In the Court of Appeal of Alberta

Citation: Spiess v Spiess, 2026 ABCA 178

Date: 20260528
Docket: 2403-0232AC
Registry: Edmonton

Between:

Tegan Anne Spiess

Respondent

- and -

Garrett Allen Spiess

Appellant

The Court:

The Honourable Justice Kevin Feehan
The Honourable Justice William T. de Wit
The Honourable Justice Karan M. Shaner

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Justice S.C. Leonard
Dated the 20th day of September, 2024
Filed on the 26th day of November, 2024
(Docket: 4803 182567)

Memorandum of Judgment

The Court:

Introduction

[1] This is an appeal from a judgment following a two-day summary trial, resulting in a judgment for divorce, retroactive and ongoing child and spousal support, and a property equalization payment. The appellant husband disputes the trial judge's conclusions respecting imputation of his income, the respondent wife's child support responsibilities and those of her new partner, and the respondent's entitlement to spousal support. Additionally, the appellant disputes the trial judge's decision to order monies held in trust by the respondent's counsel following a property transaction be released and applied to child and spousal support arrears.

[2] The appeal is dismissed for the following reasons.

Background

[3] The appellant and the respondent began living together in 2003 and were married in 2006. They separated in 2017 and have four children, all of whom remain children of the marriage. During the marriage, the appellant worked outside the home and the respondent was primarily a stay-at-home parent.

[4] Before the summary trial occurred, there were proceedings before a chambers judge respecting, *inter alia,* property division. Those proceedings resulted in an order (the 2021 order) that addressed how the parties' real property would be divided, provided an agreement could be reached on the valuation and the appellant could arrange for financing, or, failing which, the properties would be listed for sale. The order stated specifically that the respondent's share of the equity in the parties' home was without prejudice to the appellant's ability to make arguments on that point at a later time. The appellant raised funds to finance the transactions, but they did not occur. The funds of approximately $131,000 remain in trust with the respondent's lawyer.

[5] The trial proceeded summarily. The issues were retroactive and ongoing child and spousal support, and property division.

[6] In addressing matrimonial property division, the trial judge followed the process outlined by this Court in ***Hodgson v Hodgson***, 2005 ABCA 13 at paras 18-21, and the comments in ***Carmichael v Carmichael***, 2007 ABCA 3 at para 21. First, she determined the value of the parties' real property. There was a dispute between the appraisers each party hired as to the value of the two pieces of real property, which the trial judge referenced as the Homestead Property and the

Bare Land Property. The appellant's appraiser valued the Homestead Property at $380,000 and the respondent's appraiser at $640,000. The trial judge ordered the Homestead Property be listed at an initial price of $640,000, with scheduled reductions in price until it reached $380,000, at which time the value would be set at $380,000.

[7] The trial judge then considered the competing appraisals on the Bare Land Property. The appellant's appraiser set the value of the Bare Land Property at $120,000 as of September 2021. The respondent's appraiser valued the Bare Land Property at $160,000 as of June 2024. The trial judge accepted the respondent's appraisal as it was current and contained recent comparators of similar lands.

[8] The trial judge next considered the chattels and liabilities, as well as post-separation debts, assets, and liabilities belonging to the corporation owned by the appellant, debts owing to a corporation owned by the appellant's parents, and loans advanced by the appellant's parents.

[9] The trial judge determined the equalization payment owed by the appellant to the respondent was $55,727.72.

[10] Next, the trial judge turned to resolving the issues surrounding child support. There was no dispute the appellant owed $45,582.96 in retroactive child support for the period from January 2018 to December 2020. Additionally, the appellant had not paid child support from January 2021 to the date of the trial and one of the issues before the trial judge was the amount of the appellant's income for that period. At the time of trial, one child was in the appellant's primary care, and the parties shared parenting of the other three.

[11] To determine child support for the three children in the shared parenting arrangement, the trial judge applied s 9 of the *Federal Child Support Guidelines*, SOR/97-175 [*Guidelines*] and as a first step, determined each party's guideline income. Both parties argued that the other was intentionally underemployed and asked the trial judge to impute income pursuant to s 19(1)(a) of the *Guidelines*.

[12] The trial judge applied the framework for imputing income under s 19(1)(a) of the *Guidelines* set out in ***Peters v Atchooay***, 2022 ABCA 347 at para 60 [***Peters***]. She found the appellant was underemployed and imputed income to him. She noted that for the years 2019 and 2020, the appellant managed his shared parenting duties and earned an income in the range of $87,000. She set the appellant's income at $86,377, for the years 2021, 2022, and 2023, and set this as the "floor" for the appellant's income in 2024. The trial judge stated that if the appellant earned more than the floor, his support payments would be adjusted accordingly.

[13] At trial, the appellant argued the respondent was intentionally underemployed, in part by taking six years to complete her education and indecision respecting her goals. He also argued the respondent should have worked while attending school, citing her training as a painter and

bookkeeper, and her work experience in administrative positions. The trial judge rejected this argument, noting the respondent was primarily responsible for the parties' four children during the first two years of her program and that her learning impediments required a reduced academic workload. The trial judge also noted the birth of the respondent's and her new partner's child in 2020. She found the respondent was reasonably diligent in pursuing her post-secondary program and she was satisfied the respondent's guideline income was accurately reflected by line 15000 of her Notices of Assessment.

[14] The trial judge considered next the table amounts set out in the *Guidelines*. Neither party submitted evidence that there were increased costs of shared parenting arrangements. The appellant argued he should not have to pay *any* child support because the standard of living at the respondent's home exceeded the standard of living at his own home.

[15] The trial judge stated she had "very little information regarding the standard of living in [the appellant's] home". She went on to describe his house, which was over 3,000 square feet, situated on several acres of land. She noted the appellant received financial support from his parents as well as an inheritance from his grandmother, "the details of which are unknown". She considered evidence in the respondent's affidavit that the appellant regularly took the children to the mountains to ski, including a trip to Marmot Basin, and a trip to Palm Springs, after separation. The trial judge noted this evidence was undisputed.

[16] The trial judge next turned to the evidence before her on the respondent's household. She noted the respondent's new partner was questioned before trial in which he said the respondent did not contribute to household expenses because she was a full-time student and that he paid for the children's clothing, school supplies, and food. Taking stock of the respondent's household vehicles, the trial judge observed that the respondent's new partner owned a 2006 truck, a 2009 SUV, and a 2022 sedan, the last of which was financed. She also noted several snowmobiles (all more than 25 years old), a boat (from 1996), a 2001 motorhome, a quad, and a 2013 mini-side-by-side. The respondent's new partner had purchased a home for $657,000 in 2019, which was sold because the couple could not afford the mortgage payments. The evidence at trial was that the respondent and her partner purchased an older home for $690,000, encumbered by a mortgage of approximately $552,000, which they were renovating. They were living in an old farmhouse rented from the respondent's grandparents during the renovations.

[17] Ultimately, the trial judge rejected the notion of an unequal living standard between the two households. She found there was "insufficient evidence to establish that the conditions, means, needs and other circumstances of each spouse and of the children justifies anything other than offset support in accordance with the table amounts". As a result, she determined the appellant owed $45,582.96, for the period captured by the previous child support order, and a further $60,336.00 for the period 2021 through 2023. The trial judge stated that while these amounts were high, "they [were] the direct result of [the appellant's] failure to pay child support since January

2018". In addition to child support arrears, the trial judge set the proportionate amount of s 7 expenses at $8,253.63 for braces, $8,407.37 for health insurance, and $1,258.87 for dental costs.

[18] Turning to spousal support, the trial judge found there was no dispute between the parties that theirs had been a "traditional marriage" where the respondent stayed home and cared for the children while the appellant was the primary income earner. She considered and applied ***Moge v Moge***, 1992 CanLII 25 (SCC), ***Keen v Christian-Keen***, 2015 ABCA 314 [***Keen***], and ***Bracklow v Bracklow***, 1999 CanLII 715 (SCC), in determining whether and if so, upon what basis, the respondent was entitled to spousal support.

[19] The trial judge was satisfied the respondent was entitled to non-compensatory (i.e. needs based) spousal support for the period following the separation until she began living with her new partner. She noted that although this relationship ended the respondent's claim to non-compensatory support, in accordance with ***Keen***, the re-partnering did not terminate the respondent's claim to *compensatory* support (i.e. support based on economic disadvantage to the respondent arising out of the role she played during the marriage). Considering the circumstances of the parties and the income imputed to the appellant, the trial judge set the retroactive spousal support at $29,910. She also directed that the ongoing, compensatory spousal support be paid from January 2024 until such a time as the equalization payment was made to the respondent. The trial judge confirmed the outstanding amount owed by the appellant was $153,748.83 for child and spousal support to the end of 2023. Noting, *inter alia*, the appellant's non-compliance with previous support orders, the trial judge directed the $131,000 held in trust be paid to the respondent as partial payment of retroactive support.

Grounds of Appeal

[20] The appellant advances four grounds of appeal.

[21] First, he alleges the trial judge misapplied the law to the facts in reaching her decision to impute income to him based on underemployment. Specifically, he says the trial judge failed to consider the exceptions to un- and under-employment set out in 19(1)(a) of the *Guidelines* and further, that her decision to impute the income was clearly wrong because she had acknowledged that his decision to be under-employed was reasonable.

[22] Second, the appellant alleges the trial judge misapprehended the facts and misapplied the law in making the child support order because she failed to acknowledge the respondent's child support obligation, failed to consider the respondent's new partner's child support obligations to the children as a person standing *in loco parentis*, and by finding there was no difference in the standard of living between the two households.

[23] Third, the appellant argues the trial judge erroneously awarded non-compensatory spousal support, erred in determining the compensatory entitlement to spousal support would end upon

termination of the equalization payment, failing to consider the respondent's new partner's contribution to her living situation, and by reaching this conclusion without evidence from the respondent about her budget and needs.

[24] Fourth, the appellant says the trial judge misapprehended evidence or erred in law by ordering the release of the $131,000 held in trust by the appellant's solicitor to the respondent to cover support arrears. The appellant argues those funds were held in trust pursuant to a previous order made by another judge and that as a result, the trial judge's direction was *res judicata*.

Standards of Review

[25] The issues identified in the first three grounds of appeal attract a deferential standard of review. As explained in ***Al-Erbawy v Al-Noami***, 2025 ABCA 103 at para 15:

> The courts have recognized that family law determinations of both support and the division of matrimonial property are fact-based and discretionary in nature, and considerable deference will be given to a trial judge's conclusions. A trial judge is given great discretion in making such determinations because they have heard the parties directly and in most cases will have the best appreciation of the facts. Determinations of fact or mixed fact and law require a deferential standard of review. The scope of appellate review in family law cases is narrow and appellate courts can only intervene where there is a serious misapprehension of the evidence, an error of law or a clearly wrong decision. Family law decisions should promote finality and appellate courts should not overturn a trial judge's decision because they would have balanced factors differently or drawn different inferences from facts.

[26] The fourth ground of appeal raises a question of law, which is reviewable for correctness. ***Housen v Nikolaisen***, 2002 SCC 33 at para 8.

Discussion

The trial judge properly imputed income to the appellant

[27] The appellant argues the trial judge offered an "incomplete summarization of the law" set out in ***Peters*** and she, accordingly, failed to consider the exceptions to underemployment set out s 19(1)(a) of the *Guidelines.*

[28] Section 19(1)(a) of the *Guidelines* provides:

> 19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

> (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[29] In ***Peters***, at para 60, this Court set out the analytical framework that applies when the issues of un- or under-employment and the imputation of income arise under s 19(1)(a). There are three lines of inquiry. The first is whether the parent is intentionally un or under-employed, which requires consideration of whether the un- or under-employment results from circumstances *truly* beyond the parent's control. The second is whether the exceptions set out in s 19(1)(a) apply, that is, whether the un- or under-employment is required by the needs of the child or children, or by the reasonable educational or health needs of the parent. The final inquiry is whether judicial discretion to impute income should be exercised, even if the parent's un- or under-employment results from a voluntary choice. This requires the judge to determine whether the voluntary un- or under-employment is reasonable, having regard to all the circumstances.

[30] While the trial judge did not set out a recitation of these three lines of inquiry, the framework set out in ***Peters*** clearly informed her decision to impute income to the appellant. She considered whether the appellant was intentionally underemployed, or if he was underemployed through circumstances beyond his control. Throughout her reasons, the trial judge considered explanations for the appellant's variations and decline in income. For instance, the appellant's income was only $58,980 for 2016, but the trial judge accepted he had chosen to do less out-of-town work to focus on the marriage. She also considered the illness of one of the children and the effect it had on the appellant's income for the year 2017. The analysis the trial judge conducted was an appropriate application of ***Peters*** and the conclusions she reached are supported by the evidentiary record. There is no basis for appellate intervention.

[31] The appellant also points to the trial judge's comment that it was "reasonable" for him to stop working out of town. He suggests this comment and the decision to impute the appellant's income at $86,377 are incongruous and demonstrate error. We disagree. The appellant's argument amounts to "cherry picking". What the trial judge said was the appellant's decision to avoid taking out-of-town work post-separation was reasonable given his shared parenting obligations. However, the trial judge determined the *income* the appellant reported on his tax returns was *not* reasonable. The trial judge noted, *inter alia,* that the appellant had been engaged in shared parenting since 2019, and in 2019 and 2020, he was able to maintain his parental obligations while earning an income in the range of $87,000. She found there was nothing before her suggesting the appellant could not maintain that level of income while meeting his parental responsibilities. There is nothing inconsistent in these observations and the trial judge's decision to impute the appellant's income.

The trial judge did not err in calculating child support

[32] The appellant argues the trial judge misapprehended the facts and misapplied the law of child support. He says although she correctly articulated the three parts of s 9 *Guidelines* analysis, she did not consider the child support obligations borne by each of the respondent and her new partner.

[33] The trial judge expressly considered the respondent's support obligations, including the appellant's assertion that the respondent was deliberately underemployed. Three of the children participate in a shared-parenting regime and one has resided primarily with the appellant since 2023. The trial judge found the respondent's guideline income for 2023 was $43. Her monthly child support obligation was accordingly set at $0 per month. In concluding this was an accurate reflection of the respondent's income and, implicitly, her earning capacity, the trial judge considered a number of factors, including: the respondent's role during the marriage; her child rearing responsibilities while pursuing higher education and their effect on her ability to work; her work history; her documented learning impediments; and the fact that she and her new partner had recently had a baby. The trial judge's conclusion that the respondent was not deliberately underemployed was reasonable and supported by evidence.

[34] The appellant also argues the respondent's new partner carries concurrent child support obligations to the child who is primarily resident with the appellant. The legal authorities the appellant filed in support of this argument, namely, ***Nelson v Nelson***, 1999 ABQB 170 [***Nelson***]; ***Miller v Miller***, 2019 ABPC 156 [***Miller***]; and ***Chartier v Chartier***, 1999 CanLII 707 (SCC) [***Chartier***], are distinguishable and do not assist him.

[35] In ***Nelson*** the court dealt with an application to add the mother's new husband to the action for the purposes of varying child support. The argument that the appellant makes is actually precluded by the Court's comment in ***Nelson*** at para 30 that the term "spouse" as it is used in the *Guidelines* refers to spouses who were parties to the original divorce, and by well-established principles of statutory interpretation. The respondent's new partner is not a "spouse" as that word is used in the *Guidelines*. Similarly, ***Miller*** and ***Chartier*** do not provide support for the appellant's argument. Both those cases involved actions between spouses where one spouse stood *in loco parentis* to a child. The respondent's new partner is not a "spouse" within the meaning of the *Guidelines.*

[36] The effect of the respondent's new partner's income formed part of the trial judge's analysis of s 9(c) of the *Guidelines*, which requires judicial consideration of the "conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought" in making an order for support in situations of shared parenting. This is the appropriate context in which to consider the income of the new partner. The trial judge considered the size of the appellant's home, its location, the financial support he receives from his parents, trips and other special events for and with the children. She noted she had a similar amount of information

regarding the respondent's living situation. She turned her mind to the number of vehicles in the respondent's household and the value of those vehicles. She noted the respondent's new partner evidence that he and the respondent had not been on vacation since before their shared child was born, but that they take the children camping in the summer. The trial judge ultimately found she lacked sufficient evidence to conclude the conditions, means, needs and other circumstances necessitated a departure from the *Guideline* amounts. This conclusion is not based on any misapprehension of the law. It is a factual finding and it does not disclose palpable and overriding error.

The trial judge did not err in determining spousal support

[37] The appellant's arguments regarding spousal support follow a similar path as his arguments pertaining to child support. In particular, the appellant suggests it was an error to award non-compensatory and compensatory spousal support to the respondent.

[38] There was no dispute that this was a traditional marriage. The trial judge surveyed the appropriate case law and turned her mind to the applicable provisions of the *Divorce Act*, RSC 1985, c 3 (2nd Supp).

[39] The appellant's argument that the respondent is not entitled to non-compensatory spousal support on appeal is without merit. At trial, the appellant agreed some period of non-compensatory spousal support was due to the respondent. The trial judge reached the same conclusion, finding the respondent's entitlement to non-compensatory support ended when she began living with her new partner. This conclusion is not based on an error of law, nor does it disclose a palpable and overriding error.

[40] The trial judge found the respondent was entitled to compensatory spousal support by reason of the economic disadvantage created by the circumstances of the marriage. She then determined what amount and duration of support would alleviate that economic disadvantage. Having regard to the evidence, the trial judge found that ongoing support, terminating upon the respondent receiving the equalization payment, would be appropriate in the circumstances. This conclusion reveals no error of fact or law.

[41] The trial judge was also cognizant of the amount of retroactive support. She found the respondent's financial needs were high in the period following separation until she re-partnered. The trial judge appropriately turned her mind to the financial burden that would be borne by the appellant and set spousal support for that period at the mid-range. Her conclusions are factual in nature and rooted in the evidence. They are entitled to deference.

The interim property order did not bind the trial judge

[42] The appellant alleges the trial judge erred by ordering the release of the approximately $131,000 held in trust to the respondent. The appellant says those funds were held in trust pursuant to the terms of the 2021 order and the trial judge's direction to convert those funds to cover the retroactive support orders made was *res judicata* and an error of law. The respondent argues the 2021 order was an interim order and the trial judge was not bound by it, citing ***Mucha v Mucha***, 2024 ABCA 46 at para 19.

[43] The doctrine of *res judicata* is a common law principle designed to bring finality to litigation. It has two overlapping branches: issue estoppel and cause of action estoppel. Issue estoppel precludes the litigation of an issue that was previously decided in another court proceeding, whereas cause of action estoppel precludes the litigation of a cause of action that was adjudged in another proceeding. Although not identified as such by the appellant, the appellant's argument is based on the issue estoppel branch of the *res judicata* doctrine.

[44] The Supreme Court in ***Danyluk v Ainsworth Technologies Inc***, 2001 SCC 44 at para 25, confirmed that the preconditions to the operation of issue estoppel require:

> (1) that the same question has been decided;
> (2) that the judicial decision which is said to create the estoppel was final; and,
> (3) that the parties to the judicial decision ... were the same persons as the parties to the proceedings in which the estoppel is raised

There is no question the third precondition is satisfied; however, the first two are not.

[45] The terms of the 2021 order respecting the parties' real property required: (1) the respondent to obtain a second opinion for the value of the matrimonial home from a real estate agent; (2) if the parties agreed with the suggested list price from the real estate agent, the appellant had 60 days to arrange financing to buy out the respondent; (3) if the appellant could not arrange financing, the property was to be listed for the amount provided by the real estate agent; (4) if the respondent did not agree with the real estate agent's list price, she was to arrange and pay for a formal appraisal of the property; (5) following that appraisal, if the respondent accepted the valuation, the appellant would have 60 days from that date to arrange for financing to buy out the respondent; (6) if the appellant could not arrange financing, the home and the adjacent parcel would be listed for sale at the valuation amount. Importantly, the 2021 order set out a simple formula to determine the respondent's share of the equity, which was without prejudice to the appellant's ability to argue about the amount. The value of the two properties, less the mortgage balance at the time, would be divided by two. That amount would then be deposited into trust and held "pending agreement between the parties (if other property issues remain to be determined) or Court Order". Nothing in the 2021 order required the appellant to put funds into trust with the express purpose of using those funds to purchase the matrimonial home.

[46] Moreover, the 2021 order is clearly interim in nature and the terms relating to the real property and the calculations of the respondent's equity are contingent on certain events occurring. It was not a final judgment. ***Canadian Imperial Bank of Commerce v Bury***, 1979 CanLII 1121 (ABKB) at paras 9-10, 103 DLR (3d) 560. The doctrine of *res judicata* does not apply.

Disposition

[47] The appeal is dismissed.

[48] This Court previously directed the appellant to post $12,000 as security for costs: ***Spiess v Spiess***, 2025 ABCA 3. As the respondent was the successful party, she is presumptively entitled to costs on the same scale as those awarded at trial. If the parties disagree on the scale, they may attend before the Assessment Officer. Assessed costs shall be paid first from funds deposited as security for costs, with any shortfall payable by the appellant.

Appeal heard on November 5, 2025

Memorandum filed at Edmonton, Alberta
this 28th day of May, 2026

Feehan J.A.

de Wit J.A.

Shaner J.A.

Appearances:

S. Rollans
for the Respondent

T. Mallett
for the Appellant