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Mason v. Mason

Lise Mason, represented by David L. Lanthier, Applicant Michael Mason, represented by Scott D. Chambers,
Respondent

Ontario Superior Court of Justice

R.D. Gordon J.

Judgment: October 17, 2012

Docket: 17980/12

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Counsel: David L. Lanthier, for Applicant

Scott D. Chambers, for Respondent

Subject: Civil Practice and Procedure; Family

Family law

Judges and courts

Cases considered by *R.D. Gordon J.*:

R. v. W. (D.) (1991), 1991 CarswellOnt 1015, 3 C.R. (4th) 302, 63 C.C.C. (3d) 397, 122 N.R. 277, 46 O.A.C. 352, [1991] 1 S.C.R. 742, 1991 CarswellOnt 80 (S.C.C.) — followed

Rules considered:

Family Law Rules, O. Reg. 114/99

Generally — referred to

R. 1(8) — considered

R. 2(2) — considered

R. 2(3) — considered

R. 2(3)(a) — considered

R. 2(3)(b) — considered

R. 2(3)(c) — considered

R. 2(3)(d) — considered

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Federal Child Support Guidelines, SOR/97-175

Generally — referred to

s. 3(1) — considered

s. 7 — considered

ss. 15-20 — referred to

s. 19 — considered

R.D. Gordon J.:

Overview

1 The Applicant asks that I find the Respondent to be in contempt for failing to comply with temporary orders made by Justices Koke and MacDonald. In particular, it is alleged that the Respondent failed to provide the password for online access to banking records, failed to direct the company bookkeeper to respond to the Applicant's requests for back-up documents, and failed to allow her access to the business premises to inspect financial documents which were not provided to her within 48 hours of demand.

Background

2 The parties separated in November of 2011. Together, they are the owners of a thriving business in the City of Timmins. The Respondent has traditionally been the face of the business and the Applicant has worked behind the scenes in bookkeeping and administration. When their marriage failed so too did their ability to work together.

3 Eventually, it was determined the Respondent would assume day to day control of the business but only on the condition that the Applicant would have full, unfettered and ongoing access to the business records so that she would be able to monitor its operation. This was important because of her ownership interest in the business and the manner in which it had operated over the years. In particular, many of the parties' personal expenses were paid by the business directly and the business generated some unreported cash sales. When the Applicant was no longer involved in the daily operations of the business, unfettered access to the business records was necessary to ensure the Respondent was not expensing additional personal expenses to the business

and to ensure that cash transactions were properly accounted for between the parties.

4 By Order dated February 15, 2013, Justice Koke made an order to implement the arrangement described above. Among other things, his order provided that: (1) The Respondent ensure that all sales transactions are documented and provide the Applicant with monthly financial statements at month end; (2) that the Applicant have continued access to all information in relation to the financial circumstances and operations of the Business, including online access to banking Information; (3) and that the Respondent respond to the Applicant's reasonable request for financial and operation information relating to the Business.

5 Notwithstanding the order, it is alleged that the Respondent did not provide to the Applicant the required business records. The Applicant brought a motion for contempt returnable in June of 2013. On June 6, that motion was adjourned, at the request of the Respondent, so that a responding affidavit could be filed, further examinations could be held, and documents produced. Justice MacDonald made an order that day requiring the Respondent to, among other things: (1) Provide copies of all General Ledger Journal Entries on a monthly basis; (2) Provide copies of Trial Balances on a monthly basis; (3) Provide copies of all Unit Sales Reports and Commission Sales Reports on a monthly basis; (4) Cause the bookkeeper to then immediately respond to any subsequent requests for supporting documentation or information as forwarded by the Applicant to the Bookkeeper and such documentation and information be provided to the Applicant within 48 hours of any such request forwarded by her; and (5) Provide the Applicant with the online banking pass codes and sign-In information for all company and business accounts not later than Monday, June 10, 2013, on condition that the Applicant shall access the accounts only for the purposes of obtaining information and not effect any transactions in any of the accounts.

6 Recently, following a change in counsel for the Respondent, the required documents and passwords have been provided.

Position of the Applicant

7 The Applicant is of the view that the Respondent has simply been thumbing his nose at both her and the court. She says the orders in question are clear and unequivocal and the Respondent has failed to comply so that he can manipulate the business operations to his benefit.

8 The Respondent says that he provided all documents and information to his lawyer in a timely fashion with the full Intention that they be passed along to the Applicant. He says any failure to comply with the orders was attributable not to him but to his lawyer. In addition, he argues that his notice of the contempt proceedings Is not adequate and that the orders in question are ambiguous.

Applicable Legal Principles

9 There is little doubt that a finding of contempt is a serious matter and that resort to contempt orders should be made sparingly. As a quasi-criminal matter, the allegations must be proved by the moving party beyond a reasonable doubt. A finding of contempt will require that the following essential elements be proved beyond a reasonable doubt:

1. There is a court order.
2. The terms of the order are clear and unambiguous.

3. The person alleged to be in contempt was given proper notice of the terms of the order.
4. There has been disobedience of the court order.
5. The fact of the order's existence was within the knowledge of the party at the time of the alleged breach
6. The breach of the court order has been deliberate or wilful.

10 In addition, it is necessary that the person alleged to be in breach of the order be given proper notice of the alleged breach and the particulars in support thereof such that he or she is aware of the case to be met.

11 Where the credibility of the parties is at issue, it is not sufficient to simply determine who is more credible. Rather, the court must follow the principles of *R. v. W. (D.)* [1991 CarswellOnt 1015 (S.C.C.)] and take the following approach: (1) if I believe Mr. Mason, I must find him not to be in contempt; (2) If, considering all of the evidence, including the evidence of Mr. Mason, I am left in doubt as to where the truth of the matter lies, I must find him not to be in contempt; and (3) Even if I do not believe the evidence of Mr. Mason, the evidence which I do accept must satisfy me beyond a reasonable doubt that he is in contempt.

Analysis

Is There A Court Order

12 The respondent concedes that there are two court orders by which he is bound.

Are the Terms of the Orders Clear and Unambiguous?

13 Although the Respondent argued that the terms of the orders are ambiguous, I am unable to agree. As recited above, the terms could scarcely be more explicit. In addition, It is to be noted that the orders in question are consent orders to which the Respondent not only acquiesced, but agreed. Furthermore, he acknowledged when cross-examined that he understood the terms of the orders.

Was the Respondent Given Proper Notice of the Terms of the Order?

14 This was not contested by the Respondent. Indeed, as noted above, these were orders made on consent.

Has There Been Disobedience of the Court Orders?

15 Again, this was not contested by the Respondent. He frankly acknowledges that until recently the orders were not complied with as alleged.

Was the Respondent aware of the Orders when breached?

16 Once again, the Respondent did not argue to the contrary. It is clear that he was aware of the orders when the non-compliance is alleged.

Was his breach of the orders deliberate or wilful?

17 The Respondent has filed affidavit evidence to establish that he provided all of the necessary documents to his solicitor with the understanding that they would be forwarded on to counsel for the Applicant. When he

changed solicitors and determined that the documents had not been sent he arranged for them to be retrieved and delivered as soon as possible. At the very least, this raises a reasonable doubt about whether or not his breach of the orders was deliberate or wilful insofar as the production of documents is concerned.

18 With respect to providing passwords so that the business's online banking could be monitored, Mr Mason explains in his documents his understanding that his lawyer was in discussions with the Applicant's lawyer to find a way to ensure access to the Applicant would not allow her to conduct business within those accounts and that as soon as his new counsel explained that the order of Justice MacDonald contained such a safeguard, he provided the necessary password(s). This is a reasonable explanation and certainly raises a reasonable doubt about whether his non-compliance with the order of Justice Koke was wilful, at least for a time. However, he was cross-examined on this issue on July 28, 2013 and acknowledged his awareness of the provisions contained in Justice MacDonald's order on the same topic. He acknowledged the provision in the order that she not make any transactions on business accounts which she accesses online and yet he still did not provide the password(s) until several weeks later. His position was that because she refused to sign a guarantee for the business she was not entitled to access the banking records. Frankly, that is not a viable excuse. By July 28, 2013 it had to have been clear to him that she was entitled to access this information and that a court order prohibited her from entering into any transactions online. Thereafter his failure to provide the passwords was deliberate and wilful. His evidence raises no reasonable doubt in this regard.

19 The Applicant also alleges that Mr. Mason refused her access to the business premises for the purposes of reviewing documents which were not disclosed as requested by her. This entitlement is specifically provided for in the order of Justice MacDonald if a request for Information has not been met within 48 hours. On the cross-examination of Mr. Mason he admitted that documentation had not been provided within 48 hours of being requested. He admitted that he understood these provisions. When counsel said to him: "So the request has been made. When would you like Mrs. Mason to attend?" His answer was: "She's not coming in...You can You can get the — the judge to come in and run the business too."

20 Clearly, this non-compliance with the order was deliberate and wilful. His evidence raises no reasonable doubt in my mind.

Was the Respondent Given Appropriate Notice of the Allegations of Contempt and the Particulars in Support Thereof?

21 The Respondent argued there must be strict adherence to the notice provisions concerning contempt given its quasi-criminal characteristics. He pointed out that Mr. Mason was not served personally with the motion for contempt, as required by the Family Law Rules, and that the incorrect form of motion was used and did not contain the warnings contained in the prescribed form. It is to be noted that there has been no suggestion he is unaware of the allegations of contempt and the particulars alleged — only that the form of service and notice did not comply with the rules.

22 Rule 1(8) gives the court the discretion to deal with a failure to follow the rules by making any order it considers necessary for a just determination of the matter.

23 Rule 2(2) provides that the primary objective of the rules is to enable the court to deal with cases justly, and by Rule 2(3) provides that dealing with a case justly includes, (a) ensuring that the procedure is fair to all parties; (b) saving expense and time; (3) dealing with the case in ways that are appropriate to its importance and complexity; and (d) giving appropriate court resources to the case while taking account of the need to give

resources to other cases. Applying these principles to the case before me, it is appropriate to validate the motion of the Applicant and the manner of service notwithstanding the absence of strict compliance with the rules. It is clear the allegations and particulars came to the Respondent's attention. He has competent counsel and I am quite comfortable that he knows the possible consequences of a contempt finding. There has been no procedural unfairness alleged. If I were to dismiss on this argument of the Respondent, it would be open for the Applicant to renew its motion using the proper form and making personal service, and to thereafter have the matter heard. This would be an inappropriate re-allocation of court resources and would do nothing but increase costs for everyone.

24 In the end, I am satisfied beyond a reasonable doubt that the Respondent was in contempt of the orders of Justices Koke and MacDonald as outlined above.

Remedy

25 The Applicant will be seeking a remedy in costs, and I will be inviting submissions in that regard.

26 In addition, she asks for an order that would effectively allow her full access to the business at whatever hours she deems appropriate. Frankly, I do not see that as productive. Indeed, I have little doubt that it would only cause further and significant discord between the parties.

27 However, I am sympathetic to the Applicant's plight. She is a part owner of a significant business. She must be allowed to monitor its ongoing operations. The Respondent cannot be allowed to get in the way of that. There have been significant steps in this direction. Under the guidance of his current counsel, documents and information are now flowing. It has been proposed that all documents now flow through counsel so there is an accurate record of what has been provided and received. I see this as a positive step. But I think there needs to be some additional hammer that will ensure the Respondent's compliance with the court's orders, whether he likes them or not. That additional hammer will take the form of a conditional fine in the amount of \$20,000, payable forthwith in the event he is, in these proceedings, subsequently found to be in contempt as a result of some action or inaction on his part that takes place after this date. If he complies with the orders of this court, he will have no problems and the fine will never become due. If he is found in the future to be in contempt, the fine will be payable in addition to any further sanction warranted by that finding.

28 In addition, the Applicant has a legitimate concern about the recording of cash sales made in the course of business. The Respondent says such sales are no longer being made and is content with an order that he conduct the affairs of the business(es) such that all sales and services are lawfully recorded in the records of the business and provide for no compensation to him, or any other person, directly or indirectly, other than as recorded.

Conclusion

29

1. The Respondent is found to be in contempt of the orders of Justice Koke and MacDonald. A conditional fine is imposed in the amount of \$20,000 payable forthwith in the event he, at any time hereafter, is found to be in contempt in this proceeding.
2. The Respondent shall conduct the affairs of the business(es) such that all sales and services are lawfully

recorded in the records of the business and provide no compensation to him, or any other person, directly or indirectly, other than as recorded.

3. If the parties are unable to agree on costs they may make written submissions to me, limited to five pages in length plus attachments, within 45 days.

R.D. Gordon J.:

Overview

30 The Applicant seeks an order of temporary child support for Shelley, age 20 and Kayla, age 18, and asks this court to impute significant income to the Respondent. The Respondent takes the position that there are special provisions in place for the support of the children that offset the amounts payable by him. He also argues that the amounts of income which the Applicant seeks to impute are exorbitant and unreasonable.

Background

31 The parties to these proceedings separated in November of 2011. They have two children: Shelley, born March 19, 1993, and Kayla, born April 9, 1995. Shelley is currently enrolled in her third year of a four year nursing program at Laurentian University in Sudbury and resides away from the home of the Applicant for several months each year. Kayla continues to reside at home while attending her first year of post-secondary education at Northern College in Timmins.

32 The parties founded and operated a business in Timmins known as "Mikey's", which sells and services all manner of recreational vehicles and equipment. It started out as a sideline business, with both parties working elsewhere, but quickly grew to become one of the largest businesses of its kind in northeastern Ontario. For many years prior to their separation both parties dedicated their time to running the business and raising their family. The Respondent was the face of the business, overseeing sales and service while contracting with suppliers. The Applicant was involved more behind the scenes, looking after payables, payroll and other administrative functions.

33 The growth of the business was a wonderful story of success. Sales were in the millions of dollars. Profits were significant. Life was good.

34 Unfortunately, when the parties' relationship ended, so too did their ability to work together. Although neither wished to relinquish any measure of control over the business, it was eventually determined that the Applicant would step away from the business in return for an arrangement whereby she would have full and unfettered access to the financial records on an ongoing basis along with entitlement to the same benefits from the company as received by the Respondent. To this end, the parties entered Into Minutes of Settlement which were incorporated into the temporary order of Justice Koke dated February 15, 2013. The order provides that the Applicant shall receive the following benefits and remuneration from the business:

1. An annual salary of \$120,000 (the same as the Respondent);
2. Continued benefit coverage under the group life and disability insurance, and extended health benefits, as provided by the business;

3. Continued exclusive use and possession of a Cadillac SRX SUV owned by the business;
4. Continued exclusive use and possession of a new/current year snowmachine, Seadoo and 4 Wheeler/ATV owned by the business;
5. Non-exclusive access to the use of the then-current demo Spyder motorcycle owned by the business;
6. Primary non-exclusive use and possession of the pontoon boat and motor, or subsequent replacements thereof, which shall remain stored during spring/summer at the dock to the rear of the matrimonial home, provided that if it is needed for demo/loan purposes to potential customers or employees, it may be removed, on reasonable notice, for such purposes;
7. Non-exclusive access to the use of a truck and/or trailer owned by the business after hours, for transporting equipment and vehicles;
8. All expenses for her gas and fuel, insurance, and all costs and labour for any required maintenance or repair of the vehicle and recreational equipment used by her;
9. Exclusive use of the hot tub and riding lawn mower along with costs of chemicals, maintenance and repair;
10. All costs for snow clearing of the driveway of the matrimonial home;
11. A cell phone
12. Unlimited access to all Aeroplan points and Air Miles held by the business.

35 Insofar as the children are concerned, the order provides as follows:

7. With respect to remuneration, monies and expenses for the children of the marriage, and without prejudice to the Applicant's right to advance claims for child support and section 7 extraordinary expenses or the Respondent's right to claim that the current funds and monies being paid to the children, whether through wages, the family trust or other investment accounts, constitute both child support and section 7 extraordinary expenses, on an interim basis:

(a) The Respondent shall ensure that the children have continued access to, and cover all costs through the business for, the use of their cell phones;

(b) Wages shall continue to be paid to the children, from the business, in the same manner as have been previously paid, for payment either directly to the children, or alternatively for deposit to their respective High Save accounts sets aside for coverage of their post-secondary educational expenses, extracurricular expenses and other extraordinary expenses

(c) The Respondent and the Applicant shall also cooperate with the Business accountant, Mr. Al Letourneau, to forthwith complete the pending transfer of \$30,000 from M & L Mason Holdings Inc., and/or Mikey's General Sales and Repairs Ltd. through the Family Trust, for deposit to the family trust account with Northern Credit Union for the benefit of the children Kayla Mason and Shelley Mason, and to be used as needed to cover expenses, extraordinary or otherwise, of the children. The majority of

such expenses are anticipated to be incurred by Shelley Mason to cover her post-secondary expenses in 2013. This use of funds, however, shall not be construed as to limit the use to cover expenses for either child as may be required.

36 Although not provided in any of the temporary orders issued to date, the Applicant has remained in the matrimonial home, which is mortgage free.

The Position of the Applicant

37 The Applicant's request for child support is premised on two factors: (a) That even if she and the Respondent have the same income and benefits from the business, the children have maintained their residence with her and she has been made to support the children without contribution from the Respondent; and (2) That in determining the amount of the Respondent's income for child support purposes there should be included the value of the various benefits he receives from the business, including significant unreported cash income.

The Position of the Respondent

38 The Respondent takes the position that the provisions in the previous order relative to the ongoing remuneration of the children by the business, payment of expenses by the family trust, and the benefit to them of all of the perks supplied to the Applicant's household by the business, amount to special circumstances for the support of the children that should eliminate or reduce significantly his child support obligation.

39 He is of the view that the benefits attributed to him by the Applicant are significantly overvalued and that he is no longer involved in any unreported cash transactions in the business.

Applicable Legal Principles

40 The parties acknowledge their obligation to support Kayla and Shelley.

41 Child support is generally assessed in accordance with the Child Support Guidelines (the "Guidelines"), however, the court may award an amount that is different from the amount that would be determined in accordance with the guidelines if satisfied: (a) that special arrangements in an order or written agreement respecting the financial obligations of the parents, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and (b) that the application of the child support guidelines is inequitable given those special provisions.

42 Both children are over the age of majority. Accordingly, the Guidelines provide that the amount of an order for support for them is: (a) the amount determined by applying the guidelines as if they were under the age of majority; or (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, need and other circumstances of the children and the financial ability of each parent to contribute to their support.

43 A party's income for the purposes of applying the Guidelines is determined in accordance with sections 15 through 20 of the Guidelines. Section 19 allows the court to impute income to a party if appropriate in all of the circumstances, and provides a non-exhaustive list of circumstances when it may be appropriate to do so.

Analysis

44 Having regard to the applicable legal principles, the determination of the Respondent's child support obligations in this case requires the court to consider the following questions:

1. What is the Respondent's income for the purposes of applying the Guidelines?
2. What is the guideline amount of support for the children having regard to the Respondent's income?
3. Is the application of the approach to child support contained in section 3(1) inappropriate in the circumstances of this case? If so, what is the appropriate approach?
4. Are there special arrangements in an order which benefit the children?
5. Would application of the Guidelines be inequitable given those special arrangements?
6. Should an award of child support be made retrospectively, and if so, for how long?

What is the Respondent's Income for the Purposes of Applying the Guidelines?

45 The Respondent's base taxable income is agreed by the parties to be \$120,000. Although his taxable income for 2012 was \$127,160, the Applicant was forthright in acknowledging that the starting point for the calculation of his income ought to be the \$120,000 of wages he is paid by the company. However, the Applicant submits that the Respondent's true income for tax purposes is really much higher.

46 To begin with, the Applicant takes the position that there must be income attributed to the Respondent to reflect his use of a company vehicle, which she says ought to be valued at almost \$12,000 per year. The Respondent takes the position that it is used primarily for business purposes but that personal use would account for perhaps 2596, which he suggests be valued at roughly \$3,000 per year. There can be no doubt that the Respondent's use of the truck is both personal and business related. I note the Respondent has another vehicle which would be available for personal use during the summer months, thereby reducing the personal use aspect of the truck during the summer. I also note, however, that he has no other personal use vehicle for the winter months, and so the truck would take on greater personal use during those months. Having regard to these factors, it would be appropriate to assess a benefit to the Respondent of \$6,000 per year for his personal use of the company vehicle and to impute this amount of money to him.

47 Secondly, the Applicant asserts the Respondent has the benefit of a \$98,000 sports car owned by the business and seeks to impute significant income to the Respondent to reflect his personal use of it. The Respondent has explained that the car was purchased before separation, in his name alone, and is not a business asset. This has not been refuted by the Applicant. On these facts, the car is a personal asset of the Respondent for which he derives no benefit from the business.

48 Thirdly, the Applicant seeks to attribute income to the Respondent for the costs of insurance, gas and repairs for the truck and the car, given that those expenses are paid entirely by the business. The Respondent acknowledges that some income ought to be attributed to him but does not agree with the amounts proposed by the Applicant. The Respondent is content to accept the estimated costs of insurance for both vehicles to be \$4,500 per year. Given that the car is driven only part of the year, the amount attributable to it likely to be something less than one half of this amount. I must also consider that the truck is used partly for business purposes. On consideration of these factors, it is appropriate that the sum of \$3,000 per year be attributed to the Respondent for personal insurance costs paid by the business. With respect to gas and repairs, the Respondent

accepts the Applicant's estimate of \$4,800 per year but suggests that it be reduced to reflect the seasonal use of the car and the business portion of the use of the truck. In my view, having regard to these factors, an appropriate amount to impute on account of personal use gas paid by the business would be usage \$3,000 per year. Given the newness of the vehicles and the applicable warranties, I would think repair work, at least for the time-being, will be minimal.

49 The Applicant next seeks to impute significant income to the Respondent to reflect his personal use of demonstration models owned by the business. There is no doubt this use is of some value, but it is not near the \$26,000 per year alleged by the Applicant and is difficult to ascertain without additional information as to the amount of use made by him. These "demos" represent business assets, which are owned by the business, often used in the business and eventually sold by the business. It does not seem appropriate to me to assess the value of these benefits according to their retail sales value when usage by the Respondent is neither exclusive nor necessarily regular. A better assessment may come from the amount of personal use made of the items and what it would cost to rent similar equipment for comparable periods of time. For example, although it may be that he has a demonstration snowmobile available for his use at all times it would not be appropriate to impute income to him for that use during summer months when it is of no use to him, or to impute income to him for periods of time during the winter when it is being used as a business asset. In my view, the evidence before me is insufficient to properly assign a value to the Respondent's use of demonstration equipment.

50 The Applicant seeks to impute income of \$2,100 per year from health coverage provided by the business, and this is accepted by the Respondent as appropriate.

51 The Applicant seeks to impute Income to the Respondent for the personal aspect of Travel/Vacation paid for by the business. The Respondent acknowledges that \$2,400 per annum is an appropriate imputation in this regard. The Applicant notes that since January 1, 2013 the Respondent has taken at least *seven* vacations, however on the record before me I am unable to ascertain to what extent these vacations were business related, what portion of the costs of each, if any, was paid by the business, and whether the trips taken since January 1, 2013 are indicative of what may reasonably be expected in the future. In the circumstances, I impute only \$2,400 per year to the Respondent on account of personal travel or vacation paid by the business.

52 The Applicant seeks to impute income to the Respondent with respect to personal legal fees paid by the business. The Respondent says that any personal legal fees paid by the business have been repaid to the business by him and that all future personal legal fees will be paid by him personally. I accept that evidence. Surely if he acts to the contrary it will become readily apparent to the Applicant in her ongoing review of the business financial records

53 Lastly, the Applicant contends the Respondent is involved in ongoing significant cash dealing within the business which cash is received by him personally and is not otherwise accounted for. The Respondent acknowledges that there was, both before and after separation, a cash component to the business but says it has been reduced to basically nothing now it is clear to me that unreported cash transactions in the business were, at least at one time, fairly significant. The parties acknowledge that there was always significant cash in their home safe (usually over \$20,000) from cash transactions, which they used to finance personal expenses. Although their evidence differs as to amounts, it is acknowledged that tens of thousands of dollars of cash was used for the construction of their home. On separation, there was \$36,000 cash in their vault, which was divided equally between them. The bigger questions are: (a) whether this continues to be the case; and (b) whether it is appropriate to make an order based upon imputed cash income when to do so basically forces the Respondent to

continue with this unethical business practice. Although there was undoubtedly unreported cash income received by the Respondent since separation, it is almost impossible to determine its precise amount. It cannot be said to be regular and predictable. The Respondent has undertaken to discontinue this type of business and consents to an order prohibiting it. In my view, it is inappropriate to impute cash income to the Respondent on a go forward basis, particularly when there are some assurances that it will not continue. These assurances are contained in the sworn affidavits of the Respondent that he is no longer doing it, and in the order I have made in the Applicant's contempt motion which prohibits him from arranging such transactions in the business, and imposes a conditional fine in the amount of \$20,000. If, contrary to these protections, the Respondent was to allow the business to engage in similar activities on a go-forward basis, the potential consequences to him, both legally and financially, are likely to be devastating. With respect to cash transactions alleged to have taken place between the date of separation and now, that is a matter best left to be dealt with as part of the property determination to be made at trial.

54 Having regard to all of the above, it is appropriate to Impute additional Income of to the Respondent of \$16,500 per year. When this is added to his base income of \$120,000, his total income for the purposes of the Guidelines is \$136,500.

What is the Guideline Amount of Support for Annual Income of \$136,500?

55 The Guideline amount of support for two children, with the payor earning \$136,500 is \$1,856 per month. Although there would normally be a section 7 component considered, the Applicant is not asking for any additional contribution towards section 7 expenses, given those expenses are paid through the family trust and the wages paid to the children through the business.

Is the Approach to calculation of child support under Section 3(1) of the Guidelines Inappropriate In the circumstances of this case? If so, what approach Is appropriate?

56 It is appropriate that child support for Kayla be approached in the manner outlined in section 3(1) of the Guidelines, given that she continues to reside at home while pursuing her post-secondary education.

57 The issue here is whether the approach in section 3(1) of the Guidelines for two children is appropriate when the child Shelley resides away from the Applicant during the school year. In the circumstances of this case, I agree with the Respondent that it is not. It having been determined that Shelley's expenses while away at school are adequately covered via her wages and the family trust, I must consider whether the ongoing expenses incurred by the Applicant for Shelley while she is at home can be expected to continue while she is away at school, and to what extent. In this case, the Applicant is in possession of the home and all expenses are paid by the business, so it cannot be argued that she must incur expenses to maintain the house for Shelley while she is at school. Similarly, the expenses related to the vehicle and recreational equipment are all covered by the business. Accordingly, while Shelley is away at school the Applicant is not required to make significant contribution to her expenses and does not have increased costs associated with maintaining the home for her. There can be little doubt, however, that when she is at home, Shelley requires the usual expenditure of funds for food, clothing, recreational activities and the like. I take into account that Shelley is home regularly throughout the school year.

58 I am satisfied from the evidence before me that Shelley resides with the Applicant during the summer months of May through August, during the Christmas holidays and during regular trips home throughout the school year, in all, it is appropriate to find that she resides with the Applicant six months of the year.

59 In my view, the appropriate approach to the calculation of child support in these circumstances takes into account that for six months of the year, the expenses incurred by the Applicant which are related to the care of Shelley are practically zero. The result is that the support attributable to Shelley (the guideline amount for two children of \$1,856 less the guideline amount for one child of \$1,163) ought to be reduced by one half. The resulting payment for two children would be \$1,510 per month.

Are there Special Arrangements In An Order Which Benefit the Children?

60 As reviewed above, the February 15, 2013 order of Justice Koke contains several provisions which benefit the children. To begin with, the order requires that their cell phones be paid for by the business. Secondly, it requires that they continue to be paid wages from the business. Although the amounts paid into their High Savings Accounts have traditionally been earmarked for their post-secondary expenses, the order provides specifically that those funds may be used for their extracurricular and other extraordinary expenses. Thirdly, the order contemplated a payment of \$30,000 to the family trust account for use in the payment of post-secondary expenses for Shelley, but also for expenses for either child, as may be required. Fourthly, the children share in the benefits provided by the business to the Applicant and the Respondent.

61 I have little difficulty finding there are special arrangements in the order of Justice Koke which benefit the children both directly and indirectly.

Would Application of the Guidelines be Inequitable given these special arrangements?

62 It is fortunate the parties are able to structure their business affairs so that the children continue to have the standard of living they have always enjoyed. However, these special arrangements do not provide adequate or any amounts for clothing, recreation, vacations, food, and other expenses incurred regularly for them while in the Applicant's care. Although the Applicant could perhaps access the family trust funds to defray some of those expenses, that would ultimately result in a deficiency of funds for post-secondary education and would, I have no doubt, contribute to further discord between the parties. In the interim, it is appropriate that access to those funds be restricted to section 7 expenses related to the children.

63 As it stands, the Applicant is being made to bear all of these additional expenses. Given the spending habits of the children and the costs of providing for their needs, the payment of child support in accordance with the Guidelines would not be inequitable even after giving full consideration to these special arrangements.

Should Child Support Be Assessed Retrospectively?

64 The Applicant has had the care of the children since separation. Aside from the special arrangements referred to above the Respondent has not contributed significantly to the costs of their day to day upbringing. The Respondent concedes that if child support is payable, it is appropriate to order its payment from when the April, 2012 when the Application was started. The Applicant seeks payment from the date of separation some five months earlier.

65 The children have been in the care of the Applicant since separation. Both parties have had an obligation to support them since that time. Accordingly, the child support payable by the Respondent shall be assessed from December 1, 2011, with credit for the \$4,500 paid by him in accordance with the most recent order.

Conclusion

66 The Respondent shall pay to the Applicant for the support of the children Shelley and Kayla the sum of \$1,510 per month beginning November 1, 2013 and on the first of each and every month thereafter.

67 The Respondent shall pay to the Applicant on account of retrospective support, the sum of \$30,230.00.

68 If the parties are unable to agree on the issue of costs, they may make written submissions to me, not to exceed five pages in length, exclusive of attachments, within 45 days.

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