

SUPREME COURT OF YUKON

Citation: *KAM v BMM*, 2015 YKSC 56

Date: 20151116
S.C. No. 15-D4765
Registry: Whitehorse

Between:

K.A.M

Plaintiff

And

B.M.M.

Defendant

Before Mr. Justice R. S. Veale

REASONS FOR JUDGMENT

Appearances:

Debbie Hoffman
Kelly McGill

Counsel for the Plaintiff
Counsel for the Defendant

INTRODUCTION

[1] VEALE J. (Oral): This is an application by the father arising out of a chambers' order on July 28, 2015, imputing the father's income to be \$150,000 and recording the mother's income to be \$86,818. The mother and father have a shared residency arrangement of one week alternating between parents for their two children 12 and 9 years old.

[2] The Chambers judge ordered the father to pay child support to the mother in the set-off amount of \$824 per month. The Chambers judge also ordered the father to pay the mother ½ of the rental income, namely \$675, from a rental property on the Family

Home on a monthly basis. There are other incidental orders but at issue is the order that the father not be entitled to apply to vary the imputed income amount unless the father provides the financial documents ordered which included, among others, his 2014 Notice of Assessment, 2014 T1 General Income Tax Return, 2014 Business Activity Statement, 2014 financial statement for the father's sole proprietorship, a construction company.

[3] On November 3, 2015, the father applied for the following:

1. The Plaintiff and the Defendant shall take all necessary steps to close the parties' joint CIBC Line of Credit;
2. The Plaintiff and the Defendant shall make equal monthly payments of \$1,500 on the CIBC Line of Credit, commencing November 2015, and payable on the 15th day of each month thereafter until further Order of the Court;
3. The Plaintiff and the Defendant shall share equally the outstanding property taxes and penalties owing for the family home;
4. The Order of the Honourable Mr. Justice Hawco, dated July 28, 2015, requiring the Defendant to pay 50% of the rental income received from the second house located on the Family Property, be rescinded;
5. That the Defendant is entitled to retain any rental income received from the second house located on the Family Property, or alternatively, that the parties share equally the net rental income received;
6. Costs.

[4] Although it was not explicitly applied for, it was my understanding that counsel for the father submitted that the order imputing his income at \$150,000 be set aside for non-compliance with the *Federal Child Support Guidelines* (“FCSG”).

[5] I will not address every allegation or fact but just the ones required to complete this chambers application.

BACKGROUND

[6] The parties met in 2001 and married in July 2003. They had two children. The father works as a general contractor in residential and commercial construction. He also worked as a carpenter while supervising his sub-trades. He has no employees. As a result of an injury to his hand, in August 2015, he receives worker’s compensation based on 75% of his assessed compensable earnings of \$84,837 a year. It is a short-term benefit for 90 days at \$1,220.26 a week. The father provided no medical evidence regarding his hand injury except for the worker’s compensation reporting letter. His compensable earnings are based on an hourly wage with a third party, not his business income.

[7] The mother has a Government job that pays \$93,163 in 2015.

[8] The mother moved out of the Family Home on July 30, 2014, after an assault. She could not stay in the Family Home because the father runs his business from it and she was afraid for her safety.

[9] The Family Home is an acreage with an older rental home and a newly completed Family Home, which has a mortgage of approximately \$414,207, with a monthly payment of \$2,001 and annual taxes of approximately \$1,800, which are now in arrears at \$4556.42. The Family Home, including the rental property is appraised at \$632,000.

[10] The mother was not able to find suitable rental accommodation until November 2014, when she was able to provide the children with a suitable alternative residence.

[11] The father remains in the Family Home and receives the income from the rental home on the property in the amount of \$1,350 monthly, subject to the chambers order that he pay half to the mother. The mother has found herself with a bad credit rating because of arrears on the house mortgage and the CIBC joint line of credit.

[12] She is unable to purchase a house and will continue in rental accommodation until property issues can be resolved.

[13] The mother and father initially arranged their finances jointly but the mother's credit rating has been negatively affected by non-payment of the mortgage and personal line of credit. Both now wish to separate their finances and they attempted to do so in January 2015.

[14] The father agrees to pay the Family Home mortgage but wants the mother to pay her half of the property taxes. The mother wishes to share the rental income from the second home on the Family Home property. The father wishes to equally share the monthly obligation for the CIBC personal line of credit, which is almost \$50,000, the credit limit and requires a payment of \$1,500 per month. That line of credit arises from the purchase of steel building prototype for the husband's business as well as other family expenditures. The father agrees to pay for the camper loan of \$8,006 which has monthly payments of \$258.

The July 28 Application

[15] The mother filed her Statement of claim, application documents and Notice to File a Financial Statement on July 10, 2015, and served the Father on July 16, 2015. The Notice to File a Financial Statement required the husband to deliver his financial

documents within 30 days, and gave notice that if he did not comply, the mother would ask the Court to impute an income of \$150,000 for the purpose of determining child support.

[16] The application also included the relief that the father bring the mortgage on the Family Home and the CIBC personal line of credit into good standing. The application was amended to ask that the father transfer the CIBC line of credit into his name alone and remove the mother's name.

[17] At the hearing of the mother's application on July 28, 2015, the father did not appear and the Chambers judge ordered, among other things, that the father's income be imputed at \$150,000 with the father being prohibited from bringing a variation application until all financial documents were provided.

[18] On July 31, 2015, counsel for the mother advised the father by letter including a copy of the July 28, 2015 Court order and setting out the details of the order and the adjournment to August 11, 2015. The father was self-represented at the time.

[19] The mother filed her Financial Statement on August 10, 2015, enclosing her 2013 T4 stating employment income of \$86,450. She advised that her 2014 T4 was with H&R Block to prepare her 2014 Income Tax return. However, she also provided her recent pay stub indicating a bi-weekly pay of \$3,485.17, and an annual income of \$93,163, somewhat higher than the \$86,818 figure in the July 28, 2015 order.

[20] The remaining matters were adjourned to August 11, 2015, when the father appeared, but the hearing did not proceed with the exception of an order to close a CIBC joint account, and an order that the father provide a copy of the appraisal of the Family Home to the mother. The balance of the July 10, 2015 application was adjourned

to September 9, 2015. Counsel for the father filed an appearance on September 8, 2015.

[21] On September 9, 2015, counsel for the father brought a further adjournment application. Payments ordered on July 28, 2015, were incomplete and the Father's financial documents were not available for filing. The matter was adjourned to September 30, 2015, to permit the father to file his financial documents before the next hearing set for November 9, 2015.

The Father's Application and Financial Documents

[22] On September 30, 2015, the Father filed his Financial Statement. He stated that his 2015 income would consist of \$26,236 from self-employment, \$388 net from rental income and \$13,200 from Worker's Compensation (for 90 days) for a total of \$40,724. He has filed his T1 General Tax Returns for 2012 and 2013 as well as a Statement of Business or Professional Activities: Comparative Summary for 2012 and 2013. The Comparative Summary gives gross figures for Income, and Cost of Sales, which includes Purchases and Subcontracts. As for his 2014 earnings, the father simply says that his 2014 income taxes are being prepared by his bookkeeper who has not been able to do the job because of a sick husband. He says he will file them with the Court when he has them. He then proceeded to explain why 2014 was a slow year for him. He has not provided, among other things, his T1 General Income Tax Return for 2014, his 2014 Notice of Assessments or his personal and business bank accounts for 2014. But on November 6, 2015, shortly before this hearing, the father provided his business invoices for 2014 and 2015 to date. His total revenues for 2014 are \$317,280.38 but he has not provided the cost of Purchases and subcontracts to give an accurate indication of his profit.

[23] The father has also brought the following payments to the wife up to date:

1. Child support of \$1,648;
2. Rental income of \$1,350; and
3. Costs of \$1,500.

[24] He has closed the CIBC joint account and placed it in his name, but has been unable to pay the overdraft of \$5,060.

[25] The father also filed an email from the mother in November 2014 suggesting that his monthly income was \$4,000 a month while hers was \$4,400 a month. I do not place much faith on that e-mail as it was done in the spirit of negotiation without access to income information.

DISPOSITION

[26] Sections 19 of the *FCSG* states:

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:

...

(f) the spouse has failed to provide income information when under a legal obligation to do so;

...

[27] Sections 21(1)(a), (b) and (d) of the *FCSG* states that:

21. (1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

(a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;

(b) a copy of every notice of assessment and reassessment issued to the spouse for each of the three most recent taxation years;

...

(d) where the spouse is self-employed, for the three most recent taxation years

(i) the financial statements of the spouse's business or professional practice, other than a partnership, and

(ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;

...

[28] Section 21(20) imposes the same obligation on the spouse who receives an application for a child support order.

[29] Sections 22, 23 and 24 of the *FCSG* provide the remedies that a court has respecting a spouse who did not file the income information as required. This remedy is to order production of the income information and draw adverse inferences if necessary. None of these remedies apply here as the mother has provided her 2015 income information. They do apply to the father who has yet to produce all his 2014 income information.

[30] Counsel for the father submits that the July 28, 2015 order should be rescinded on the ground that at the time the order was granted, the Court did not have the mother's 2014 T4 in breach of s. 21(a). I note that the father has still not provided the Court with accurate information on which his 2014 income can be determined and that his gross revenue of \$317,280.38 was not provided until November 6, 2015. The mother on the other hand disclosed her 2015 income at \$93,163 on or about August 10, 2015.

The mother's income is more predictable because it is employment income and can be accepted at face value.

[31] The father had not provided any income on the expiry of the 30-day period from the service of the Notice to File Financial Information on July 16, 2015.

[32] Thus, the inability of the Court to determine the father's income without speculation based on a Comparative Summary Statement of Business or Professional Activities for 2012 and 2013 makes it impossible to establish the father's true financial position in 2014.

[33] I adopt the judgment in *A.G. v. B.R.*, 2005 BCSC 96, which drew an adverse inference and imputed income on circumstantial evidence rather than relying on reported income from income tax returns.

[34] However, I do admonish both parties for relying on the fact that financial documents are with bookkeepers or accountants as a reason for not producing them. In those circumstances, barring extraordinary circumstances, all the documents can be photocopied and disclosed to the Court if a party wishes to avoid the drawing of an adverse inference and imputation of income. I appreciate that the father has come forward as of September 30, 2015, and provided the Court with considerable information but not enough to revise his imputed income at \$150,000 in the July 28, 2015 order. I do, however, revise the July 28, 2015 Order in the following respects:

1. Using the mother's income of \$93,163 and the father's imputed income of \$150,000, I revise the child support to be paid to the mother at \$741 (\$2089 - \$1,348) per month. The father may reduce his December 1, 2015 payment by the overpayment he has made since August 1, 2015;

I should also advise counsel and the parties that shared custody does not necessarily result in a set-off where the higher income earner pays child support to the lower income earner. Under s. 9 of the *FCSG* the condition, means, needs and other circumstances of each spouse and parent are considered and a parent earning the same income may be required to pay child support to the other.

2. As of November 1, 2015, the father is not required to share the rental income from the rental house.

[35] In answer to the father's application filed November 3, 2015, going forward from November 1, 2015, the father is ordered to pay the camper loan, the CIBC line of credit, the CIBC overdraft, the CIBC mortgage and the property taxes on the Family Home. The camper shall be transferred to the father upon the mother being relieved of any obligation to pay the camper loan.

[36] The father is at liberty upon filing complete financial information to apply to revise the child support ordered bearing in mind that s. 9 of the *FCSG* may be applied. In the event that the father is unable to pay the monthly mortgage payment, taxes, camper loan, CIBC line of credit and CIBC overdraft, the mother is at liberty to apply for an order to sell the Family Home property to avoid foreclosure proceedings.

[37] I am not making a further costs order at this time.