
CANADA / JUDGMENT

Zubek v. Nizol

2011 BCSC 776

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Supreme Court of British Columbia

DECIDED

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2011 BCSC 776 Zubek v. Nizol

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zubek v. Nizol,

2011 BCSC 776

Date: 20110614

Docket: E20112

Registry: New Westminster

Between:

Elizabeth Mary Zubek

Claimant

And

Stanley Andrew Nizol

Respondent

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Appearing on her own behalf:

E. Zubek

Counsel for the Respondent:

R. Simunovic

Place and Date of Hearing:

New Westminster, B.C.

May 30, 2011

Place and Date of Judgment:

New Westminster, B.C.

June 14, 2011

I. Background

- [1] The respondent father, Mr. Nizol, applies to increase child support payable by the claimant mother, Dr. Zubek, retroactive to January 1, 2008.
- [2] The parties were married in 1995 and divorced by an order made June 20, 2005. There are two children of the marriage, Gillian (formerly called Erika), born in 1996, and Adam, born in 1997. Currently they are 15 and 13 years old, respectively.
- [3] On February 23, 2007, Mr. Justice Slade made an order providing for joint custody and joint guardianship of the children, with alternate week residency. Access times were set out in some detail. Slade J. determined that Dr. Zubek's Guidelines income was \$120,000 and Mr. Nizol's Guidelines income was \$25,000. Taking into account the shared custody regime, Slade J. ordered that Dr. Zubek pay Mr. Nizol child support in the amount of \$750 per month.
- [4] Dr. Zubek is a physician and Mr. Nizol is a bus driver.
- [5] The circumstances of the parties have changed since the order of February 23, 2007:
 - a) Gillian now resides exclusively with Mr. Nizol and has done so since May 1, 2008. She is estranged from her mother. Also, Adam now resides with Mr. Nizol 2/3 of the time and with Dr. Zubek 1/3 of the time has done so since March 16, 2010; and
 - b) Dr. Zubek's income has fluctuated somewhat, although the exact amount of her Guidelines income is in dispute.

II. Positions of the Parties

- [6] Dr. Zubek operates her medical practice through a corporation. Mr. Nizol argued that the court should "pierce the corporate veil", and not rely on the "line 150 income" reported by Dr. Zubek on her personal income tax return, because the corporation is solely owned and controlled by Dr. Zubek and certain details in the corporate financial records indicate that Dr. Zubek's effective earnings are greater than those she reports for personal income tax purposes. He argued, in particular, the following:
 - a) amounts indicated for "wages & salaries" and "employees' benefits" should be attributed entirely to Dr. Zubek as she must be the only employee of the corporation;

- b) "CPP expense" of about \$2,100 should be entirely attributed to Dr. Zubek as income;
 - c) charitable donations, in significant amounts, made by the corporation ought to be considered as income that is available to Dr. Zubek;
 - d) since the corporation's year end is June 30 of each year, half of the corporation's income from one corporate tax year should be added to half of the corporate income for the next tax year in order to arrive at an income figure for Dr. Zubek for one calendar year.
- [7] Adopting this approach, Mr. Nizol calculated that Dr. Zubek had an actual income ranging between \$135,000 and \$162,000 from 2008 to 2010 and, depending on the approach used -- that is, whether it reflected shared custody, split custody or custody of both children with Mr. Nizol -- the arrears of child support range from just under \$10,000 to approximately \$45,000.
- [8] Mr. Nizol argued that a variation of child support should be made retroactive to January 1, 2008, because within weeks of Slade J.'s order of February 23, 2007, his previous lawyer told him that an error had been made on the Guidelines amounts at the hearing, but he was told he had to wait one year from the date of the order to make an application to vary. Further, Mr. Nizol deposed that sometime prior to 2008 he wrote to the court registry asking that child support matters be put back before Slade J., but he was told that his request for review could be "put in the regular process". Mr. Nizol said that he did not follow up with the regular court process because he could not afford it.
- [9] Mr. Nizol subsequently retained counsel, who sent to Dr. Zubek's then counsel a letter dated June 11, 2010, informing him that he had been retained for the purpose of "reviewing child support", among other things, and requesting certain financial disclosure.
- [10] Dr. Zubek emphasized that she had fully disclosed the finances of her medical practice and therefore it was not necessary to make any assumptions about them. For example, it was not correct to assume that payroll amounts are entirely paid to her because she pays amounts to independent contractors to assist her in her practice. Similarly, the "employees' benefits" are expenses incurred in providing generous Christmas gifts to her staff, whom she shares with other physicians. She explained that she provides these generous gifts because she is of the view that the staff should be paid more but is fettered in doing so because of the sharing arrangement she has with the other physicians.
- [11] Dr. Zubek acknowledged significant charitable contributions made by her corporation (about \$15,000 for the year ended June 30, 2009, the last year for which an income statement is available), and said that some of these were made because she is a Christian and runs her corporation as a Christian organization. As part of her religious beliefs she adheres to the practice of tithing. Dr. Zubek referred to several biblical passages cited by her pastor which emphasized the importance of the practice, said that tithing is a necessary part of her beliefs, and argued that these amounts should not be considered when setting her income for Guidelines purposes.

- [12] In the 2009 corporate income statement there are donations to four Christian charities totalling \$7,800. There is a separate charitable contribution of \$7,329.95 for a Christian summer camp called Qwanoes Camp. Dr. Zubek explained that during her vacation she volunteers her time and medical expertise to Qwanoes Camp, and since she provides medical services to children and others at the camp during these times, she submits bills to, and is paid by, the Medical Services Plan. The total of these amounts is then donated by Dr. Zubek's corporation back to Qwanoes Camp.
- [13] Dr. Zubek said that there were a number of other circumstances to take into account, as follows:
- a) she feels that she had been the victim of parental alienation and that to make an adjustment to child support to reflect the current situation with the children -- a situation that does not accord with Slade J.'s order -- would both reward that negative behaviour and make it more difficult for her to address the custody and access issues that she wants to address. Dr. Zubek suggested that Mr. Nizol has influenced the children to live with him in order to argue for greater child support, and on that basis she maintained that the child support obligation should instead be based on the child residency arrangements set out in the order of Slade J.;
 - b) Dr. Zubek has remarried and is now responsible for a 17 year old child, who is expected to attend post-secondary education next year, and a 1 year old baby. Because of her duties associated with her young baby, she has additional child care expenses and is working somewhat less than she used to;
 - c) she and her husband are supporting his mother (i.e., her mother-in-law), who is undergoing treatments for cancer, and his father (i.e., her father-in-law), who has progressive dementia and resides in a seniors' complex;
 - d) she has the burden of paying a mortgage and two lines of credit, and as to the lines of credit, one is a consequence of Mr. Nizol's significant business losses and the other funds the seniors' housing for her in-laws; and
 - e) Mr. Nizol is underemployed insofar as he works only four hours each weekday as a school bus driver and claims he cannot get full-time work. Dr. Zubek's own inquiries suggest that full-time work with annual earnings of about \$50,000 is available from Coast Mountain Bus Company.
- [14] Dr. Zubek deposed that she referred the quantification of her annual income to her accountant, who in an email response (appended as an exhibit to her affidavit) indicated that Dr. Zubek's adjusted income for child support purposes was as follows:

Year

Amount

2005

\$116,338

2006

\$130,841

2007

\$106,489

2008

\$110,480

2009

\$107,869

[15] In his email the accountant indicated that the corporation is run more or less on a break-even basis and does not retain earnings.

[16] Dr. Zubek said that her current income is \$9,000 a month, before taxes, which is the amount of her draw. She has not yet done her tax returns for 2010 but expects that the results will be similar to those in the returns she filed in 2009.

[17] Dr. Zubek also said that Mr. Nizol had not paid his proportionate share of s.7 expenses, such that he owes her roughly of \$2,800 for these expenses.

III. Issues

[18] The following are the issues on this application:

- a) On what parenting arrangement should support be based?
- b) What is Dr. Zubek's income for child support purposes?
- c) What, if any, retroactive variation should be made?
- d) Should any reduction in child support be made to reflect Dr. Zubek's additional financial burdens?
- e) What should be done with section 7 expenses?

IV. Discussion

- (a) Parenting Arrangement

- [19] There is no dispute on the facts relating to the residence of the children. Gillian now resides exclusively with Mr. Nizol and has done so since May 1, 2008. Since March 16, 2010 Adam has resided with Mr. Nizol 2/3 of the time and with Dr. Zubek 1/3 of the time. The children initially resided with each parent in the manner prescribed by Slade J. in his order of February 23, 2007, but the situation changed, although without any consequential legal change by way of a court order.
- [20] I am unaware of any authority that allows the court to continue to base child support on court-ordered custody or residency where long-term, actual custody has changed from that set out in the order. Certainly no authority was cited by Dr. Zubek for that proposition. Accordingly, I conclude that a recipient parent is entitled to child support according to the actual physical custody of the children.
- [21] Counsel for Mr. Nizol spent some time dealing with various permutations of split and shared custody, situations which are dealt with in ss. 8 and 9, respectively, of the Guidelines. I find it unnecessary to deal with these submissions because, quite simply, this is not a split custody or shared custody case.
- [22] Split custody refers to a situation where each parent has custody of at least one child: s. 8 of the Guidelines. There is no split custody in this case. Shared custody is where one party exercises his or her right of access to, or has physical custody of, a child for at least 40% of the time over the year: s. 9. In the present case, one child (Adam) is shared. However, the 40% threshold for access or physical custody has not been met because Dr. Zubek has physical custody of Adam for only 33% of the time, and therefore s. 9 does not apply: *Contino v. Leonelli-Contino*, 2005 SCC 63 at para. 37, [2005] 3 S.C.R. 217.
- [23] Accordingly, the parenting arrangement for child support purposes is simply that of two children in the sole physical custody of the recipient, Mr. Nizol.
- (b) Dr. Zubek's Income
- [24] Dr. Zubek's line 150 income for the 2009 taxation year was \$114,658, as reflected in a Notice of Assessment from the Canada Revenue Agency. Dr. Zubek has not yet completed a 2010 income tax return, but she said that her income for 2010 will be similar. So-called "line 150 income" is the starting point (and, in practice, is often the ending point) for determination of income for child support purposes: s. 16 of the Guidelines.
- [25] Mr. Nizol argues that her income is more than that. Dr. Zubek argues it is less than that.
- [26] Mr. Nizol argues that an assumption should be made that the entire amount listed for "wages & salaries" (for 2009, the sum of \$131,500) in the medical corporation's income statement was paid to Dr. Zubek. I decline to make that assumption. It was open to Mr. Nizol to show facts, through the financial disclosure made or offered by Dr. Zubek, rather than urge the court to make assumptions.

- [27] I also decline to include the amounts shown to have been paid by the corporation for "employees' benefits" in view of Dr. Zubek's explanation and in the absence of evidence that establishes that these benefits enured to her benefit.
- [28] Finally, I see no basis to attribute the amount shown for "CPP expense" to Dr. Zubek's income. This amount has not been shown to be anything other than the employer's CPP payment obligation, the "employer" being Dr. Zubek's medical corporation.
- [29] The charitable donations that Dr. Zubek has caused to be made by her medical corporation are another matter. While Dr. Zubek's sense of charitable obligation is laudable, it does not change the fact that these donations are essentially voluntary and would otherwise be available to Dr. Zubek as income.
- [30] It must be remembered that the right to child support is the right of the child, and a parent cannot take steps to reduce apparent income so as to deprive his or her children of their full right to financial support. I accept that Dr. Zubek feels a moral obligation to support her church, but that moral obligation must yield to her legal obligation to support her children. To hold otherwise would invite great mischief.
- [31] On this issue I am supported in my view by the decision of Master Powers, as he then was, in *Wlodarczyk v. Wlodarczyk*, [1997] B.C.J. No. 70 (QL) (S.C.), where he held (at para. 18) that the payment of tithes is a discretionary expense and cannot take priority over a payor's obligation to his children. Cases from other Canadian jurisdictions are to the same effect: *Remillard v. Remillard* (1990), 24 R.F.L. (3d) 156 at p. 166 (Alta. Q.B.); *Hanslien v. Hanslien*, [1980] A.J. No. 254 (QL) at para. 59 (Q.B.); *Mikkelsen v. Mikkelsen* (1990), 23 R.F.L. (3d) 428 at p. 434 (Ont. H.C.J.); *Rutherford v. Rutherford*, [1988] O.J. No. 1713 (QL) (Dist. Ct.); and *Miller v. Miller*, 2002 NBQB 233 at para. 14, *aff'd* on another issue 2003 NBCA 37, 36 R.F.L. (5th) 386.
- [32] On the authority of s. 18 of the Guidelines I conclude that the 2009 charitable donations (totalling \$7,800) made by Dr. Zubek through her corporation ought to be considered as part of her personal income for the purposes of calculating her child support obligation.
- [33] The donation to Qwanoes Camp stands on a somewhat different footing. Dr. Zubek volunteers her time to the camp during her vacation and her medical corporation receives payments from MSP for her services, which she, in turn, donates to Qwanoes Camp. The time is volunteered both to assist the camp and to generate money for the donation. The money received is not part of the general income she receives from her regular medical practice. To attribute the donation amount as income received by Dr. Zubek for child support purposes might well have the effect of discouraging that volunteer work entirely.
- [34] In these circumstances I do not consider it appropriate to characterise the charitable amount paid to Qwanoes Camp as income received by Dr. Zubek for child support purposes.
- [35] Dr. Zubek's argument for a reduced income amount is based on her accountant's email. This raises an evidentiary problem insofar as the email is both hearsay and is said to be a draft of a letter, although no objection on either basis was made at the hearing. While there may be

a relaxed standard of evidence in family matters, at least at times (often as a practical necessity, where self-represented litigants are involved), where the evidence has a direct relationship to the final order being sought, and there is no element of necessity -- in the legal sense -- that might weigh in favour of receiving hearsay evidence, the usual evidentiary rules should apply.

[36] Here, there is a very direct relationship between the evidence (Dr. Zubek's income) and the order being sought (the child support amount). The evidence in question should therefore have come from the accountant himself.

[37] I have nonetheless examined the accountant's email to determine what approach should be taken. The accountant said the following:

I have started with total income for income tax purposes for the year and deducted carrying charges and employment expenses plus added back the non taxable one half of capital gains and deducted the dividend gross up.

[38] It would appear from this statement that the accountant used the approach set out in s. 16 of the Guidelines, that is, to start with line 150 income and to adjust that income in accordance with Schedule III of the Guidelines. In her own affidavit Dr. Zubek purports to say that this type of approach was taken by her accountant, but this merely compounds the evidentiary difficulties with this issue.

[39] I conclude that, to deal with this issue properly, there ought to have been an affidavit from the accountant that sets out his evidence on the issue. Details of the adjustments (that is, the actual figures) should also have been provided, together with a copy of Dr. Zubek's 2009 income tax return as only the Notice of Assessment was in evidence.

[40] I observe, however, that the effect of these adjustments on the amount of child support is not great. Without them, Dr. Zubek's 2009 income for child support purposes is \$122,458 (line 150 income of \$114,658 + charitable donations of \$7,800), for which the monthly child support obligation is \$1,727. With all claimed adjustments, her 2009 income is \$115,669 (adjusted income of \$107,869 + charitable donations of \$7,800), for which the monthly child support amount is \$1,644. The difference is \$83 per month. Accordingly, the parties may wish to attempt to resolve this relatively small difference between themselves.

[41] If the parties do not resolve this issue Dr. Zubek should, within 30 days of the date of these reasons, file an affidavit from her accountant as discussed above. If she fails to do so, her income for child support purposes will be set at \$122,458. If she does so and Mr. Nizol takes no issue with it, then her income for child support purposes will be set at \$115,669. If issue is taken, the parties should arrange for a further attendance before me for the purpose of making further submissions.

(c) Retroactive Date

- [42] The issue here is the commencement date for a varied child support obligation. Mr. Nizol argues that the variation should be retroactive to January 1, 2008, an argument that is not logical insofar as the change in circumstances relied upon (Gillian's change in residence) did not occur until May 1, 2008. The presumptive date for a retroactive variation to a child support order is the date of effective notice to the payor (which may be when the recipient "broaches the subject" about a proposed change to child support): *D.B.S. v. S.R.G.*, 2006 SCC 37 at paras. 124-125, [2006] 2 S.C.R. 231 ("D.B.S."). The date may be earlier if there is blameworthy conduct on the part of the payor, but no blameworthy conduct was alleged here.
- [43] Mr. Nizol maintains that notice was given in 2007; however, neither of the events relied upon involved any communication or notice to Dr. Zubek, much less a communication that indicated a variation was being sought due to a change of circumstances. The presumptive date for support variation is therefore June 11, 2010, the date of the letter from Mr. Nizol's counsel in which the subject was raised.
- [44] Dr. Zubek argues for an abatement of her child support obligation based on the financial burdens associated with her other children and in-laws. Since *D.B.S.* provides that hardship -- including hardship to a payor's other children -- is a factor to consider in deciding whether a retroactive award is appropriate, I will deal with both the hardship issue and the retroactivity issue in the next section.
- (d) Dr. Zubek's Additional Obligations
- [45] Responsibility for a second family does not relieve a parent of his or her legal obligation to support the first family: *Earle v. Earle*, 1999 BCSC 283 at para. 32, and *Virk v. Virk*, 2002 BCSC 1586 at para. 25 - both of which were decided in the context of reduction or cancellation of support arrears.
- [46] The child support amounts set by the Guidelines are presumptive and the discretion to depart from these amounts is very limited. Section 10 of the Guidelines gives the court a discretion to depart from the Guidelines amount if the court finds, for example, that the payor would otherwise suffer undue hardship. However, the authorities have established a high threshold for proof of undue hardship: payment of the Guidelines amount must be "'exceptional', 'excessive' or 'disproportionate'" in all of the circumstances: *Van Gool v. Van Gool* (1999), 64 B.C.L.R. (3d) 94 at para. 51 (C.A.), 44 R.F.L. (4th) 314 ("Van Gool").
- [47] In *Van Gool* the court said:
- [51] ... The onus is on the party applying under s. 10 to establish undue hardship; it will not be presumed simply because the applicant has the legal responsibility for another child or children and/or because the standard of living of the applicant's household is lower than that of the other spouse. The applicant must lead cogent evidence to establish why the table amount would cause undue hardship.

...

[53] ... Whether an applicant has legal obligations to children from prior or subsequent relationships, some evidence is needed to establish that this has resulted in "undue" hardship to the applicant, not simply hardship.

[48] As noted earlier, the Supreme Court of Canada in *D.B.S.* said that hardship is a factor to be taken into account when considering a retroactive support award. On this issue, Bastarache J., for the majority, said the following::

115 There are various reasons why retroactive awards could lead to hardship in circumstances where a prospective award would not. For instance, 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. As well, 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. In short, retroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not. Courts should be attentive to this fact.

116 I agree with Paperny J.A., who stated in *D.B.S.* [2005 ABCA 2, 7 R.F.L. (6th) 373] that courts should attempt to craft the retroactive award in a way that minimizes hardship (paras. 104 and 106). Statutory regimes may provide judges with the option of ordering the retroactive award as a lump sum, a series of periodic payments, or a combination of the two: see, e.g., s. 11 of the Guidelines. But I also recognize that it will not always be possible to avoid hardship. While hardship for the payor parent is much less of a concern where it is the product of his/her own blameworthy conduct, it remains a strong one where this is not the case.

[49] In this case Dr. Zubek did not lead sufficient evidence, let alone cogent evidence (as Van Gool requires), on which a finding of undue hardship, or even mere hardship, might be made. For example, nothing was said of her husband's contribution to the finances of the household, nor was there any evidence concerning the financial ability of her in-laws to pay for their care and housing. These are major gaps in Dr. Zubek's financial picture.

[50] Accordingly, I conclude that there is no basis to depart from the Guidelines amount for child support, and no basis to depart from the presumptive variation date, which is the date that notice was given. Child support shall therefore be varied effective June 15, 2010, and payable in an amount set in accordance with paragraphs 40 and 41 of these reasons. I have chosen the 15th as the start date because child support was payable on the 15th of each month under the February 23, 2007 order.

- [51] I grant leave to Dr. Zubek to make further submissions, should she wish to do so, as to the how the support arrears accrued from June 2010 to the present date should be retired, that is, whether they should be payable over time, as a lump sum, or a combination of both. Should Dr. Zubek not take steps within 30 days to bring this issue back before me, the support arrears shall be payable as a lump sum.
- (e) Special & Extraordinary (Section 7) Expenses
- [52] Dr. Zubek claims that Mr. Nizol has failed to pay his share of s. 7 expenses. Since the guiding principle for s. 7 expenses is that they are shared in proportion to the incomes of the parties, those incomes must be determined. Dr. Zubek alleges that Mr. Nizol is intentionally under-employed. If that is the case, then income may be imputed to him pursuant to s. 19 of the Guidelines.
- [53] In their respective affidavits both parties provided some evidence on Mr. Nizol's income-earning capacity, but I am unable to draw any conclusions from that evidence. This is an issue on which cross-examination is necessary.
- [54] I conclude that these two issues ought to be referred to the registrar for a report and recommendation to the court. Specifically, the registrar should report on the s. 7 expenses claimed by Dr. Zubek, whether Mr. Nizol is under-employed and, if so, what amount of income should be imputed to him. As with all registrars' hearings of this type, the parties should first arrange and attend a pre-hearing conference prior to setting the date for the substantive registrar's hearing.

V. Conclusion

- [55] Child support payable by Dr. Zubek to Mr. Nizol is varied effective June 15, 2010 and is payable on the 15th of each month in an amount that is set in accordance with paragraphs 40 and 41 of these reasons.
- [56] Dr. Zubek has leave to make further submissions as to the how the support arrears accrued from June 15, 2010, to the present date should be resolved. Should Dr. Zubek not take steps within 30 days to bring this issue back before me (though the actual hearing may take place after 30 days), the support arrears shall be payable as a lump sum.
- [57] The matter of s. 7 expenses is referred to the registrar for a report and recommendation, as set out in paragraph 54 of these reasons.

"Blok J."

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