VOGEL

THE TOP 5 QUARTERLY FAMILY LAW REVIEW

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1. Janiten v Moran, 2019 ABCA 380

J.D. Bruce McDonald, J.A.; Barbara Lea Veldhuis, J.A.; Michelle Crighton, J.A.

Appeal from the Decision of G.A. Campbell, J.C.Q.B.A. *Failure to Disclose, Previously Filed Evidence*

The Appellant Mother and Respondent had one child, born in 2001. In January 2018, the Mother applied to vary child support retroactively and sought financial disclosure from the Father. The Father was ordered, on January 22, 2018, to produce his financial disclosure within 3 days, and the remainder of the application was adjourned to January 26, 2018. By the return date, the Father had not complied with the Order for disclosure and a further Order was made setting the Father's guideline income at $200,000 and directing child support in the amount of $1,753, payable on an ongoing basis retroactive to December 21, 2017. The Mother's arrears application was adjourned to February 28, 2018 with further deadlines for the production of disclosure, with which the Father again failed to comply. On February 28, 2018, the Court, in the absence of the Father's financial information, made an Order imputing the Father's income at $155,000 for the period January 1, 2014 to November 30, 2017, and setting child support arrears for that period in the amount of $63,920.

Approximately one year later the Father filed an affidavit disclosing his financial information that he had refused to produce a year prior, and an application seeking to vacate the Orders for ongoing and retroactive support, apparently due to Maintenance Enforcement commencing collections.

The self-represented Mother opposed the Father's application, arguing that it was a collateral attack on the two previous Orders. She did not file an affidavit in response to the Father's application, but sought to rely on her previously-filed affidavit in the action in support of her previous applications.

The Chambers Judge refused to refer to the Mother's previously-filed materials and determined that there was no evidence before her on behalf of the Mother in response to the Father's application. She found that, notwithstanding the Father's blameworthy conduct in failing to provide the Court-ordered disclosure, the 2018 Orders would be a hardship on the Father and vacated them, as well as significantly reduced the child support arrears based on the Father's evidence as to his actual income for those years. She also found, on the basis of *DBS v SRG*, 2006 SCC 37, that retroactive applications should generally only reach back three years from the date of the notice and as such she cancelled the arrears due for 2014.

The Mother appealed.

Appeal

The Court of Appeal found that the Chambers Judge, in her ruling, failed to take the delinquency of the Father in failing to provide his financial disclosure into account. The Court found that anyone who ignores a Court Order requiring disclosure and fails to comply with that Order "does so at his or her own peril." They found that the delinquency must be considered and as such should not ground a successful application to vary the previous Orders.

The Court further found that it was an error in principle for the Chambers Judge to have refused to consider all affidavits filed in the action pursuant to Rule 13.25 of the *Alberta Rules of Court.*

The Court overturned the Chamber Judge's decision and the January 26, 2018 and February 28, 2018 Orders were reinstated, however, the Court varied ongoing support in accordance with the Father's actual income as of January 1, 2019, i.e., the date the Father provided proper disclosure. The Father was ordered to pay significant costs.

Practical implications: Non-compliance with Court-ordered financial disclosure can have significant negative consequences.

2. GM V JB, 2019 ABQB 772

N. Devlin, J.C.Q.B.A. *Section 9 Factors, Means Analysis*

In *GM v JB*, the parties had a brief relationship and one child together aged 8 at the time of trial.

The Applicant Father was employed as a senior manager at a major bank and the Respondent Mother was a lawyer with an impressive resume, though she had been unemployed since 2018. The parties each had substantial capital assets, the Mother having a net worth approaching $1.9 million and the Father having investments and income properties with a total gross value of approximately $1.3 million.

The Father applied for a re-assessment of child support and a refund for overpayment of support since the parties moved to shared parenting. The Mother opposed the application and cross-applied for payment of childcare expenses and Court costs arising from prior judgments. The following were the primary issues before the Court:

- Does the doctrine of res judicata estop the Father from seeking a variation in child support?
- What is the proper application of Section 9 of the *Alberta Child Support Guidelines* on the facts of this case?
- Is the Father entitled to seek a retroactive variation of child support? Or do the principles outlined by the Supreme Court in *DBS* operate to preclude any part of a retrospective adjustment?

Res Judicata

The Mother relied on the principle of *res judicata* in defence of the application, on the basis that the issue had already been decided at the June 2017 Hearing and could not be pursued again. The Court found that the issue of finances arising from the shared parenting arrangement had never been decided by any previous Court. Further, the principle of *res judicata* is ill-fit for child support as it is the right of the child and the Court has an obligation to ensure children are supported on an ongoing basis.

The Mother alternatively argued that the issue of support could or should have been included in a previous proceeding and can not be raised retroactively. The Court did not accept this, finding that claims regarding parenting and support are separate and distinct legal actions. Additionally, penalizing a party for failing to raise an issue in family law is contrary to the emphasis Courts place on parties cooperatively resolving as many issues as possible.

Section 9 of the *Alberta Child Support Guidelines*

Section 9 of the *Alberta Child Support Guidelines* (the "*ACSG*") provides a discretionary approach for the Court to take where unmarried parents have shared parenting of their children. The Court takes into account:

- the amounts set out in the applicable tables for each parent;
- the increased costs of shared parenting arrangements; and
- the condition, means, needs and other circumstance of each parent and of any child for whom support is sought.

The Father submitted that the Mother was deliberately under-employed, and should therefore be imputed an income for the purposes of determining child support. The Mother's own evidence was that she had diligently applied for employment positions, however, when pressed by the Court as to how someone with such transferable "blue-chip professional skills could plausibly claim a zero income" her counsel argued that it was reasonable for an individual of her abilities to hold out for work of a similar echelon as before and resist seeking more modest income.

Notwithstanding the Alberta Court of Appeal's decision in *Hunt v Smolis-Hunt*, 2001 ABCA 229, wherein they determined that income may only be imputed where there is proof of specific intention to undermine or avoid support obligations, Justice Devlin found that the case law allowed for a more nuanced approach in the context of a shared parenting analysis. Specifically, the Court found that Section 9(c) of the ACSG calls for an inquiry into the parents "means", as distinct from their actual achieved income, and that the *Hunt* requirement for a specific-intent to avoid support obligations does not logically apply to the broader assessment of the parents' means.

Justice Devlin endorsed a "broad, holistic view of a family's unique circumstances" to render a result that is fair and functional for them, and found that "earning potential" can be properly factored into the "means" analysis under Section 9(c) of the *ACSG*.

Considering the factors set out in Section 9, Justice Devlin found that the actual incomes of the parties, and the table amounts of child support payable, were a poor proxy for the parties' historical pattern of earnings and overall capital positions. He further found that Father's increased costs in relation to the shared parenting

arrangement were $495/month. Finally, the Court found that both parties had a similar capacity to generate a high income and that Mother had substantial "means" as she had greater capital assets and she could produce income with her skills if she chose to. On these bases, Justice Devlin found it was in the child's best interest to end the economic interconnectedness of the parties and as such, no ongoing child support was ordered.

Retroactive Variation of Support

The Father claimed a refund of support arising from a 9-month overpayment of support after the parties switched to a shared parenting arrangement. The Court considered the principles outlined in *S(DB),* bearing in mind "the key concern being the unfairness of extracting funds from a payee parent who reasonably relied on support being received unencumbered by a claim for future repayment'.

The Court found the Father's delay in seeking an adjustment could be justified when considering the state of the parties' relationship. Further, the Mother's "legal sophistication" meant she likely knew there was a material change in circumstance and that her entitlement would be diminished by same. Other relevant considerations included that there was no objectionable conduct by the Father, the child would not be adversely impacted by a re-adjustment in support, and there would be no financial hardship if repayment was ordered. On these grounds, the Court ordered the Mother repay the Father for his overpayment during the period of the shared parenting arrangement.

The amount for repayment considered the Mother's application for reimbursement of childcare expenses. The Mother established that she was owed a total of $3,449 under the terms of a previous Order for childcare. This amount was deducted from the Father's overpayment. The Mother was ordered to pay the Father a total of $17,612, over 18 equal monthly instalments of $978, as enforceable by the Maintenance Enforcement Program.

Practical Implications: We should not be so quick to apply a straight set-off in shared parenting situations - Section 9 allows for a holistic approach looking beyond the actual incomes of the parties to their overall "means", which can include an analysis of capital assets and potential earning capacity.

3. Brear v Brear, 2019 ABCA 419

D. Pentelechuk, J.A.; K. Feehan, J.A. (concurring in result); B. McDonald, J.A. (dissenting)

Appeal from the Decision of R.A. Jerke, J.C.Q.B.A. *Retroactive Child Support, Child of the Marriage*

The Appellant Mother and Cross-Appellant Father were divorced in 2004 and entered into a Parenting and Support Contract in 2009 which granted primary care of the parties' three children to the Mother and setting the Father's child support obligation at $2,563 per month, based on his 2007 guideline income of approximately $140,000. The Contract between the parties further provided that the Father's child support was not to increase, despite increases in his income, so long as he paid 50% of Section 7 expenses and agreed-upon child support arrears, notwithstanding that the Mother's 2007 income was only $17,840.10. The parties were obliged pursuant to the Contract to exchange financial disclosure each year, but both parties failed to do so.

In 2016, when all three children were in high school and living with the Mother, her counsel wrote to the Father stating that his child support was inadequate and served upon him an **unfiled** notice to disclose. Notwithstanding it was unfiled, the Father complied with the Notice to Disclose and furnished the Mother's counsel with his disclosure. The Father's disclosure showed that his income had significantly increased, such that his income in 2014 was $256,686, in 2015 was $317,087 and in 2016 was $220,736. In contrast, the Mother's income remained stagnant, some 10-15 times lower than that of the Father's.

In 2017 the youngest child moved in with the Father, upon which he brought an application for child support from the Mother. In response, the Mother filed an application for retroactive child support for all three children back to 2010, notwithstanding that the two eldest children were no longer "children of the marriage" as defined by the *Divorce Act*. The chambers judge awarded retroactive support for the youngest child only from 2014, concluding that he had no jurisdiction to hear the application for support for the eldest children as they were no longer children of the marriage.

The chambers judge held that notwithstanding that the Mother took steps towards an application while the children were still children of the marriage, the service of the unfiled application did not fit within the exception for the Court's jurisdiction to hear the application for retroactive child support after the children were no longer children of the marriage. The Mother appealed. The Father cross-appealed the award of retroactive support exceeding the three-year period before the Mother brought her application.

Pentelechuk, J.A.

Justice Pentelechuk found three bases under which the chambers judge should have exercised jurisdiction to hear the Mother's application:

- First, the fair and just result would be to award retroactive child support for the three children. Deciding that the Court did not have jurisdiction because the Mother served an unfiled Notice to Disclose put form over substance and was contrary to the objectives of the *Divorce Act* (the "*Act*"), the Federal Child Support Guidelines, and common law child support principles.
- Second, the jurisdiction to hear an application for retroactive child support differed depending on whether the application was an original application under Section 15.1(1) of the *Act* or a variation application under Section 17(1) of the *Act*. Justice Pentelechuk held that the Mother's application in 2017 was a variation application under Section 17(1) and therefore the only requirement was that a material change of circumstances be demonstrated.
- Third, Justice Pentelechuk found that the Father engaged in blameworthy conduct, and therefore triggered the Court's jurisdiction to hear the application. The Court found that the chambers judge's decision rewarded the Father for failing to disclose the significant increase in his income.

In the result, Justice Pentelechuk allowed the appeal and awarded retroactive support for all three children from January, 2014, and dismissed the cross-appeal.

Feehan, J.A. Concurring in Result

Justice Feehan, concurring in result, agreed that Sections 15.1 (originating applications) and 17(1) (variation applications) of the *Divorce Act* should be approached differently, and that the Mother's application was a variation application under Section 17(1) and, having proven a material change in circumstances, she must be granted retroactive child support for the three children. However, Justice Feehan disagreed with Justice Pentelechuk's reasoning that it was within the chambers judge's discretion to hear the application based on fairness or blameworthy conduct.

Dissent of Bruce McDonald, J.A.

Justice McDonald, dissenting, disagreed with Justice Pentelechuk's reasoning that blameworthy conduct gives jurisdiction to the Court to retroactively increase child support, citing *S(DB) v G(SR)*, 2006 SCC 37 for the general rule that a Court does not have jurisdiction to award retroactive support for children who were no longer children of the marriage at the date of the application. Justice McDonald noted that the exception to this rule stipulates that in cases where there is an existing child support Order under the *Act*, the Court does have jurisdiction to award retroactive support if the children remained children of the marriage at the time the application was filed and served. Justice McDonald held that in the present appeal, the Mother's service of an unfiled Notice to Disclose was not an application.

Practical Implications: You can bring a variation application seeking a retroactive adjustment of support for a child who is no longer a "child of the marriage". The Court has jurisdiction to hear an originating application for child support for a child who is no longer a "child of the marriage", so long as that application *or* a Notice to Disclose was served upon the responding party while the child for whom support is sought was still a "child of the marriage".

Important Note: Appellate Courts across Canada are divided on this issue - those Courts in British Columbia, Saskatchewan, Manitoba and Nova Scotia have ruled that, whether variation or originating application, it must be brought while the children are still children of the marriage. Meanwhile, in *Colucci v Colucci*, 2017 ONCA 892, the Court made the same distinction as our Court of Appeal in Brear, allowing a variation application brought after the child at issue ceased to be a child of the marriage. The Supreme Court of Canada's decision in *Michel v Graydon* (judgment delivered orally just weeks after *Brear* - written reasons not yet released) affirmed the jurisdiction of the Court to retroactively vary child support awards for children that are no longer children of the marriage, seemingly agreeing with our Court of Appeal. Leave to appeal was also very recently granted in the aforementioned *Colucci* case, meaning we should soon have clear direction on this issue.

4. Dissanayake v Dissanayake, 2019 ABCA 370

Jack Watson, J.A.; Myra Bielby, J.A.; Jolaine Antonio, J.A.

Appeal from the Decision of K.P. Feehan, J.C.Q.B.A

Self-Help Remedies, Support Arrears

The Appellant Mother and Respondent Father were married in Sri Lanka and moved to Canada in 2001. They had two children before separating in 2014. Following separation, the Mother, who was unemployed, remained in the matrimonial home with the children of the marriage, and the Father, who was a high-income earner, was ordered to pay spousal support of $4,000 per month and child support of $2,769 per month. The Mother was ordered to pay all expenses associated with the matrimonial home. By way of another Order in 2018, spousal support was reduced to $3,000 per month and child support remained the same.

The Father fell into arrears on his support payments, and the Mother therefore could not keep up the mortgage payments on the matrimonial home, causing the mortgage to go in to foreclosure and resulting in the home's sale. The net sale proceeds arising from that sale were held in trust by counsel for the Father, in the amount of $38,000.

In morning chambers, the Father sought an equal division of the net sale proceeds arising from the sale of the matrimonial home, and to apply certain mortgage payments made by him against his substantial support arrears of $70,294.70. The chambers judge directed MEP to apply the $64,584.70 in payments made by the Father towards the mortgage to be credited towards the Father's arrear and further directed that the net sale proceeds of the matrimonial home be split equally, with each party receiving $19,000 from the funds held in trust. The Mother appealed.

Appeal

The Alberta Court of Appeal found that the chambers judge erred by conflating the Father's required support payments with his having made some contributions to the mortgage, obscuring the essential difference between issues of matrimonial property and support obligations. The Court found that the Father had unilaterally decided the method by which he was going to make payments on spousal support, and in doing so secured a jointly owned assets rather than make the support payments as ordered, thereby benefiting himself. The Court referred to this as "self-help", which should be discouraged, and found that these payments could not however abolish any part of the Father's support obligation.

The Court held that the support arrears were a debt owed to the Mother, of which 100% belonged to her. As a joint owner of the matrimonial home, his equity in that home was benefited to the same extent her equity was benefitted, so that she did not gain 100% of the value of the mortgage payments made. The Court noted that the had the Father made mortgage payments in addition to support payments, those payments could have been treated as a factor related to ultimate division of matrimonial property under Section 8 of the *Matrimonial Property Act*.

The Appeal was allowed and the support arrears owing to the Mother in the amount of $64,585.70 were restored, with the equal division of net sale proceeds of the matrimonial home deemed to be done an interim basis subject to final distribution.

Practical Implications: Self-help remedies should always be discouraged. If there is an agreement to pay joint expenses in the place of support, this should be confirmed in a Court Order.

5. NLZ v JDV 2019 ABQB 720

M.J. Lema, J.C.Q.B.A.

Partition and Sale, Urgent Circumstances

In *NLZ v JDV*, the parties had been divorced some 6 years earlier by way of a divorce judgment after severance of the divorce from the corollary relief. Following separation, the Respondent Wife remained in the jointly owned matrimonial home ("Home") with the agreement that she would be responsible for making payments to the line of credit secured against the Home for which the parties were jointly liable.

In July, 2015, the Applicant Husband made an application pursuant to Section 15 of the *Law of Property Act* for partition and sale of the Home. His application was adjourned *sine die*, but later renewed in January, 2019. The Husband's application was supported by the following grounds:

- The Wife had missed one or more of the monthly interest payments on the joint line of credit secured against the Home;
- The Wife had made no headway in reducing the principal debt on the joint line of credit;
- The Husband was ineligible for a mortgage on a new home so long as the current line of credit

was in existence;

- The Home had decreased in value meaning there was little, if any, equity in the home; and
- Both parties were unable to buy out the other's interest in the home.

The Wife, for her part, raised a number of arguments including that the division of matrimonial property had never been finalized and should be dealt with before the Home was sold.

Partition and Sale Pursuant to the *Law of Property Act*

In his decision, Justice Lema of the Alberta Court of Queen's Bench considered whether partition and sale pursuant to Section 15 of the *Law of Property Act* (the "*Act*") should be stayed in light of still-pending matrimonial property proceedings. Section 15 of the *Act* provides that a co-owner of property may apply to the Court to terminate the co-ownership in the interest in the land by way of a sale, however, where the application relates to matrimonial property, Section 21 of the *Act* grants the Court power to stay proceedings pending the disposition of an application made under the *Matrimonial Property Act*.

In reviewing the case law on the issue, the Court found that there is a general principle that the sale of a matrimonial home should not be ordered if there are other significant financial matters to be resolved. However, a party can overcome this principle where they can show there is, or soon will be, urgency in selling the Home.

Justice Lema ultimately held that there were urgent circumstances warranting the sale of the Home. In particular, the value of the Home had decreased since the Husband's previous application in 2015 and no evidence was presented by either party regarding a forecasted upswing in the markets. Additionally, the line of credit secured against the Home was equal to, if not greater than, the value. The Wife had made no contributions against the principal amount of the line of credit since the date of separation and the existence of the debt rendered the Husband unable to access any other financing. The Court also found that there was no enforceable contract between the parties stating that the Wife could remain in the property and indefinitely make interest-only payments against the line of credit.

While the Wife opposed the sale and partition of the Home, she was unable to afford the significant repairs the Home required, nor could she afford to buy out the Husband's interest in the property. She proposed a plan for acquiring financing, but the Court found it to be "unworkable".

In further defence to the application, the Wife asserted the Husband was responsible for dissipating the line of credit. The Court did not go into detail regarding the dissipation because the Wife did not provide sufficient evidence to prove her position. However, Justice Lema did reserve the parties right to make arguments about an unequal responsibility for the line of credit, noting that it was an issue that could be heard after the sale of the Home.

Similarly, the unresolved matrimonial property issues, namely the Husband's pension and exemptions, did not stand in the way of ordering the sale of the Home. The primary concern was preventing the parties from incurring a larger shortfall on the line of credit.

The sale and partition of the Home was ordered.

Practical Implications: Partition and Sale will be ordered prior to a final resolution of the division of matrimonial property where the circumstances are sufficiently urgent.