Case Name:

Macdonald v. Macdonald

Between
Susan Rebecca Macdonald, plaintiff (appellant)
(respondent by way of cross-appeal), and
Ian Alexander Macdonald, defendant (respondent)
(appellant by way of cross-appeal)

[2002] B.C.J. No. 121
2002 BCCA 46 Vancouver
Registry No. CA028825

British Columbia Court of Appeal
Vancouver, British Columbia Donald,
Levine and Smith JJ.A.

Heard: December 5, 2001.
Judgment: January 24, 2002. (26 paras.)

Family law - Maintenance of wives and children - Maintenance of children - Considerations, support tables - Where income over $150,000 - Interim relief-Interim maintenance.

Appeal by the wife from an order setting interim monthly child support payable by the husband at $20,000 for three children. Interim child support had been set by a Master at $59,500 and then was reduced on appeal to $20,000. The Master had used the Federal Child Support Guidelines amount, but on appeal this was ruled inappropriate, and the amount was reduced. The husband earned $4,500,000 annually. While living together, the parties had agreed to live on a budget of $200,000 annually and save the rest for retirement. The wife had presented a budget of $207,000 which was similar to the parties' budget before they separated. The question of appropriateness of the Guidelines amount came into play, as an income above $150,000 was being considered in interim proceedings.

HELD: Appeal dismissed. The appellate judge had not erred in reducing the interim child support. The husband had rebutted the presumption that Guideline support should be ordered. The judge correctly considered the parties' lifestyle before and after separation, the wife's budget, and the values and aspirations the family had when they were a unit.

Statutes, Regulations and Rules Cited:

Divorce Act, R.S.C. 1985, c. 3, s. 15.1(3).

Federal Child Support Guidelines, s. 4(a), 4(b)(i), 4(b)(ii), 4(b)(iii).

[Quicklaw note: Supplementary reasons for judgment were released September 11, 2002. See [2002] B.C.J. No. 2035.]

Counsel:

F.E. Maxwell, Q.C., for the appellant.
L.A. Kahn and A. Duke, for the respondent.

The judgment of the Court was delivered by ,

1 **DONALD J.A.:-** This appeal involves a controversy over the correct approach to the Federal Child Support Guidelines in high income situations.

2 We are asked to reconcile what are said to be differences apparent in two decisions of this court: Metzner v. Metzner (2000), 9 R.F.L. (5th) 162 and Hollenbach v. Hollenbach (2000), 10 R.F.L. (5th) 280. In the judgment under appeal, Madam Justice Loo said the difference was one of emphasis and distinguished Hollenbach on the facts at para. 31:

> I do not need to reconcile what the parties consider to be the apparent dichotomy between Hollenbach and Metzner (2000), R.F.L. (5th) 162 (B.C.C.A.) [sic] where the emphasis was on the circumstances of the particular children, rather than on the circumstances of similarly placed children. I do, however, point out that in Hollenbach, the mother's budget was based on the amount the father paid.

3 This appeal is brought by the appellant mother from the reduction of an interim order for child maintenance set by a Master at $59,500 a month for three children and varied on appeal by Loo J. to $20,000 a month. The Master's order was based on the table amount under the Guidelines for the father's average annual income which the Master said was $4,500,000. Loo J. found that the table amount was excessive.

4 The father cross-appealed on various grounds, the most significant of which alleged that the learned chambers judge erred in failing to vary spousal support and in failing to order reimbursement of the overpayment during the time that the Master's order was in force. We refused to hear the cross-appeal because the order appealed from made no reference to these items, nor was there any reference to them in the reasons. Furthermore, we were informed that the parties had set down a date for the further hearing of these issues in the Supreme Court.

Background

5 The parties are in their early forties. They married on 14 August 1988, had three children now eleven, nine and seven years of age, and separated on 18 May 1999.

6 The mother was trained as a journeyman goldsmith but with the arrival of the children has worked at home looking after the family. Her family is wealthy and pays her sums from time to time from companies and discretionary trusts. The learned chambers judge found that she received from these sources: $93,750 in 1996; $268,750 in 1997; $49,562.50 in 1998; $99,937.50 in 1999; and $68,250 in 2000.

7 The father is a Vice-President ofRBC Dominion Securities with responsibility for investing the company's funds. According to the learned chambers judge his earnings from employment and investments were: $785,744 in 1996; $2,106,992 in 1997; $3,806,977 in 1998; $3,200,568 in 1999; and $6,518,160 in 2000.

8 While they were together the parties decided to live on a budget of $200,000 a year, the father's salary in previous years, in order to put money away for early retirement. They accumulated significant joint assets. The learned chambers judge estimated the share of each party to be: real estate, $1,300,000; chattels, $110,000; and RBC Dominion Securities investment accounts, $2,000,055.

9 The trial of the action is set for 4 February 2002 and is expected to take four weeks. Both counsel are anxious to have the law on the points in question settled before trial.

Issues

10 The mother advances six grounds of appeal alleging that the learned chambers judge:

1. ignored the standard of review on appeal from a Master by substituting her opinion on the appropriate amount of maintenance;

2. failed to apply the presumption that the Guideline amount is appropriate;

3. shifted the burden by requiring the mother to justify the Guideline amount;

4. placed excessive reliance on the mother's existing budget;

5. focused on the short-term needs of the children and failed to consider their future and intermediate needs; and

6. failed to consider savings as part of the lifestyle and needs of the children before and after separation.

Conclusion

11 In my judgment the learned chambers judge did not err as alleged and I would dismiss the appeal with one important reservation: this decision should not be taken as an endorsement of the quantum fixed by the learned chambers judge. The judgment under appeal was an interim order. The argument before us went to the legal issues surrounding the applicability of the Guidelines, not the amount. The judge who hears the trial should feel free to order whatever amount is seen to be appropriate for the interim period.

12 In brief, I would dismiss the appeal because in my view the learned chambers judge: (1) enunciated the correct review test, "clearly wrong", and applied it; (2) recognized the presumption in favour of the Guideline amount and the payor father's onus to rebut it; (3) did not shift the burden of rebutting the presumption to the mother; (4) did not put too much reliance on the mother's budget, it was a relevant consideration in relation to the needs of the children; (5) nor did she err in not resolving the savings issue, the matter was at an interim stage of the proceedings.

Hollenbach v. Hollenbach

13 I would say in relation to the legal controversy animating this appeal that there was no intention in Hollenbach to change the law as it was stated by the Supreme Court of Canada in Francis v. Baker, [1999] 3 S.c.R. 250 and by this court in Metzner v. Metzner. The approach I took in Hollenbach must be appreciated in the light of the unusual circumstances of that case. In responding to those circumstances, I did not hold, and I should not be understood to mean, that the lifestyle of the parties before separation is an irrelevant consideration in deciding whether the Guideline amount was inappropriate; or that the receiving parent's budget should be ignored on the issue; or, as the learned chambers judge said of the Master's decision, that children are automatically entitled to a lifestyle commensurate with the payor's income; or, finally, that appropriateness should be determined by reference to the spending habits of other wealthy families, rather than the actual situation of the children in question.

14 For the reasons I gave in Hollenbach it was not reasonable to hold the children in that case to the stringent pre-separation lifestyle imposed by the father, or the mother's budget organized on the basis of what the father was paying, when after separation the father went on to make much more money and adopt a more lavish style of living.

15 The learned chambers judge in the present case correctly distinguished Hollenbach on this basis (at para. 32):

> Here, the situation is quite different. The defendant does not argue that the budget is too high and the plaintiff does not argue that it is too low; for the most part, they agree on the budget. The plaintiffs entire budget is $210,000 a year. It is remarkably similar to the budget during the marriage. The plaintiff does not suggest that she would spend more on the children if she had more, or that she needs more.

16 There is a danger in taking too much from a decision by deriving broad general rules, tests or propositions from the resolution of a particular dispute. Mr. Justice OHalloran in Bell v. Klein (No.3) (1954), 13 W.W.R. 193 (B.C.C.A.) put it this way at p. 195:

> I do not find occasion to recite an analysis of these decisions in this judgment. It is enough for me to say they must be read with a critical mind in the light of their own statutory and factual backgrounds, which, as is well known, unavoidably sway judicial decision when the result depends upon close reasoning. A sentence or two or a paragraph taken here or there may seemingly support a forensic proposition. The danger, of course, is that in another case such an extract may be advanced as a general principle and, although it may appear verbally as such, yet the court was in truth directing it to the particular facts and circumstances which dominated its mind in the single case, and led the court to use a form of words which it would not have employed in such a final sense in a different set of facts and circumstances.

Applicable Principles

17 For a restatement of the applicable principles I cannot improve on the summary of Francis v. Baker (supra) set out by Mr. Justice Finch (now Chief Justice) in Metzner at para. 30:

> As I understand the reasons for judgment of the court in reaching that conclusion, these principles were applied:
>
> 1) **It** was Parliament's intention that there be a presumption in favour of the Table amounts in all cases (para. 42);
>
> 2) The Guidelines figures can only be increased or reduced under s. 4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate (para. 42);
>
> 3) There must be clear and compelling evidence for departing from the Guidelines figures (para. 43);
>
> 4) Parliament expressly listed in s. 4(b)(ii) the factors relevant to determining both appropriateness and inappropriateness of the Table amounts or any deviation therefrom (para. 44);
>
> 5) Courts should determine Table amounts to be inappropriate and so create more suitable awards only after examining all circumstances including the factors expressly

set out in s. 4(b)(ii) (para. 44);

6) Section 4(b)(ii) emphasizes the "centrality" of the actual situation of the children. The actual circumstances of the children are at least as important as any single element of the legislative purpose underlying the section (para. 39). A proper construction of s. 4 requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of the actual "condition, means, needs and other circumstances of the children" on the other. (para. 40)

7) While child support payments unquestionably result in some kind of wealth transfer to the children which results in an indirect benefit to the non-paying parent, the objectives of child support payments must be kept in mind. The Guidelines have not displaced the Divorce Act which has as its objective the maintenance of children rather than household equalization or spousal support (para. 41).

8) The court must have all necessary information before it in order to determine inappropriateness under s. 4. **If** the evidence provided is a child expense budget, then "the unique economic situation of high income earners" must be considered.

9) The test for reasonableness of expenses will be a demonstration by the paying parent that the budgeted expense is so high "as to exceed the generous ambit within which reasonable disagreement is possible". Bellenden v. Satterthwaite, [1948] 1 All E.R. 343 at 345.

18 Thus, in deciding whether the payor has rebutted the presumption by presenting clear and convincing evidence that the Guidelines are not appropriate, it will be relevant to consider: the parties' lifestyles before and after separation, the budget or plan the receiving parent has for the children along with the values and aspirations of the family when it was a unit. These are only some of the factors that may bear upon appropriateness of the Guidelines. Like all such factors, their weight is a matter of judgment in each case.

Interim Proceedings

19 Are there any special circumstances related to the interim nature of the proceedings? In the case of a payor's income below $150,000 I would say not. Section 15.1(3) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), provides that the Guidelines apply to interim orders:

> (3) Guidelines apply - A court making an order under subsection (1) or an interim order under subsection (2) shall do so in accordance with the applicable guidelines.

20 For incomes below $150,000 the Guideline table amount will apply as a matter of course. Above that income level the question of appropriateness comes into play and in that regard there may be a difference in the outcome as between interim and "final" orders or variances where findings that could only be made at trial may have an influence on what is appropriate.

The Savings Issue

21 The mother alleges here that the learned chambers judge neglected to consider an element of savings for the children's future in her award. While the parties were together they decided to live as though the father's earnings were $200,000 a year even though he was earning in the millions. They saved for his early retirement so the father could spend more time with the family and maintain their very comfortable lifestyle. Since the separation the father was able to put away $2,700,000 in savings. The mother argues that had the family stayed together those savings would have inured to the children's future benefit and she submits that the maintenance award should have reflected that.

22 The learned chambers judge did not specifically address that argument in her judgment. In my opinion that was not an error. I think that the subject of savings should await the trial when all the financial aspects of the dispute between these wealthy parties are before the court. This is because s. 4(b)(ii) of the Guidelines requires an examination of the financial position of each spouse. Section 4 reads as follows:

> 4. Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is
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> (a) the amount determined under section 3; or
>
> (b) if the court considers that amount to be inappropriate,
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> (i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
>
> (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
>
> (iii) the amount, if any, determined under section 7.
>
> [Emphasis added.]

23 There may be an argument that future savings relate to capital rather than income and therefore is inappropriate for a Guideline determination. I do not decide that question. My point is that the savings issue raised by the mother in this case is the kind of thing that should be resolved at trial rather than at an interim hearing because the decision on the financial issues may influence the result.

The Appeal Decision

24 In her reasons the learned chambers judge identified a number of errors in the Master's decision which demonstrated to her satisfaction that he was "clearly wrong". She said:

> [33] In my view, the Master erred and was clearly wrong in his finding that the plaintiff had incurred a debt of $50,000 in order to meet the children's expenses. Counsel for the plaintiff informed the Master that the plaintiff had taken out a $100,000 line of credit and incurred a debt of $50,000 over the last number of months. There was no evidence of that fact, but counsel

undertook to provide particulars of the debt to counsel for the defendant. After the hearing before the Master, counsel for the defendant was provided with documents which reveal that the plaintiff obtained a $100,000 line of credit in March 2001 and spent close to $40,000 in legal fees. Contrary to the Master's findings, she had not incurred any debt to meet expenses for the children.

[34] It may be as the Master stated, that the children do not live a lifestyle commensurate with the income earned by the defendant, but they never have, and neither has he. This is quite different from Hollenbach, where the father treated the children parsimoniously, while he lived lavishly.

[35] The children's budgets in this case are a mere fraction of the table amount. Although I accept the plaintiffs argument that she may want to take the children to Paris, have them educated abroad, or take them on an expensive holiday, there are no reasonably contemplated expenses for the children that can approach $59,500 a month or $714,000 a year, an amount more than three times the plaintiffs entire 2001 annual budget of $207,932. In my view, the table amount has reached that point described in Francis v. Baker at para. 41 where "the applicable Guidelines figures is so in excess of the children's reasonable needs that it must be considered to be a functional wealth transfer to a parent or de facto spousal support" .

[36] In my respectful view, the Master was clearly wrong when he concluded in para. 13 of his reasons as follows: " ... I am satisfied that the financial circumstances that the mother has found herself in since the order made in July of 1999 have been inadequate."

[37] The test to be applied is not just looking at the table amount and determining that the children are entitled to a lifestyle commensurate to that amount. The Master erred when he failed to take into account the condition, means, needs and other circumstances of the children, and the financial ability to the plaintiff to contribute to their support as required under s. 4(b)(ii).

25 I respectfully agree with the learned chambers judge that the Master's analysis failed to consider all the relevant factors in deciding that the Guideline amount was not inappropriate. She had regard for s. 4(b)(ii) of the Guidelines as well as the principles set out by Francis v. Baker, as interpreted by this court, and she correctly applied them in deciding that the Guideline amount was inappropriate. I do not agree with the mother's contention that the learned chambers judge used the wrong review test, ignored the presumption in favour of the Guideline amount, shifted the onus, gave too much weight to the mother's budget, or concentrated too much on the short-term.

Disposition

26 I would dismiss the appeal. This decision upholds the determination that the Guideline amount was inappropriate. I offer no opinion on the appropriateness of the quantum of $20,000 a month set by the learned chambers judge, and I leave that issue to the trial judge.

DONALD J.A.
LEVINE J.A.:- I agree.
SMITH J.A.:- I agree.

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