

SUPREME COURT OF YUKON

Citation: *JAC v VRC*, 2015 YKSC 36

Date: 20150810
S.C. No. 06-D3902
Registry: Whitehorse

Between:

J.A.C.

Plaintiff

And

V.R.C.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Debbie Hoffman and Gary W. Whittle
F. Ean Maxwell, Q.C., and Angela Dunn

Counsel for the plaintiff
Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the Wife for retroactive child and spousal support following the division of family assets in *JAC v VRC*, 2015 YKSC 15.

[2] The findings of fact in *JAC v VRC* provide the basis for determining the level of income that should be found for the Husband.

[3] On April 12, 2007, this Court ordered that the Husband, based on a line 150 Total Income of \$83,928, pay interim child support of \$1,233 per month to the Wife for the two children and interim spousal support of \$2,400 per month to the Wife.

[4] I will set out a summary of the facts in *JAC v VRC* and apply the four factors in *D.B.S. v. S.R.G.*, 2006 SCC 37, for the analysis of retroactive child support and spousal support.

[5] Counsel advise that the issue of the Husband's non-RRSP investment at the date of separation has been resolved and I do not need to address that issue.

THE FACTS

[6] I do not intend to repeat all the facts from *JAC v VRC*. The following is a summary of the ones most important to a consideration of retroactive child and spousal support.

[7] Firstly, the Husband delayed and continuously failed to provide financial information, despite repeated requests from the Wife and a Court order. On April 12, 2007, the Court ordered him to provide full financial disclosure, "in a timely manner", of all companies, businesses and partnerships in which he had a legal, beneficial or equitable interest. He substantially failed to do that until delivering a valuation report in July 2012, and this was followed by further court orders to produce documents. Ultimately, the trial had to be adjourned in January 2014 because of the late production of documents that should have been disclosed far earlier.

[8] Secondly, the Husband hid the true value of his assets, hid assets themselves, and significantly underrepresented his income. Among other things, the Husband failed to disclose an estate freeze and business reorganization that took place in 2007/2008 and which had marital asset protection as one of its objectives. Further, his sworn Financial Statements failed to disclose significant assets, including the Norman McIntyre Trust and shareholder loans. He also failed to disclose complete particulars of

his shareholdings in the C. Group of Companies, which he initially valued at \$253,884, but which his business valuator valued in excess of \$1,000,000 in 2012.

[9] The concealment of the Norman McIntyre Trust is particularly egregious. It was established for the benefit of the children and also included the Husband and Wife as beneficiaries, however its existence was not revealed until 2009 and disclosure about its value was not made until 2014. A dividend cheque for \$700,000 destined for the Trust was carried in the trustee's pocket for six months during the pre-trial settlement conference and the early months of trial, until Norman McIntyre deposited it into his personal account in January 2014.

[10] I also found that the Husband's Valuation Report assumed the accuracy of the market value of capital assets proffered by the Husband and Norman McIntyre without any attempt to independently verify the accuracy or completeness of that information, and that some of the information was lowballed. This included the valuation of a barite mill and other equipment at \$372,000 as at the spring of 2011 when in fact the barite mill sold on September 30, 2011 for \$700,000.

[11] In terms of the Husband's income, the line 150 reported income on his tax filings was generally around \$80,000, which is not reflective of his actual earnings or value to the C. Group of Companies. I found that the Husband is the leader and manager of the C. Group of Companies. He provides the overall strategic direction for the company and has the final say in business decisions. In this context, his salary is notably low as compared to the salary plus bonus paid to the Chief Financial Officer, which ranged between \$140,000 and \$195,000 from 2010-2012. Additionally, a \$200,000 allocation to the Husband's investment account from the Kluane Drilling Employee Profit Sharing

Plan (“EPSP”) made in 2008 was reversed on the advice of Norman McIntyre in January 2009 and then transferred to his father.

[12] Finally, the Wife sacrificed her own career in fish farming to raise a family with the Husband. In addition to doing the vast majority of child care and upbringing and assuming management of the family home, she also made a significant contribution to the C. Group of Companies. Without her support, the Husband could not have become the leader and driving force behind the family business.

[13] In terms of his relationship with the children, I found that the Husband’s secrecy and unwillingness to reveal the true extent of his assets, including the Norman McIntyre Trust, denied one child the financial support to attend Pearson College.

ANALYSIS OF CHILD SUPPORT

[14] The Wife applies for child support retroactive to 2007 and ongoing so long as the children are children of the marriage, pursuant to s. 15.1(1) and s. 2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). There is no dispute that there has been a material change in circumstances.

[15] The April 12, 2007 court order granted primary residence of the children to the Wife, with specified access to the Husband.

[16] On September 12, 2008, the court ordered shared parenting of the children. However, I prefer the evidence of the Wife that the children have been primarily in her care except for a brief period following the September 12, 2008 order. There is no doubt that she carried the substantial burden of raising and caring for the children while the Husband led the family business and travelled extensively, and no reason to think that this would have changed after they separated.

[17] I conclude that there should be no set-off in calculating retroactive child support.

[18] In *D.B.S. v. S.R.G.*, Bastarache J. set out the factors that a court should consider before awarding retroactive child support. These are the delay in application, the conduct of the payor parent, the circumstances of the child, and the hardship retroactive payment would occasion to the payor parent. None of these four factors are decisive, but rather the court should strive for a holistic view and decide each case on its particular factual matrix (para. 99). By way of example, even where a payor parent engaged in no blameworthy conduct, the British Columbia Court of Appeal ordered retroactive support where an interim support order was honestly made, but based on incorrect financial information. See *Tedham v. Tedham*, 2003 BCCA 600.

1. Delay

[19] Delay in seeking retroactive child support is not presumptively justifiable and unreasonable delay militates against a retroactive child support order. However, here the financial information provided by the Husband was a significant underestimate of his income. This, coupled with an enormous delay in providing accurate financial information, means that the delay in this case is quite justifiable. The Wife simply could not commence an application for retroactive child and spousal support without complete financial information, which was not available until trial.

[20] There has been no delay since reasonable financial information was finally produced.

2. Conduct of Payor Parent

[21] Courts should not hesitate to take into account a payor's blameworthy conduct in considering the propriety of a retroactive award. While the Husband paid child support

on an income of \$83,928, this amount was clearly a sum that had little relationship to his actual income, which I find was considerably higher after taking into account services paid for by his companies and his use of his shareholder loans to finance the C. Group of Companies. This is not to say that the Husband's use of the RESP and shareholder loans to finance the business was without justification. Rather, it is his conduct in refusing to disclose financial information and hiding the value of his assets that is at issue in considering this factor.

[22] A payor who knowingly diminishes his support obligation should not be allowed to profit from it. In particular, the secrecy around the Norman McIntyre Trust for the children and the refusal to use it for their benefit exacerbates the Husband's already blameworthy conduct.

3. Circumstances of the Child

[23] Both the past and present circumstances of the children should be considered to determine whether a retroactive award is justified.

[24] In the past, one child was unable to pursue an academic opportunity at Pearson College. This was not simply an unfortunate circumstance but rather one that was denied by the Husband while he kept details of the Norman McIntyre Trust secret and did not attempt to access those funds for the child.

[25] As this Court validated the trust for the benefit of the children, one could arguably say that the circumstances of the children are now addressed. But that position does not consider the past circumstances that could have been substantially improved for the children.

4. Hardship Occasioned by a Retroactive Award

[26] Retroactive awards can lead to hardship because they are linked to what the payor should have paid in the past rather than what the payor can currently afford. It is also recognized that hardship for the payor is much less a concern where it is the product of his own blameworthy conduct (*D.B.S. v. S.R.G.*).

[27] Counsel for the Husband submits that he will suffer hardship if there is a retroactive award made for several reasons. The first is that the mining business, and consequently the drilling business, is in a downturn. The second is that the Husband's shareholder loan account has been depleted by this court's order to pay one-half of its value on the date of separation to the Wife. None of this hardship should come as a surprise. The mining economy is cyclical and it should have been readily anticipated that the shareholder loan account, which was at issue in this litigation, would be split equally at the date of separation.

[28] I also consider the Husband's conduct in rejecting his claim that he will suffer hardship. To a large extent, he is the author of his own misfortune; if he had not kept the Wife in the dark as to his true financial worth between 2007 and 2012, he would not be in this position now. As well, to the extent that he has consistently minimized his income and worth throughout this process, I am reluctant to take his assertions about hardship at face value.

[29] In my view, considering child support in a holistic manner, a retroactive child support order should be made.

5. The Date of the Retroactive Child Support Order

[30] The Court has four options for establishing the date to which the child support award should be retroactive: the date when the retroactive application was made; the date when formal notice was given to the payor parent; the date when effective notice was given to the payor parent; and the date when the amount of the child support should have increased. The date of effective notice is the general rule and the date of application to the court and the date of formal notice are not generally used. Effective notice means the date that there was any indication that the current amount of child support needed to be changed and the recipient parent broached the topic.

[31] The Supreme Court of Canada has also stated that the date when the increased support should have been paid will sometimes be a more appropriate date.

[32] The proper approach is summarized by Bastarache J., at para. 125 of *D.B.S. v. S.R.G.*:

... the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.

[33] The basis on which interim child support in 2007 was established was an inaccurate statement of the Husband's income. The subsequent delays in disclosing the value of his business assets and other financial benefits were deliberate on his part.

[34] In my view, the date when the child support order was made i.e. April 12, 2007, is the appropriate date for commencing retroactive child support. The line 150 Total Income amount for the Husband has never been more than an amount imputed by the

Husband or by his accountant, i.e. it is tax driven and not an accurate reflection of the income available to the Husband for child support.

6. The Amount of the Retroactive Child Support Award

[35] The *Divorce Act* and the associated *Federal Child Support Guidelines* must be followed in determining the amount of child support awarded. With the exception of 2011 when the Husband's line 150 income was \$104,112, his line 150 income from 2008 to 2012 has generally been around \$80,000.

[36] Section 19(1)(f) of the *Guidelines* permits the imputation of an amount of income to the Husband as appropriate in the circumstances where the spouse has failed to provide income information when under a legal obligation to do so.

[37] However, s. 18 of the *Guidelines* also applies, as the Husband's declared annual income does not fairly reflect all the money available to him for the payment of child support. Section 18 reads as follows:

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.

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other

payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[38] In *Kowalewich v. Kowalewich*, 2001 BCCA 450, at paras. 47-50, Huddart J.

discussed the fact that the Guidelines give no explicit guidance as to how a court should choose between the corporate income method in s. 18(1)(a) and the personal services method in s. 18(1)(b). However, she said the corporate income method is most suitable for a spouse who wholly controls a corporation as it allows the court to include not only reasonable payment for personal services but also a reasonable return on the owner's entrepreneurial capacity and investment.

[39] In the case at bar, the corporate income method is not appropriate because the C. Group of Companies is a family business and, while I have found the Husband to be the effective manager and leader of the C. Group of Companies, he is nonetheless one member of a family where other family members contribute to the business.

[40] My preference is to assess the Husband's guideline income from the services provided perspective set out in s. 18(1)(b) for the following reasons:

1. It permits consideration of the market value of the Husband's service, which can be inferred based upon the CFO's salary which has fluctuated from \$140,000 to \$195,000 but is presently at \$150,000;
2. It may take into consideration the corporate context and the Husband's actions in putting money back into the company; and
3. It ensures that the Husband's skills, experience, management and leadership within the C. Group of Companies is reflected.

[41] In this context, there is no doubt that the Husband's value and services exceed those of the CFO. However, the C. Group of Companies remains a family business in which all members participate and the Husband's value should not be excessively compensated.

[42] In all the circumstances of this corporate family business, I assess the Husband's guideline income at \$200,000 for each year retroactively and going forward for child support. This results in a monthly child support obligation of \$2,699, against which the child support payment already paid must be credited. Because of the Husband's blameworthy conduct, there should be no reduction in the table amount. See *Power v. Power*, 2013 NSSC 99. As the table amount may have changed over the years, I will leave the calculation to counsel who may bring the matter to case management for resolution if necessary. The retroactive child support shall be paid by way of a lump sum within 60 days.

RETROACTIVE SPOUSAL SUPPORT

[43] The considerations for retroactive spousal support are somewhat different, although the guideline income allocation should remain the same in this case.

[44] In *Kerr v. Baranow*, 2011 SCC 10, at paras. 207-209, the Court applied the four factors in *D.B.S. v. S.R.G.* to spousal support while recognizing that, in contrast to child support, there is no presumptive entitlement to spousal support. Concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support.

[45] Although the Husband conceded in this trial that spousal support should continue for a "modest period", counsel for the Husband now raises a "double-dipping" issue, as

the Court has made a family property division. I also confirm that there were advance payments of \$119,000 during the trial in January 2014, and \$500,000 in 2015 after the *JAC v VRC* judgment on March 27, 2015.

[46] Under s. 15.2(6) of the *Divorce Act (Canada)*, spousal support should meet the following objectives:

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[47] Having regard to these policy objectives, s. 15.2(4) requires the court to take into consideration the condition, means, needs and other circumstances of each spouses, including:

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[48] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, the Supreme Court of Canada identified three grounds for entitlement to spousal support:

1. Compensatory support which is intended to redress economic disadvantage or conferral of economic advantage on the other spouse i.e.

(b) in s. 15.2(6). The entitlement to compensation arises from sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities that result in lower earning potential and prospects for financial success. It also addresses economic advantages conferred upon the other spouse.

2. Contractual support, which reflects any agreements made by the spouses with respect to support obligations.
3. Non-compensatory support, which aims to narrow the gap between the means and needs of the spouses upon marital breakdown. “Need” goes beyond the necessities of life and varies according to the circumstances of the parties. As stated in *Moge v. Moge*, [1992] 3 S.C.R. 813, at 870, the longer the relationship, and the closer the economic union, the greater the presumptive claim to roughly equivalent standards of living following a breakdown of the marriage.

[49] In my view, the Wife is entitled to spousal support on both compensatory and non-compensatory grounds. She assumed childcare and household responsibilities during the marriage, which freed the Husband up to pursue greater financial success. She also made a significant contribution in her own right to the C. Group of Companies. This degree of involvement with the C. Group of Companies entitles the Wife to non-compensatory support, because of the closeness of her economic union with the Husband during marriage.

[50] I recognize that the Wife has received spousal support, but it was not at the quantum she was entitled to as the Husband kept his financial information from her. The

Husband cannot lay the blame for this on his accountant who I have found always acted for the Husband's interests and with the Husband's blessing.

[51] The main submission of counsel for the Husband is that the Wife has now been awarded approximately \$1.5 million in property and assets and should not be allowed to "double-dip" or obtain double recovery. In my view, this concern does not apply to this case for several reasons.

[52] Firstly, the double recovery argument is usually applicable, although not limited to, a pension asset which engages both support and capital issues. Thus, to apply in the case at bar, counsel would have to establish that the Husband will have to deplete his share of the family assets to pay spousal support. I do not find factual support for this. The Husband has appropriated all the family assets to the date of trial.

[53] Secondly, the Husband infers that the Wife has received the entirety of her family asset entitlement. In fact, she was deprived of her share of the family assets for approximately eight years due to the Husband's disregard of this Court's order to disclose his financial situation. The Wife did receive an advance of \$119,000 on January 23, 2014. The date for full payment of the court order is unknown but I am advised that the timing of payment has been resolved.

[54] The point is that when the Wife needed capital to buy a house for herself and the children, she had to borrow from her family.

[55] Thirdly, this is not a case where the family property division was made specifically to provide for spousal support or apportioned to award the Wife a greater share. In fact, the Wife received 50% of the family home but one-third of the business part of the family assets. This award was predicated on the assumption that spousal

support would be determined later. While one must always be concerned about double recovery, one must be equally concerned about the adequacy of compensation. In my view, the case at bar is closer to the circumstances in *Macdonald v. Macdonald*, 2005 BCCA 23, at para. 17, where compensatory support was not barred by a large asset award.

THE QUANTUM OF SPOUSAL SUPPORT

[56] The Spousal Support Advisory Guidelines were released in July 2008 to reflect the state of the law and are intended to be advisory and a “useful tool”. The Guidelines do not necessarily apply in all cases. There are a number of exceptions outlined in the Guidelines document itself and these are summarized in *Chutter v. Chutter*, 2008 BCCA 507, at paras. 103 – 104. I do not find that these exceptions apply in this case.

[57] The Guidelines’ formula is intended to apply at initial determination of spousal support but is subject to restructuring so long as the amount and duration are appropriate pursuant to s. 9 of the Guidelines. In the case at bar, until the family property award is completed, a moderate award of spousal support is appropriate.

THE RETROACTIVE AWARD FOR SPOUSAL SUPPORT

[58] The Wife has been receiving spousal support in the amount of \$2,400 per month (which is taxed) since the order of April 12, 2007, totalling in excess of \$216,000 over seven and one-half years. During that time, to her credit, she was able to obtain employment income in addition to the \$2,400 monthly spousal support as follows:

Year	Employment Income	Spousal Support Received	Line 150 Income
2003	\$45,000		\$48,037
2004	\$45,000		\$42,627

2005	\$65,000		\$73,128
2006	\$50,000		\$54,715
2007	\$0	\$16,800	\$27,913
2008	\$2,212	\$28,800	\$32,968
2009	\$22,760	\$28,800	\$55,201
2010	\$5,309	\$28,800	\$37,527
2011	\$58,180	\$28,800	\$86,980
2012	\$72,580	\$28,800	\$106,332
2013	\$78,758	\$28,800	
2014	\$84,000	\$28,800	
TOTAL			\$565,428

[59] Counsel for the Wife provided a DivorceMate calculation for the Husband's income of \$200,000, and \$40,000 for the Wife's income, assuming a child support payment of \$2,699 which I have ordered. The "With Child Support" formula proposes a low of \$2,748, mid of \$3,290 and high of \$3,836. I note that the formula provides for a duration of minimum 5.5 years and maximum 11 years, and that the amount is subject to variation and possibly review.

[60] The Wife has been receiving \$2,400 per month since May 1, 2007. To the Husband's credit, this is not a situation where his misconduct has been an absolute denial of spousal support. I also note that the spousal support of \$2,400 per month is not grossly out of proportion to the range in the DivorceMate proposal, which is premised on the Wife earning \$40,000, or an average of the Wife's actual earnings between 2007 and 2014.

[61] I have concluded that the Wife is entitled to the 'low' formula amount of \$2,748 per month reflected in the DivorceMate calculations. Although the Husband's support has almost reached this level, I do consider it appropriate to award her the difference retroactively. I find that support should be awarded at the low end of the range because:

1. The Wife is relatively young and very well-educated and she has been able to generate a reasonable income and career since separation;
2. She consistently improved her financial situation with the assistance of \$2,400 per month, and is now earning over \$80,000 per year;
3. The children are older and do not require an unusual amount of the Wife's time and resources;
4. The compensation award for retroactive child support is already significant, raising the concern that a large retroactive spousal award could cause hardship.

[62] For all of these reasons, I am of the view that a retroactive spousal support award bringing the Wife into the low end of the Guidelines range is appropriate in the circumstances. I order that the Husband pay \$348 per month retroactively to the date of separation, to bring the monthly \$2,400 spousal support to \$2,748. The monthly payment of \$2,748 shall continue until the property division and all payments required for the property division have been paid in full, as well as the retroactive child support, at which time the spousal support shall terminate.

SUMMARY

[63] I find that the Wife is entitled to both retroactive child support and a small retroactive increase to her spousal support.

[64] In terms of child support, the delay caused by the Husband's late financial disclosure, the inaccurate reflection of his income and resulting diminishment of his support obligation, and the circumstances of the children all militate in favour of a retroactive support order to the date the interim support order was made. In this case,

that was April 12, 2007. I have assessed the Husband's line 150 income at \$200,000 and concluded that this is not an appropriate case to consider a set-off in calculating the award, given that the children predominantly reside with the Wife despite the September 2008 order for joint parenting. This results in a monthly child support obligation of \$2,699 under the current table. The retroactive child support shall be paid by way of a lump sum within 60 days, and counsel shall calculate the exact amount owing, in light of the fact that the table amounts may have changed since April 2007. If this amount cannot be agreed on, it may be brought back to case management.

[65] I have also concluded that the Wife is entitled to compensatory retroactive spousal support despite the fact that she has realized significant assets in my earlier decision in this case. The Husband appropriated all the family assets between the date of separation and date of trial and deprived her of capital when she needed it to purchase a house, among other things. Although the Wife has been receiving \$2,400 per month since the April 12, 2007 Order, this is an appropriate case to bring it up to the low end of the range proposed by the Advisory Guidelines. Accordingly, the Husband shall pay \$348 per month retroactively to the date of separation, and continue to pay the full \$2,748 per month until the property division special costs and retroactive child support have been paid in full. On full payment of the Wife's award in this case, the spousal support obligation shall terminate.

VEALE J.