Date of Release: October 30, 1995

IN THE SUPREME COURT OF BRITISH COLUMBIA

No. D087180	)
Vancouver Registry	)
	)
BETWEEN:	)
	)
JARNAIL SINGH SARAN	)
	)
PETITIONER	)
	)
AND:	)
	)
PARMINDER KAUR SARAN	)
	) **REASONS FOR JUDGMENT**
RESPONDENT	)
	)
AND:	)
	) **OF THE HONOURABLE**
KALVINDER JIT SINGH ATWAL	)
	)
CO-RESPONDENT	)
	) **MR. JUSTICE CLANCY**
	)
	)
A N D	)
	) **(IN CHAMBERS)**
	)
	)
No. A933042	)
Vancouver Registry	)

PARMINDER KAUR SARAN	)
PLAINTIFF	)
AND:	)
JARNAIL KAUR SARAN	)
DEFENDANT	)
J.A.W. Schuman and	
J. Taylor	Counsel for the petitioner
F. Potts	Counsel for the respondent
Date and place of hearing	October 5 and 6, 1995, at Vancouver, British Columbia.

1 On September 15, 1993 Master Donaldson ordered payment of child maintenance by the petitioner Jarnail Saran in the amount of $4,000.00 per month. An appeal to this Court from that decision was heard by Hall J. On November 26, 1993 he allowed the appeal in part by providing for payment of maintenance in respect of each child at the rate of $900.00 per month. In addition, he ordered Mr. Saran to make the payments on the mortgage on the family home as they fell due. Those payments are approximately $1,600.00 per month.

2 When the trial was adjourned on March 6, 1995, Mr. Saran brought an application to vary the order of Hall J. by reducing the maintenance payable. He asked, as well, that his obligation to pay arrears other than from the sale of family assets or from the sale of assets disclosed subsequent to that date be suspended. That application was adjourned and eventually rescheduled to be heard before me. The specific variation sought by Mr. Saran is a reduction of the order to $400.00 per month per child and the dispensing with the requirement that he make the mortgage payments. He has not pursued his request for an order that he be required to pay arrears only from the proceeds of the sale of assets.

3 Counsel for Mrs. Saran takes the position that Mr. Saran should not be heard. The authorities provide that the Court should refuse to entertain an application to vary in some circumstances. The principle generally adopted was enunciated in ***Parkinson* v. *Parkinson***, [1973] 3 O.R. 293, 11 R.F.L. 128, 36 D.L.R. (3d) 521 (Ont. C.A.), by Gale C.J.O. at p. 128:

> The Court has come to the conclusion that it ought not to entertain the appellant's appeal until either the arrears owing by him are paid or we are satisfied that he cannot pay them.

4 That principle has been adopted in this province. See: ***Bucholtz* v. *Bucholtz*** (1977), 1 R.F.L. (2d) 289 (B.C.S.C.).

5 In ***Gray* v. *Gray*** (1983), 32 R.F.L. (2d) 438 (Ont. H.C.), Soubliere L.J.S.C. elaborated on the reasoning of the Court in ***Parkinson*** by

holding that before an application would be entertained, good faith on the part of the applicant must be established. One of the submissions made on behalf of Mr. Saran is that he does not have the means to pay. I am satisfied that an analysis of that submission is necessary to allow him to establish his *bona fides* by showing that he lacks the ability to make the maintenance payments ordered.

6 In considering the evidence put forward by Mr. Saran, I am entitled to take into account the findings of other decision makers as to his credibility. Master Donaldson, in his reasons for judgment when ordering maintenance payments of $4,000.00 per month, found that he should be skeptical of some of the evidence put forward by Mr. Saran. At another point the Master stated flatly that he did not believe a statement of Mr. Saran and he found a decision allegedly made to have been incredible. His conclusion was that Mr. Saran had been less than candid and sincere in giving information to the Court.

7 Hall J. said, "And I say with respect to the learned Master I can well appreciate his unhappiness, to use a mild term, with the respondent in his incomplete disclosure, his failure to be frank with the Court, ...".

8 In dealing with contempt proceedings, which were never concluded, Brenner J., on November 29, 1994, said:

> I have grave concerns as to the respondent's credibility. I do not believe that he is unable to pay. I have considerable doubt as to the *bona fides* of the purported sale of the Mercedes.

9 Given the history of skepticism with which evidence put forward by Mr. Saran has been received in the past, I would have expected that he would be meticulous in endeavouring to establish his inability to pay his maintenance obligation. He has put forward a substantial body of information contained in affidavits and most particularly in statements attached as exhibits to his affidavit of October 5, 1995, which purport to show his receipts and disbursements from the date of his separation in January 1993 to October 31, 1994, and from the date of separation until October 4, 1995.

10 The first position taken by him is that his income has been demonstrated by those statements to have been dramatically reduced since November 1993. Master Donaldson found, and Hall J. accepted, that Mr. Saran's income had exceeded $300,000 per year through 1992. In Mr. Saran's submission both must have assumed that his income stream would continue. In the statements produced, earnings for 1993 are shown at $61,469, for 1994 $22,648, and for 1995 to date $16,686.87. I am asked to conclude that his income has dropped by this date to an estimated $25,000 per year. Accepting his income figures as accurate, there is some basis for an estimated income of $25,000 for 1995 and the statements demonstrate that Mr. Saran's earnings have fallen substantially below $300,000 per year.

11 The difficulty is that the figures presented cannot be accepted as completely accurate. Before Master Donaldson in late 1993 Mr. Saran stated his income was $10,000 per month for 1993. That figure provides an income of $120,000 per year. His statement and his tax returns show a figure of $61,469, or approximately 50 per cent of that projection. Mr. Saran apparently was not truthful in the evidence he gave to the Master or, alternatively, in the materials provided to me. Master Donaldson gave his decision in September 1993, by which time Mr. Saran should have had a reasonably accurate estimate of his 1993 earnings. I stop short of finding that he has been untruthful in stating that his 1993 income was $61,469, but the discrepancy does cause me concern.

12 There are other discrepancies which make reliance on the statements, as proof of inability to pay maintenance, difficult. A tax refund of $7,328.79 was not disclosed. His counsel says that was through inadvertence. A series of loans are shown and described as loans from friends. There is no supporting documentation and no information as to how the loans are to be paid.

Counsel for Mrs. Saran submits those funds should be taken to have been income rather than loans. One of the loans shown on the statement effective for the period ending October 31, 1994 was from a Mr. Amrit Gill in the amount $25,000. In a property and financial statement sworn on November 21, 1994, that loan is shown at $16,000. The date of the loan is given as 1993. If the loan was increased to $25,000 before October 31st, that was not reflected in the property and financial statement.

13 I am concerned as well by the lack of documentation supporting expenditures. It is true that Mr. Saran has sworn to the accuracy of the statements but his lack of accuracy has been demonstrated in a number of instances.

14 For example, Mr. Saran shows real estate expenses of $79,392 for 1993 on both statements. In his income tax return for 1993, he shows that figure as a total expense, including real estate expenses of $29,164.41. On both statements his living expenses less auto and telephone expenses are shown by reference to the following formula:

($8,255 - $2,650 - $1,050 - $250 = 4,305 x number of months).

It will be noted that there are three deductions, not two.

15 A comparison of the loans shown on the two statements reveals that a loan of $50,000 disappears on the second statement without an explanation of it having been repaid. Other loan figures change without any explanation offered, or documentation provided.

16 Child maintenance is shown on the earlier statement as $2,700 per month multiplied by 17 months for a total of $61,400. The actual total is $45,900, a mistake of $16,000. A similar discrepancy as to automobile payments seems to indicate a $7,000 error.

17 There are other examples, for some of which explanations have been offered. I have concerns over the accuracy of the statements and do not accept them as having been proven to be accurate.

18 It has been established that Mr. Saran is in arrears on his child maintenance payments in the amount of $15,008.60. That calculation is not disputed. I am not satisfied on the material produced that Mr. Saran is not in a position to pay those arrears. He has not met the burden of proof placed upon him. His application to vary the order of Hall J. should not be entertained.

19 That conclusion is sufficient to dispose of the application but I should add that, on the evidence put before me, I would not order variation in any event.

20 Section 17(4) of the ***Divorce Act***, R.S.C. 1985 (2d Supp.), c. 3, requires the court to "satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order ....".

21 There must then be a change in circumstances since November 1993 which would justify a variation of the order of Hall J. The burden of establishing such a change in circumstances rests on Mr. Saran. Taylor J.A. in ***Reid*** **v.** ***Reid*** (1992), 68 B.C.L.R. (2d) 258 referred to a substantial onus and said:

To obtain variance or reduction or cancellation of arrears an applicant must make a full disclosure of his or her means and satisfy the court

that the change in means is real and not one of choice and is such as to warrant the exercise of the court's jurisdiction to grant relief.

(p. 262)

22 In ***Levesque* v. *Levesque***, [1994] 8 W.W.R. 589 (Alta. C.A.), the Court reiterated the view that income capacity and not just actual income should govern the court in making an award. The Court expressed the view that only where an order for some special reason proves to be too great a burden should variation be considered. It recognized that it is not in the best interests of the child to reduce a parent into poverty. However, to ask a child or the other spouse to reduce their standard of living to assist the parent making maintenance payments is not appropriate unless there is a risk that the parent who pays would fall below an acceptable subsistence level.

23 Dealing with those principles, I do not think that Mr. Saran has been frank in making full disclosure. By his own account, some $859,517.77 has passed through his hands during the period from the date of separation until October 4, 1995. He alleges that much of that money was provided through loans, that a substantial portion of it was acquired before the making of the maintenance order, and that it cannot be said that his wife's standard of living or that of the children was reduced because most of the monies passed through his hands while he was in compliance. I note that compliance was achieved in a substantial way through garnishing orders but, having said that, there is no question that no maintenance has been paid since January 1, 1995. None of the monies acquired after that date have been applied to maintenance.

24 Mr. Saran's statements also show that many accounts, including substantial legal fees, have been paid even though Mr. Saran is in arrears of his child maintenance obligations. In ***Whitely* v. *Whitely*** (2 February 1995), Nelson 4536 (B.C.S.C.), Cooper J. adopted the following passage from the judgment of Trussler J. in ***Murray* v. *Murray*** (1991) 35. R.F.L. (3d) 449 (Alta. Q.B.):

A parent's primary obligation is to support his or her children ... That means child support comes before such things as car payments, high monthly mortgage payments, entertainment, alcohol, tobacco, recreation, vacation savings, and debts.

(***Whitely***, p. 5)

25 I respectfully adopt that principle. I specifically reject the suggestion of counsel for Mr. Saran that the only time payment of debts in priority to meeting maintenance obligations is offensive is when money is available in the bank while arrears are outstanding. I do not agree that the authorities can be read as approving so narrow a principle.

26 Mr. Saran lives in a home valued at approximately $450,000, and drives a Mercedes. He has travelled to England and India in the past 2½ years. He says that the mortgage on his home is in arrears and that he has sold the Mercedes. I have serious doubts, as did Brenner J., as to whether or not the sale of the Mercedes was *bona fide*. I also note that on a loan application to the bank he valued the Mercedes at $90,000 and now contends its value is $35,000. Counsel describes the bank statement as puffery, but it indicates another reason why the Court should be concerned about the evidence put forward by Mr. Saran.

27 I am concerned, as well, by his statement that his income took such a precipitous drop after 1992. The passage I have cited in ***Reid* v. *Reid***, *supra*, makes it clear that before relief will be granted an applicant must make full disclosure as to means and satisfy the Court that the change in means is not one of choice. Recognizing that there has been a downturn in the real estate market and that his assets have been encumbered by the matrimonial proceedings, it may well be that the drop in income is, to some extent, caused

by him expending less effort to earn it.

28 I do not agree that Master Donaldson and Hall J. based their award solely on an expectation of a continuation of an annual income of $300,000. Ability to earn income was also taken into account by them.

29 The affidavit evidence also discloses that the bank has refused to accept further payments on the mortgage on the family home. That allows Mr. Saran to avoid payments of approximately $1,600.00 per month. His maintenance obligations have effectively been reduced by that amount. Given those circumstances, Mr. Saran's failure to make full disclosure and the large sums which he has acquired and expended, I conclude that the variation order should not be made. Mr. Saran is in no danger of being reduced to poverty by continuation of the order.

30 The applications to vary the maintenance ordered by Hall J. and to suspend payment of the arrears of maintenance are dismissed. I find, as well, that there was no real prospect of success in bringing this application. I would be disposed to order costs against Mr. Saran, but I am reluctant to make that order since it may lead him to say his ability to pay child maintenance is affected. The trial judge will be in a better position to assess the effect of payment of costs. They should be left in his or her discretion, and I so order.

"D.L. Clancy J."

D.L. CLANCY J.

October 30, 1995

Vancouver, B.C.