
CANADA / JUDGMENT

C.A.L. v. D.E.L.

2020 BCSC 1026

COURT

Supreme Court of British Columbia

DECIDED

10 July 2020

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2020 BCSC 1026 C.A.L. v. D.E.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.A.L. v. D.E.L.,

2020 BCSC 1026

Date: 20200710

Docket: 171130

Registry: Victoria

Between:

C.A.L.

Claimant

And:

D.E.L.

Respondent

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Claimant:

M. Kinney

Counsel for the Respondent:

B. A. MacLeod

Written Submissions Filed:

Victoria, B.C.

May 21, 2020 and June 9, 2020

Place and Date of Judgment:

Victoria, B.C.

July 10, 2020

A. INTRODUCTION

- [1] In this high conflict family matter, the claimant seeks orders against the respondent including an order for sale of the family property and an order for contempt. The respondent opposes the claimant's application.
- [2] This matter was heard by way of written submissions pursuant to the procedures put in place as a result of the COVID-19 pandemic (COVID-19 Notice #14, April 27, 2020). It involves the claimant's application filed May 21, 2020 and the respondent's response filed June 9, 2020. There is also a written submission/argument from the respondent, dated June 9, 2020, and an undated, written submission/argument from the claimant. And there are affidavits from both parties.
- [3] Covid-19 Notice #14 practice directive states that an application by way of written submissions is limited to one disputed issue. On this basis I am proceeding only on the issue as to whether the family property should be sold. It arises because the respondent has failed to pay money to the claimant as ordered by a September 2019 judgment. As directed by COVID Notice #14, I am not considering other issues such as the claimant's allegation of contempt by the respondent. There are also difficulties in applying the standard of proof beyond a reasonable doubt to an application for contempt based on affidavit evidence.
- [4] I have anonymized the names of the parties to protect the privacy of their children.

B. BACKGROUND

- [5] The parties were married in March 2001, they separated in November 2016 and a divorce was granted on September 4, 2019.
- [6] There are two children of the marriage: H, born in May 2002 and N, born in January 2005. The claimant is the mother and the respondent is the father.
- [7] The family home is in North Saanich. The respondent currently lives there with the two children. Its value is in dispute with the range being between \$850,000 and \$950,000. The claimant lives in a rented apartment.

- [8] A number of issues between the parties were the subject of a four-week trial that took place in July and August 2019. The property issues were decided under the Family Relations Act, R.S.B.C. 1996, c 128 ("FRA") because a previous separation agreement was under that statute. The claimant was represented by legal counsel and the respondent represented himself. The judgment was published on September 4, 2019 (2019 BCSC 1483). No appeal was filed.
- [9] As recorded in the September 2019 judgment, the claimant is a registered nurse and she previously earned significant income. However, since April 2019 she has been on medical leave for anxiety. The trial judge assessed the claimant's income to be \$65,965 for the purposes of calculating child and spousal support (para. 38).
- [10] The respondent's primary source of income is a disability annuity he receives under a structured settlement from a motor vehicle accident. He has also received rental income. The September 2019 judgment assessed the respondent's income to be \$206,699 including a disability pension and other income (para. 48).
- [11] In a Form 8, filed June 9, 2020, the respondent deposes that his income for child support purposes is \$140,586 and for spousal support purposes is \$145,212. He describes monthly expenses of \$14,746 and assets of \$853,588 (including the family home valued at \$850,000). He has total debts of \$943,525 comprised of a judgment against the family property in the amount of \$106,145 (from November 2018) and three lines of credit from June 2011. He has monthly debt payments of \$737 and mortgage payments of \$2,400 per month. He has unsecured debts totaling \$157,615, all post separation, including a personal loan in the amount of \$121,000 and significant credit card debt.
- [12] The respondent also deposes in his Form 8 that his disability income was terminated on June 1, 2020, as was his employment. He says these changes will increase his medical expenses significantly (he requires a prosthetic leg) and will decrease his income. He no longer receives rental income because his daughter has moved into the rental suite in the family home.
- [13] In the September 2019 judgment, the court ordered the respondent to pay to the claimant: \$10,732.00 in retroactive child support by October 1, 2018; \$265,394.50 in full satisfaction of her claims against the family property; and \$31,752.00 for retroactive spousal support by October 1, 2019. Costs were also awarded against the respondent amounting to \$90,092.47. With respect to the family home, an order for sale was not given but the claimant was to transfer her interest in the home to the respondent upon completion of his payments to her.
- [14] Since the September 2019 judgment the respondent has cashed in his RDSP in the amount of \$46,459 on September 5, 2019, the day after the judgment. The respondent also sold an airplane for \$20,000, paid a hangar fee and then paid \$15,000 to the claimant. She says this was a "fire-sale" price and the respondent acknowledges the value was in dispute at trial. The respondent says that he could only sell the airplane for \$20,000 but the trial judge valued the airplane at \$65,000 (with the flight books). The respondent then sold assets such as a train set (\$2,200), art (\$1,900), and a minivan (\$2,000) for "living expenses" and he did not pay

anything to the claimant. The June 2020 Form 8 describes \$72,559 as being disposed of in the previous two years (including the airplane and the RDSP in the amount of \$46,459).

- [15] Very few of the amounts ordered in the 2019 judgment have been paid by the respondent, including child and spousal support. There have been no payments by the respondent in 2020 and the amount owing by the respondent to the claimant was \$383,103.03 as of February 2020. The claimant has attempted various collection actions, including garnishment, without any success.
- [16] Since the respondent has not complied with the September 2019 judgment by paying the claimant the amounts ordered, the claimant has not transferred title to the family home to the respondent, as contemplated by the 2019 judgment. She has severed the joint tenancy of the property and filed the September 2019 judgment against the respondent's resulting one-half interest. The parties are now tenants in common.
- [17] Counsel (primarily counsel for the respondent) respond to issues about the complexity of this case by saying the process of written submissions does not permit them to address all of the issues here. That may be so but the answer is to put the application on the Chambers' list. I have considered ordering it moved to that list but that would obviously add more expense and delay. In any event, there is agreement that the family property can be sold under the Partition of Property Act, R.S.B.C. 1979, c. 311, the Family Law Act, S.B.C. 2011, c. 25 [FLA], (but there is disagreement about whether that should occur).

C. ANALYSIS

- [18] In the subject application the claimant, as a tenant in common, seeks an order for sale of the family home to obtain some of the funds that the respondent was ordered to pay her in the September 2019 judgment. Again, the respondent accepts that the family property could be sold under the Partition of Property Act, the FLA, and/or Family Rule 15-8. However, he says that a sale is not appropriate in this case.
- [19] Although the parties cite s. 97 of the FLA as providing the authority for the order sought, as mentioned earlier, the September 2019 order was made under the FRA. As noted in *Partridge v. Partridge*, 2018 BCSC 1687 at para. 73, the wording of s. 97 largely tracks that of s. 66 of the FRA.
- [20] The relevant portion of s. 66 of the FRA provides as follows:
- 66 (1) In proceedings under this Part or Part 6 or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 65, or under Part 6 and may make orders that are necessary, reasonable or ancillary to give effect to the determination.
- (2) Without limiting subsection (1), the court may do one or more of the following in an order under this section:

- (a) declare the ownership of or right of possession to property;
 - (b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;
 - (c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division;
 - (d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;
 - (e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;
 - (f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property and may order that the spouse waive or release in writing any right, benefit or protection given by section 23 of the Chattel Mortgage Act, R.S.B.C. 1979, c. 48, or section 19 of the Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373;
 - (g) if property is owned by spouses as joint tenants, sever the joint tenancy.
- [21] Under s. 66, the court has the authority to vary an earlier order concerning the division of property to give effect to the intention of the court in the initial order (*Klassen v. Klassen*, 2001 BCCA 445 at para. 73). However, this authority does not permit the court to vary a final order dividing family assets to achieve a materially different apportionment (*Klassen* at para. 72, cited in *Truong v. Tran*, 2012 BCCA 492 at para. 45). Where courts have dismissed an application under s. 66, it has been primarily on the basis that the order sought would materially alter the division of property.
- [22] The respondent does not dispute the order following the September 2019 judgment (for which he had legal advice) and he did not appeal it. Nor does he take any issue with the claimant's accounting of what he has paid to her to date or her calculation of the amount still owing to her. In a garnishing order entered February 24, 2020 that amount is calculated as \$383,103.03 (net of payments made). And the respondent agrees that the claimant has taken all steps available to her to enforce the September 2019 order.
- [23] The position of the respondent is that, simply, he does not have the funds to pay anything further to the claimant. He also says that the children living with him are settled in the family home, it is not in their best interests to be moved and the home has been accommodated for his disability. His estimate is that there is only about \$32,000 of equity left in the home.

- [24] For her part, the claimant says that she is heavily in debt, the respondent used the equity in the family home for his sole benefit after separation, he has flagrantly violated the September 2019 judgment ordering him to pay money to her (after an expensive four-week trial) and he has preferred personal debts over his obligations under the court judgment. An order for sale of the family home is sought to recover some of the money owed to the claimant by the respondent under the September 2019 judgment.
- [25] The respondent relies on a number of previous authorities to say that the sale of the family home should be delayed because the children require the stability of the home to assist them in getting through school. According to the respondent, they have resided there for many years, their school is nearby and their social lives are rooted in the community where they currently live.
- [26] The authorities relied on by the respondent include *Bashi v. Bashi*, [1991] B.C.W.L.D. 1798 (S.C.); *Cinnamon v. Cinnamon* (1987), 20 B.C.L.R. (2d) 210 (S.C.); *Boeckler v. Boeckler* (1987), 15 B.C.L.R. (2d) 134 (C.A.); *Huguet v. Huguet*, 1994 CanLII 680 (B.C.S.C.); *Barker v. Barker*, 2000 BCSC 305 and *Waugh v. Waugh*, 2010 BCSC 110. These were made under the former FRA as was the September 2019 judgment involving the subject parties. I note that *Barker* was successfully appealed although on different grounds (2002 BCCA 345).
- [27] Two excerpts from these cases are instructive about whether a family home should be sold when there are children living in it or whether the sale should be delayed. In *Boeckler* the Court of Appeal summarized the authorities in the following terms:
- [8] Each case will demonstrate different factors to be taken into account in determining whether or not justice requires that the home not be sold. There must be a careful consideration of the impact on those involved of an order that there not be a sale. *Prima facie* the owner is entitled to sell, and that right should not be set aside without good reason.
- [28] Similarly, in *Waugh*, Mr. Justice Cullen stated:
- [111] The principles governing when it is appropriate to make an order of exclusive possession and delaying sale was set out in *Kaur v. Ram*, 2006 BCCA 527 at para. 23, 62 B.C.L.R. (4th) 298, in which the Court cited *Tsonis v. Tsonis* (1985) 45 R.F.L. (2d) 353 (BCSC) with approval, where Madam Justice McLachlin (as she then was), wrote:

The final question is whether there should be a postponement of the order for sale of the house. An immediate sale should be made unless justice requires otherwise: *Harmeling v. Harmeling*, [1978] 5 W.W.R. 688, 6 R.P.R. 129, 90 D.L.R. (3d) 208 (B.C.C.A.). The court's power to refuse an order for immediate sale is not limited to those cases where there has been want of good faith, vexatious intent or conduct, or malice in commencing proceedings: *Seath v. Seath* (1979), 18 B.C.L.R. 396 (S.C.). In *Lam v. Lam*, [1980] B.C.J. No. 1696, Vancouver No. C792593, 24th April 1980, the court refused to grant partition and sale where the children would have been adversely affected because they would have been uprooted from their environment. The sale was postponed for ten years. In *Borsato v. Borsato*, [1985] B.C.J. No. 1268, sale of the property was

deferred, because, inter alia, the result would be that the father would see less of his son who lived in the same area. These reasons apply in the case at bar. It is not desirable that the family home be sold at this time and Mr. Tsonis and the youngest child forced into other lodgings - perhaps in a different area of the city where communication between the son and Mrs. Tsonis will be more difficult ...

- [29] In summary, in the subject application, the claimant has a prima facie right to sell the family home. However, other factors need to be considered and one of these is whether the sale of the family home would uproot the children. I note that some of the above cases involved young children; for example, in Cinnamon the children were five and seven years old. Another complication is that the subject application is made after an order concerning property has been made under the FRA in the September 2019 judgment. This was not considered in the above authorities.
- [30] Returning to the evidence, the children are 16 and 18 years old and they both currently live with the respondent in the family home. However, at times they have lived with the claimant mother (September 2019, for example) so it is not accurate for the respondent to say they have lived in the family home their entire life.
- [31] In any event, in my view, another factor to be considered in the circumstances here is why the sale of the family home has to be considered at all. The answer is that the respondent has placed significant encumbrances on the family property after separation. Without those encumbrances he would be able to at least finance some of the funds owed to the claimant. In fact, if he had paid the amount owed to the claimant under the September 2019 judgment, he would now be the sole owner of the property. None of the authorities relied on by the respondent considered this issue.
- [32] The details of this situation are partly set out in the September 2019 judgment. The debt secured by the property at trial was \$675,515. The trial judge valued the house at \$931,000 (on the basis of a current assessment) so the total equity available was \$255,485. Under s. 65 and s. 66 of the FRA, the trial judge concluded that the family property should, after apportionment, be divided equally with the result that each party was entitled to \$127,742 in equity (paras. 86-122, 128).
- [33] The debt against the property of \$394,464 at the time of separation had increased to \$700,000 at the time of trial. This was "due solely" to the respondent's actions after the November 2016 separation (para. 90). The respondent also used the property after separation to secure a personal debt in excess of \$100,000. The trial judge decided that it was appropriate to compensate the claimant for the decrease in the equity in the home (para. 111). The respondent now says there is only \$32,000 in equity in the property. That is, since trial, the equity appears to have decreased from \$255,485 to \$32,000. There is no explanation of this change.

[34] In addition, it is clear that the respondent has preferred his personal debt problems over the September 2019 order to make payments to the claimant. For example, he used all of the amount he received from his RDSP for his personal debts and did not pay anything to the claimant. In his 1st affidavit he explained that he:

decided that the amount I could have paid the Claimant from the \$46,459.88 after making minimum payments on my cards, compared to what I owed her, needed to be balanced with my need to pay off the credit cards in order to move forward with basic life obligations for the Children and myself. I decided that as much as possible of the \$46,459.88 should go towards credit card debt.

[35] The respondent also significantly undervalued the airplane he sold, although he paid \$15,000 to the claimant from that sale. He has not made any support payments in 2020.

[36] I conclude that, assuming there is some benefit to the children in staying in the family home, it is clear enough that another reason, perhaps the dominant reason, for the respondent opposing its sale is his quite precarious financial situation (despite stated income of about \$140,000). Further, that situation is entirely the respondent's doing after separation and has nothing to do with the claimant. Having significantly encumbered the family property and having failed to comply with a court order, the respondent now seeks de facto relief from that order.

[37] The family property is a potentially significant asset available to the parties. But the respondent says that there is minimal equity left in the family home, about \$32,000. The thrust of his submission is that any benefit to the claimant from this modest amount is outweighed by the benefit to the children of staying in the family home and the value to the respondent of being in a place that has already been accommodated for his disability.

[38] There are reasons to question the respondent's estimate of \$32,000 equity left in the family property. It is based on the respondent's valuation of the property of \$850,000. The claimant says the value is about \$950,000. The trial judge valued the family home at \$931,000 as of the date of trial (July/August 2019) using the notice of assessment at that time (para. 110). There were also appraisals of \$925,000 and \$950,000 in January 2017 and March 2017, respectively (no one is asking for an appraisal here). Obviously, if the actual value of the family home is more than the amount estimated by the respondent, the result would be more funds available to the claimant.

[39] The respondent says that the valuation by the trial judge was unrealistic. But the respondent did not appeal the trial judgment and, indeed, he says he does not disagree with it. Therefore, the valuation by the trial judge must be taken as the basis for the amounts owing by the respondent to the claimant. Those amounts cannot be amended now because the respondent says the home is worth less than the trial judge determined. The logic of that submission is that, if the value of the property increased after trial, the claimant would be able to say the respondent owes her more than she received at trial. However, I do agree with the respondent that the value of the home is relevant to the current amount of equity

available to the parties for the purposes of the present application.

- [40] Looking at the equity in the family home a bit differently, the respondent's Form 8 (filed June 9, 2020) describes the current line of credit debt secured by the property as \$679,765. There is also a personal debt the respondent secured against the family home in November 2018 in the amount of \$106,145. The total debt secured by the family property and described in the Form 8 is \$785,910. The value of the property is described as \$850,000. Assuming that is an accurate valuation, the equity available is about \$65,000, not \$32,000 as asserted by the respondent in his response and written submissions.
- [41] Returning to the children, the respondent says that the family home should not be sold because it would be disruptive to them; they are aged 16 and 18 years old. There are previous cases where this has been the result but they also confirm that a party holding an interest in the property is entitled to have it sold. And those cases do not consider the situation here where the property at issue is greatly encumbered after separation by the party opposing the sale.
- [42] It cannot be disputed that the claimant is entitled to the funds she was awarded in the September 2019 judgment. The respondent accepts that result and yet he has preferred his personal debt problems over that of the court-ordered payments to the claimant. He has also sold other assets for amounts substantially lower than the amounts assessed by the trial judge and provided only very small payments to the claimant. He has not offered the claimant a proposed schedule of payments, nor has he come back to court to seek relief.

D. SUMMARY & CONCLUSION

- [43] In my view the resolution of the differences between the parties about the valuation of the family home and the determination of the amount of funds available to the claimant requires the sale of the family home. The respondent may be correct about the valuation of the property or he may have undervalued it. The ultimate appraisal is the price the property will fetch on the market.
- [44] The claimant is owed money by the respondent and he has not complied with a court order to pay that money to her. Instead he has chosen to "balance" his compliance with a court order and his obligations to the complaint in favour of his personal debts. What that means is that his personal debts get paid (in part) and the claimant gets very little or nothing.
- [45] Unfortunately, on any valuation, it appears that the funds available to the claimant will be less than she was entitled to under the 2019 judgment, perhaps substantially less. However, I conclude that the sale of the family home is the only way to give effect to the September 2019 judgment which contemplated each party receiving one-half of the equity of the family home. In addition, the order sought here does not materially alter the division of property ordered by the September 2019 order. Nor is that order undermined since the current circumstances were not part of the 2019 trial.

- [46] This will be a disruption to the children. But that is primarily the responsibility of the respondent who has accumulated very significant debt since separation and made no proposal to the claimant or application to court to deal with that debt. The time for that is well past and the claimant is now entitled to the funds ordered by the court.
- [47] Nor is it of much significance that the respondent says he will refinance the family home when his credit rating improves or the equity in the home increases. In my view, at this late date, the claimant does not have to wait to see if that vague commitment comes about. The respondent cannot substantially dilute the equity in family property to his sole benefit and then claim he is without funds to comply with a court order.
- [48] I am satisfied that I have authority to order a sale of the family property under either the FRA or the Partition of Property Act. In my view the latter is more appropriate and the family home in North Saanich will be sold on the following terms:
- a) Effective immediately, the claimant will have sole and exclusive conduct of the sale. This includes retaining a real estate agent, executing the required documents, instructing the agent, setting or changing the asking price, deciding the selling price and all other matters necessary for the sale.
 - b) The claimant will give the respondent reasonable notice to vacate the property. Reasonable notice includes time for the respondent to obtain alternative accommodation. The claimant will decide when the notice commences and its length. It will be in writing and delivered to the respondent in a way that provides confirmation of its receipt.
 - c) The respondent will leave the house in a clean state, capable of being shown to potential buyers. He will provide reasonable and prompt cooperation for the signing of any documents required for the sale. The claimant may show the house during the notice period after reasonable notice to the respondent.
 - d) The claimant's expenses such as taxes, insurance, legal fees and reasonable costs to prepare the property for sale will be deducted from the sale proceeds.
 - e) When the claimant has accepted an offer of purchase she will advise the respondent as soon as practicable by sending him a copy of the contract of purchase and sale.
 - f) The net proceeds of the sale will be deposited in the trust account of counsel for the claimant. A written accounting of the proceeds (not necessarily prepared by an accountant) will be provided to the respondent as soon as practicable after possession by the new owners.
 - g) Unless there is agreement between the parties, the claimant will apply for approval to court for the disbursement of the net proceeds of the sale of the house, with the usual notice to the respondent. Justice Steeves will hear and decide the claimant's application.

[49] The claimant has been substantially successful and she is entitled to her ordinary costs from the respondent, deducted from the proceeds of the sale of the family property.

"J. J. Steeves, J."

The Honourable Mr. Justice Steeves

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Prepared on 28 October 2026 · Esheria