claimant

And

L.M.T. also known as L.M.J.

Respondent

Before: The Honourable Justice Jenkins

Reasons for Judgment

The Claimant, on his own behalf:

T.A.J.

Counsel for the Respondent:

S.W. Wong

Written Submissions Received from the Respondent:

March 18, 2022

March 28, 2022

Written Submissions Received from the Claimant:

March 22, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 10, 2022

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- [1] These reasons for judgment relate to two orders sought by the respondent, L.M.T., in her Notice of Application filed on April 30, 2021 ("April 30, 2021 NOA"). During the corresponding oral submissions of the parties on May 31, 2021, it was determined, due to insufficient time, that the orders sought by the claimant would proceed and the orders sought by the respondent would be heard at a later date.
- [2] In my reasons for judgment issued on September 29, 2021 ("September 29, 2021 RFJ"), I granted orders on those applications sought by the claimant in his Notice of Application of December 3, 2020.
- [3] I turn to the applications of the respondent which are Orders 4 and 5 as set out in the April 30, 2021 NOA:
4. An Order that the Claimant's income for the purposes of child and spousal support be imputed based on earnings and benefits received from his business and not be based on his reported income to Canada Revenue Agency;
 5. An Order that the child support payable by the Claimant (payor) to the Respondent (recipient) set out in the parties' Separation Agreement dated February 22, 2017 be varied in accordance with the Federal Child Support Guidelines, retroactive to 2018.

- [4] The April 30, 2021 NOA did not include any factual basis to support the Orders 4 and 5 reproduced above. Order 4 sought an order imputing the income of the claimant for child and spousal support based upon the claimant's earnings from his business as opposed to his income reported to Canada Revenue Agency. There was no reference to a claim for retroactive child and spousal support.
- [5] I received subsequent written submissions on the applications of the respondent set out in paras. 4-5 of her April 30, 2021 NOA. Submissions were received from the respondent on March 18, 2022; and from the claimant, on March 22, 2022. A further reply submission was received from the respondent on March 28, 2022.
- [6] The claimant also seeks clarification of the September 29, 2021 RFJ.

FACTUAL BACKGROUND

- [7] The parties separated in September 2016, after a ten-year relationship which included an eight-year marriage.
- [8] There are two children of the marriage: L, currently 13 years old; and D, currently 7 years old.
- [9] The parties entered into a separation agreement ("the Agreement") on February 22, 2017 and filed it with the court on June 29, 2018.
- [10] The terms of the Agreement relevant to the applications before me can be summarized as follows:
- Paragraph 11 called for the claimant to pay spousal support of \$945 per month, until the respondent's remarriage or September 13, 2023.
 - Paragraph 12 called for the claimant to pay child support of \$1,580 per month, so long as the children remain children of the marriage, as defined by the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
 - Paragraph 13 dealt with reviews of spousal and child support in the cases of a material change of circumstances; or the claimant's salary exceeding \$120,000 per annum; or the respondent's income exceeding \$36,000 per annum. The same paragraph established that either party may ask for a review after December 15, 2020.
 - Paragraph 16 called for the claimant to pay all s. 7 special and extraordinary expenses until the respondent's income exceeds \$30,000 per annum, after which the parties would commence paying their proportionate share of those expenses, based upon their incomes.
- [11] Revisiting the history of this file, the Notice of Family Claim was issued on September 25, 2017, in which the claimant sought only a divorce. A final order of divorce was granted on January 22, 2018, prior to the filing of the Agreement.

- [12] At the hearing of May 31, 2021, the conditions for a review of child and spousal support were satisfied, i.e. whether the parties' incomes exceeded the amounts set out in para. 13 of the Agreement.

SUMMARY OF ORDERS FROM SEPTEMBER 29, 2021 RFJ

- [13] In my September 29, 2021 RFJ, I found at para. 16 that the respondent's 2020 income be adjusted to a taxable amount of \$45,000.

- [14] At para. 6 of the same reasons, I found the claimant's 2020 income to be \$119,670 as deposed to by the claimant at para. 6 of his Affidavit #3, in which he stated:

I own and operate [JSW] Inc., this is a contracting business, and we specialise in single family custom homes and renovation work. I also contract my services to commercial developers as a site superintendent. My income for 2020 is \$119,670.00, however, this is because I have drawn the maximum amount from the business. The business is not able to retain any profits, and I am drawing much more [than] what the business is earning. My actual income should be between \$90,000 and \$112,000, and the separation agreement correctly accounts for my income at \$112,000.

- [15] I also wrote: "[t]here is no information in the financial statements regarding whether any of [T.A.J.'s] personal expenses are paid by the company".

- [16] The two persons involved in the operations of JSW Inc. are the claimant, T.A.J., and his oldest son, who is an employee and has used of one of the vehicles owned by the business.

- [17] In my September 29, 2021 RFJ, I found the respondent's income, after considering tax free payments made to her amounted to \$45,000, and found the claimant's income to be \$119,670 as of 2020. Based upon those incomes, I found spousal support payable commencing 2020, in an amount of \$549.

- [18] As for s. 7 special and extraordinary payments for the children, I ordered the following, in my September 29, 2021 RFJ at para. 21:

Regarding s. 7 special and extraordinary expenses, the parties will pay their proportionate share of s. 7 expenses based upon an annual income for the claimant of \$119,470 and for the respondent of \$45,000 which results in [the] proportionate payment of s. 7 expenses of 63% by the claimant and 37% by the respondent, effective from January 1, 2020.

LAW RELATING TO IMPUTING THE CLAIMANT'S INCOME - FEDERAL CHILD SUPPORT GUIDELINES

- [19] At issue is the income of the claimant for the years 2018-2020, for the purposes of child support under the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. The respondent submits that since the claimant's income is derived from his wholly-owned company, which operates in the construction industry, in order to comply with the Guidelines, he is required to add to his income the amount of any net profit of the company,

plus any personal expenses paid by the company on his behalf. Specifically, the respondent submits amounts paid for meals and entertainment, office expenses including cell phone payments and legal fees, rent payments and vehicle expenses, should all be added to the claimant's income.

[20] Section 18 of the Guidelines states as follows:

Shareholder, director or officer

18. (1) 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 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, and of any 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.

[21] The following subsections of s. 19 of the Guidelines state as follows:

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:
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
 - (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

Reasonableness of expenses

- (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

[22] In the decision of *Quigg v. Quigg*, 2019 BCSC 1989, Justice Choi summarized the applicable Guidelines including ss. 18-19, at para. 113:

[113] I have also considered the pre-tax income that was available to Mr. Quigg through his various companies. While a party's income as reported on their tax return is the starting point for determining income under s. 16, Guidelines, when a spouse is a shareholder, director or officer of a corporation and derives income from that corporation ss. 18 and 19 of the Guidelines apply, which are discussed in *Younger v. Younger*, 2017 BCSC 363 at paras. 24-25, citing *D.N.L. v. C.N.S.*, 2013 BCSC 1211:

[24]

[16] In *Hausmann v. Klukas*, 2009 BCCA 32, leave to appeal to S.C.C. ref'd [2009] 398 N.R. 399 (note), the Court approved the following statement from *Jeffery v. Motherwell*, 2006 BCSC 140 at para. 13:

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*.

[17] As the Court of Appeal observed in *Kowalewich v. Kowalewich*, 2001 BCCA 450 at para. 41, the use of pre-tax corporate income as a basis for the determination of child support "does not strip a spouse of his available money", but rather, uses "available money as a measuring rod for the purpose of fixing annual income and thus the amount of child support."

[18] When determining income under s. 18 of the Guidelines, "[f]airness guides the assessment, taking into account the legitimate needs of the business balanced against the support obligations of the shareholder": *Chapman v. Summer*, 2010 BCCA 237 at para. 15.

[25] The point of the authorities is that the court is not bound to accept a spouse's declared income for income tax purposes as the income on which to determine support obligations, rather the task of the court is to determine what money is fairly available to support the children of the marriage.

[Emphasis added in Quigg.]

[23] Also, of assistance are the following paragraphs from *Ursel v. Ursel*, 2014 BCSC 1219, a decision of Justice Dorgan:

[26] As is apparent from s. 18(2), personal benefits paid by a corporation on behalf of a shareholder, officer, or director 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": *Jenkins v. Jenkins*, 2012 NSSC 117 at para. 24; *Stevens v. Stevens*, 2012 BCSC 1698 at para. 16. As stated in *K.S.F. v. S.M.F.*, 2011 BCSC 1563, "the owner spouse must state business income and allocate expenses honestly and transparently. Expenses must be reasonable and for legitimate business purposes, considering all the

circumstances" (para. 54). Even charitable donations by the corporation must be added back in to the pool of available income: *Boykiw v. Boykiw*, 2013 BCSC 1107.

- [27] For example, in *Hadjioannou v. Hadjioannou*, 2013 BCSC 43, the court found that the tax deductions from the corporate income included expenses which provided a personal benefit to the respondent. Telephone, internet and vehicle expenses, along with food, meals and entertainment were all included in that category. The court added these expenses back in, noting that it would "not be appropriate to deduct this type of ordinary living expense from the claimant's employment income" and that therefore it was not appropriate to permit its deduction when income flowed through a corporation. (See also *Reis v. Bucholtz*, 2008 BCSC 1156, *aff'd* 2010 BCCA 115.)
- [30] In *Riemersma v. Riemersma*, 2013 BCSC 474, Rogers J. emphasized that the court has a discretion, in assessing income, "to employ common sense when it analyzes financial information" (para. 39). That is what I intend to do here. I also follow the lead of Barrow J., in *C.J.R. v. S.P.J.*, 2009 BCSC 264, where the defendant dentist was the sole shareholder of his professional corporation. The plaintiff argued that \$42,000 in expenses - in particular, vehicle expenses, professional fees, travel, and telephone - were "essentially personal in nature." The court assessed the expenses and determined that a portion of these expenses should be added back, emphasizing the defendant's failure to adduce evidence on the point.

[Emphasis in original.]

CLAIMANT'S 2018 INCOME

- [24] Under s. 18(1)(a) of the Guidelines, if the taxpayer's annual income does not reflect all the money available to the spouse for the payment of child support, the claimant is to add to his income, all or part of the pre-tax income from the business.
- [25] The claimant's line 150 income tax for 2018, found his net income to be \$92,800. Assuming the sum of \$92,800 is accurate, the respondent submits the following items are to be added to the claimant's income.
- [26] The respondent submits the pre-tax income of the claimant's business, which should be added to his income for child support purposes, was \$41,360. In arriving at this number, the respondent relies on the claimant's first financial statement at p. 94 (mistakenly referred to as p. 93 by the respondent). The amount of \$41,360 in that financial statement is referred to in the corporate tax return at p. 94 as "Income eligible for the small business deduction from Schedule 7". The taxable income referred to on p. 93 is \$10,156.
- [27] I also note that the financial statements of the business, prepared by the accountants, indicated a loss in 2018 of \$56,128.
- [28] In his fourth affidavit at para. 3, the claimant deposed that he had invested \$102,000 into his business.

[29] The claimant also deposed at para. 4 of his fourth affidavit:

4. My HPO provider (National Home Warranty) requires \$250,000 equity to be a builder in this program. As I did not qualify, I was required to get my stepfather to sign as a guarantor so I could operate as a Licensed General Contractor in B.C. I subsequently had to pay NHW a \$15,000 retainer that is refundable 10 years after the past project my company completes.

[30] As I understand the relationship between the business and National Home Warranty, the business must maintain an equity of \$250,000 to qualify as a residential builder in B.C., which will require National Home Warranty to insure homes for construction defects for set periods of time. Therefore, the \$10,156 earned by the business in 2018, is to be retained in the company and would not be available to the claimant for the payment of child support. Only once the company has \$250,000 in equity, would the entire amount of pre-tax income of the business be added to the claimant's annual income, for child support purposes.

[31] The respondent submits the cost of meals and entertainment incurred by the business, amounting to \$4,558.79, should be added to the claimant's income as a personal expense, as opposed to a corporate expense. The claimant has not deposed as to which portion, if any, of those expenses were incurred while advancing the business. As there is no evidence supporting those expenses as proper business expenses, the above amount of \$4,558.79 is to be added to the claimant's income for 2018.

[32] The respondent submits the legal and professional fees incurred by the company, amounting to \$10,000 in 2018, relate to the cost of these family law proceedings, and there is no evidence those costs have been incurred in the course of the business. Accordingly, the sum of \$10,000 is to be added to the claimant's income for 2018.

[33] The respondent questions the cost of cell phones, which have been paid by the business and amount to \$3,597. The claimant submits that 98% of the cell phone use was for business purposes, however, there is no affidavit evidence to support that allegation. Such a high percentage of work-related phone use is unlikely, although I take judicial notice of the fact that a small contractor doing business in and around the Lower Mainland requires a cell phone to be in regular contact with owners, consultants, suppliers, subcontractors and others involved in the business. Accordingly, I find that \$2,400 of that expense was for business purposes and the balance of \$1,203 be added to the claimant's income for 2018.

[34] The respondent also submits the lease payments reported in the business financial statement of \$9,600, should be added to the claimant's income. In his fourth affidavit, the claimant has deposed to that expense in the financial statements of the business, which he claimed at \$800 per month out of the total rent he pays on his rental residence of \$3,481 per month. Allocation of \$800 per month (for the annual total of \$9,600) for the storage of tools, materials, a home office and more, is a reasonable business expense and is not to be added to the claimant's income.

- [35] The respondent questions the vehicle expenses of \$40,642 for the claimant and his son in the course of business and submits that the expense must be added to the claimant's income for 2018. The claimant has deposed in his fourth affidavit, that the business was working on a large project in Whistler, B.C., during 2018 and 2019, and commuted daily from the Lower Mainland to Whistler and back for business purposes, over a twelve-hour workday. As a result, I find it reasonable that approximately three-quarters of the costs for travel were for business purposes and only \$10,000 of the \$40,642 is to be added to the claimant's income for child support purposes.
- [36] Finally, referring to the claimant's income for 2018, the office expenses of \$20,188 are not clearly explained in the affidavits. As a result, I find it reasonable that \$10,000 of that amount be added to his personal income.
- [37] Concluding the task of imputing an income to the claimant for Guidelines purposes considering a starting point of \$92,800 the claimant's income for 2018 was:

2018 Assessed Income:

\$92,800

Meals and entertainment:

\$4,558

Legal fees:

\$10,000

Cell phones:

\$1,203

Vehicle expenses:

\$10,000

Office expenses:

\$10,000

Total:

\$128,561

- [38] The respondent disputes the accuracy of the sum of \$92,800 representing the claimant's income from his business, and submits that I should look at the total amount of funds deposited into the claimant's personal bank account by the business, which total \$135,531. Included in the sum of \$135,531, are cheques for reimbursable expenses amounting to \$13,531.

- [39] The personal bank statements of the claimant are attached at Exhibit B of his fourth affidavit. The respondent submits that the total amount of cheques deposited in the claimant's personal account from the business account in 2018 amounts to \$135,531.
- [40] Before leaving my analysis of the claimant's income for 2018, I must refer to the respondent's submissions, which suggested the claimant's income for 2018 was \$256,659, or alternatively, \$215,638. The difference between the calculations of the respondent and my calculations above, are that the respondent has added \$176,822, as deposits into the claimant's personal account or, alternatively, \$135,531. After a review of the submissions and the documents, I conclude that the deposits received by the claimant from the business include reimbursement for expenses of the business, which had been paid by the claimant. It is difficult, if not impossible, to do a detailed calculation of the almost 700 pages of documents included in the claimant's fourth affidavit, including bank statements and cancelled cheques of the business and the respondent; however, based upon the balance of probabilities, the total available income of the respondent is more likely closer to the sum of \$128,561.

CLAIMANT'S 2019 INCOME

- [41] The claimant's 2019 assessed income is to be adjusted with the same considerations I have found applicable to 2018.
- [42] The claimant's assessed income for 2019 was \$80,636.
- [43] Legal expenses of \$9,107 incurred by the claimant, for the family law dispute, are to be added to the personal income of the claimant.
- [44] Office expenses, including cell phone costs incurred by the claimant, amounted to \$12,435 in 2019, of which \$4,000 is to be added to the claimant's income, considering approximately two-thirds of the cell phone use and other expenses were appropriate business expenses.
- [45] Rent and lease payments of \$9,600 are not to be added to the claimant's income for the same reasons, as are applicable to the 2018 tax year.
- [46] Finally, the vehicle expenses incurred of \$25,396, are similar in proportion to those in 2018, as the business continued to work on a project in Whistler, therefore 75% of the costs are charged to the business and 25%, or \$6,349, is to be added to the claimant's 2019 income.
- [47] There was no reference in the materials to the cost of meals and entertainment for 2019.
- [48] Concluding the task of imputing an income to the claimant for Guidelines purposes considering a starting point of \$80,636 the claimant's income for 2019 was:

2019 Assessed Income:

\$80,636

Legal expenses:

\$9,107

Office expense - cell phones:

\$4,000

Vehicle expenses:

\$6,349

Total:

\$100,092

CHILD SUPPORT PAYABLE FOR 2018 AND 2019

[49] In light of my above findings for the claimant's 2018 and 2019 incomes, and turning to Order 5 sought by the respondent, the monthly child support payable for the two children is \$1,892 in 2018 and \$1,523 for 2019. Given the previous child support payments in the Agreement of \$1,580 per month, the claimant is to pay the respondent \$3,060 in retroactive child support.

[50] As neither party could be considered substantially successful, I make no order as to costs.

"Jenkins J."

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