IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20041217
Docket: A890307
Registry: Vancouver

Between:

Wayne Gareth Henderson

Plaintiff

And:

Irene Wendy Van Nieuwkerk

Defendant

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Judgment

In Chambers
December 17, 2004

Counsel for Plaintiff	F.G. Potts
Counsel for Defendant	K.L. Anderson
Place of Hearing:	December 17, 2004

[1] **THE COURT:** By a Notice of Motion dated September 15, 2004, the defendant seeks various relief relating to child support payments for the parties' three children. She seeks a variation of a consent order made September 14, 1994, an order for retroactive support in accordance with the ***Federal Child Support Guidelines*** based on the plaintiff's income, and she seeks orders for disclosure in support of the other relief.

[2] The substantive matters are set for hearing in January 2005, but the issues of disclosure have come on before me in advance of that January hearing date. The specific disclosure relief sought is set out in paragraph 1 of the Notice of Motion:

> That the plaintiff provide the defendant with documentation of his income between 1995 and the present, and further that he provide his income tax returns and other documentation mandated to be attached to his 1994 Property and Financial Statement utilised when the 1994 orders were obtained by consent.

[3] There is along history of litigation, negotiation and agreements between the parties, which I need not go into in detail. The essential facts are these: The parties were married on July 29th, 1985. They have three children who are now aged 19, 17 and 12. The parties separated and were later divorced on September 19, 1991. The defendant obtained custody of the children. On September 14, 1994 an order of this court was made by consent which set the total child maintenance payments to be made by the plaintiff to the defendant at $3,000 per month. Prior to that order being made the plaintiff delivered his Property and Financial Statement which listed his gross monthly employment income as $8,900, that is, approximately $107,000 per year. That 1994 Property and Financial Statement did not, however, include the

required attachments and in particular, did not include his tax returns for the preceding three years.

[4] On June 28, 1994 counsel for the defendant wrote to counsel for the plaintiff pointing out that deficiency and asking at a minimum for copies of the plaintiff's tax returns for the preceding three years. Those materials were never supplied. Notwithstanding that deficiency, the parties, who were both represented by counsel at the time, agreed to the terms of the consent order that was eventually entered on September 14, 1994. All of this occurred, of course, before the ***Child Support Guidelines*** came into effect in 1997.

[5] On March 9, 1998 the defendant wrote to the plaintiff pointing out that the ***Guidelines*** had come into effect and requested an adjustment in the child support payments. In that letter she stated that she believed the plaintiff then had an income "in the neighbourhood of $250,000" and that the ***Guidelines*** would require him to make payments of $3,498 per month, non taxable, in her hands. In response, the plaintiff agreed to adjust the amount of his payments. Over the years he also paid for various extras, including school tutoring and the purchase of a $33,000 van for the defendant to use to transport the children.

[6] In January 2004, in connection with ongoing litigation, the defendant was served with various documents including a Form 89 financial statement of the plaintiff, dated January 23, 2004. That statement showed the plaintiff's annual ***Guideline*** income as $107,013 per year. There were no tax returns attached to that Form 89. On December 10, 2004 the plaintiff swore another Form 89, this time

showing an annual ***Guideline*** income if $125,507. The defendant now says that the plaintiff in fact had an income of $647,485 in 2002, which includes a severance payment from the Canadian Imperial Bank of Commerce. She says his 2001 income was $436,193. She refers to paragraph 48 of the plaintiff's affidavit, sworn December 11, 2004, in which he deposes that CIBC paid him $691,979 in severance, being 20.25 months' salary, plus $11,538 in lieu of notice. The defendant calculates that this means the plaintiff's annual salary must have been over $400,000 at the time of his termination.

[7] In short, the defendant says the plaintiff has clearly been earning substantially more than she ever had reason to suspect, and more than he had ever previously disclosed. She says that this gives her substantial reason to believe that the plaintiff's failure to provide income tax returns in 1994 to substantiate his Property and Financial Statement means that his income as stated therein may not have been accurate, in which case the consent order of 1994 ought to be varied. She seeks disclosure in order to have an evidentiary basis for pursuing her claim at the hearing in January 2005, to vary the 1994 order and to seek retroactive child support in accordance with the plaintiff's ***Guideline*** income over the intervening years. The plaintiff takes the position that he has already supplied whatever disclosure the law requires based on the ***Rules of Court***, the ***Divorce Act***, the ***Family Relations Act***, and the ***Guidelines***. He submits that since the defendant never demanded his income tax returns over the years, he was not bound to produce them, and in response to her current demands, he is only obligated to provide his tax returns for the most recent three years, which he has already done.

[8] The plaintiff does not go so far as to submit that the court lacks jurisdiction to make the disclosure order requested by the defendant, but rather he says that she has not in this case established a basis for doing so. He submits that the defendant has not shown a likelihood that she is entitled to a variation of the 1994 order or a retroactive order for support in accordance with the ***Guidelines***. He submits that she has not demonstrated need and that any such order at this time would not be for the benefit of the children, but would only be a redistribution of capital.

[9] I agree with the plaintiff that a demand for past disclosure of this sort cannot be based merely on a desire to go on a fishing expedition. It must be based on something more than mere speculation. On the other hand, it is not necessary for the defendant to show at this stage that she is likely to succeed on her applications to vary retroactively the child support she has been receiving. I am satisfied, in the circumstances of this case, that the defendant has a valid basis for believing that the financial disclosure provided by the plaintiff in 1994 may not have been accurate and that this may have led her over the ensuring years to substantially underestimate his true income. Whether or not that is actually the case will only be known when she has access to the documents she has now requested.

[10] In ***S.E.C. v. D.C.G.,*** 2003 BCSC 896, Davies J., in a case somewhat similar to this, said at paragraph 114:

> I recognize that in signing the 1986 Agreement the mother ultimately acquiesced in the father's refusal to provide the full financial information that had been requested. Such acquiescence does not, however, preclude her from now obtaining retroactive child support. The authorities make it clear that parents cannot bargain away a child's right to support.

[11] The plaintiff referred to a number of cases, including ***Walsh v. Walsh,*** [2004] O.J. No. 254 in which the Ontario Court of Appeal said this, at paragraph 23:

> Neither the ***Divorce Act*** nor the ***Guidelines*** contains any provision giving the court jurisdiction to recalculate child support retroactively because of an increase in the payor's income or the non-disclosure of the payor's actual income. For example, neither the Act nor the ***Guidelines*** imposes a duty on a payor to disclose annual increases in income. The parent entitled to receive child support bears the onus of ascertaining increases in the payor's income.

[12] However, in British Columbia the courts seem to have accepted that the payor/spouse has an ongoing obligation to inform the custodial parent of significant changes in income that would affect the appropriate level of child support. In ***Hietanen v. Hietanen,*** 2004 BCSC 306, Fraser J. said this at paragraphs 13 to 16:

> No judge of this court and no lawyer who works regularly in family law can be unaware that children are on the losing end when there is a paying parent who is not paying them the amount of child support that the ***Guidelines*** say that they are entitled to. The same applies, in some circumstances, to the recipient parent, for example, where there are things like extraordinary expenses which must be shared.
>
> During submissions, I suggested that if the plaintiff in this case had taken a student into her home as a boarder to help supplement her income and had not told the insurance company which provides her with fire insurance that she had done so, chances are that if her home burned down, the insurance company would refuse to pay her, on the ground that she had a legal obligation under the doctrine known as utmost good faith to volunteer that information to the insurance company.
>
> It seems to me inconceivable that the law could attach smaller importance to the right of children to have proper child support.
>
> I therefore say that as from today in British Columbia, the law is that parents whose incomes are relevant to the financial support of their children, have an obligation to disclose changes in their income from time to time. This is based on the concept of utmost good faith. It

> does seem to me that the law should not hesitate to require that parents act with the utmost good faith toward their children.

[13] That case was followed by Melnick J. in ***Daicar-Gendron v. Gendron,*** 2004 BCSC 1239.

[14] I cannot say at this point whether the defendant will succeed in her application to vary the 1994 order and to obtain retroactive support in accordance with the ***Guidelines***. That will depend in part on what is disclosed in the plaintiff's tax returns.

[15] I do note that in ***L.S. v. E.P.,*** 1999 BCCA 393 our Court of Appeal held at paragraph 66 that, "... incomplete or misleading financial disclosure at the time of the original order" is one factor to be considered on an application for retroactive child maintenance.

[16] In the particular circumstances of this case I am satisfied that there should be an order for disclosure in the terms requested by the defendant. The plaintiff has not submitted that this will prejudice him in any way except for the inconvenience and expense involved. Those matters can at least partially be addressed in an order for costs if the disclosure turns out to be unfruitful for the defendant.

[17] Accordingly, I order that the plaintiff provide the defendant with documentation of his income between 1995 and the present, and further that he provide his income tax returns and other documentation mandated to be attached to his 1994 Property and Financial Statement utilised when the 1994 orders were obtained by consent.

[18] The issue of costs is deferred, to be dealt with at the hearing of the substantive issues.

W. Ehrcke, J.

The Honourable Mr. Justice W. F. Ehrcke