

CANADA / JUDGMENT

C.M.P. v. D.J.P.

2025 BCSC 97

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Supreme Court of British Columbia

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2025 BCSC 97 C.M.P. v. D.J.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.M.P. v. D.J.P. ,

2025 BCSC 97

Date: 20250122

Docket: E69395

Registry: New Westminster

Between:

C.M.P. also known as C.M.D.

Claimant

And

D.J.P.

Respondent

Before: The Honourable Madam Justice Sukstorf

Reasons for Judgment

Counsel for the Claimant:

Martha Metzner

Counsel for Respondent:

Katherine B. Lawrence

Place and Date of Hearing:

New Westminster, B.C.

July 18, 2024

Place and Date of Judgment:

New Westminster, B.C.

January 22, 2025

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Introduction

- [1] This application arises from a family law dispute. The claimant, Ms. C.P., seeks an interim distribution of \$100,000 from family property under s. 89 of the Family Law Act, S.B.C 2001, c. 25 [FLA] to fund litigation expenses.

- [2] The respondent, Mr. D.P., opposes the application on jurisdictional and substantive grounds. Specifically, he argues that the parties' Marriage Agreement, signed in August 2016, (the "Marriage Agreement"), governs the division of property and that, unless set aside, the Marriage Agreement precludes this Court from ordering an interim distribution under s. 89 of the FLA.
- [3] Alternatively, D.P. asserts that such an order would harm his financial interests unless the funds are sourced specifically from the sale proceeds of their jointly owned home located at 24861 56 Avenue, Langley, British Columbia (the "Former Family Residence") which C.P. has refused to sell.
- [4] The primary contested asset is the proceeds of the Former Family Residence, where C.P. currently resides with their two children. D.P. argues that the distribution of property sought by C.P. is tied up in the home. He contends that C.P.'s refusal to sell the residence limits the availability of liquid funds to satisfy her request.
- [5] C.P. does not challenge the validity of the Marriage Agreement.
- [6] The Marriage Agreement entitles C.P. to a minimum of \$350,000 in spousal support and a 50% interest in the equity of the Former Family residence, referred to in the agreement as the Matrimonial Home. D.P. submitted that the sale of this property is anticipated to yield approximately \$269,800 or less in net shared property. Each party is entitled to an equal 50% share of this amount. Accordingly, C.P. can expect to receive at least \$133,900.

Background

- [7] The parties began living together and were married on October 8, 2016, in Burnaby, British Columbia. They have two children: J.P., age 6, and S.P., age 4. The date of separation is disputed. D.P. asserts that the relationship ended on December 18, 2020, when he sent a text message stating his desire for a divorce. C.P. contends that the separation occurred on July 1, 2023.
- [8] The Former Family Residence is assessed at \$2.06 million and is encumbered by a \$687,450 mortgage, held by D.P.'s father.
- [9] Prior to their marriage, the parties executed a Marriage Agreement which addressed, among other things, the division of property and spousal support if the parties were to separate. The agreement stipulates that the parties would retain pre-relationship property and gifts received during the relationship. It also states that the proceeds from the sale of the matrimonial home would be divided equally between the parties, but that any funds which either party contributed to the initial purchase of the home would be excluded from these net proceeds.
- [10] I find that the Former Family Residence falls within the definition of "matrimonial home" as referred to in the Marriage Agreement.

- [11] In this case, D.P.'s father contributed \$1,000,000 to the initial purchase of the home. In accordance with the Marriage Agreement, this money is excluded from the equal division of the proceeds of the Former Family Residence.
- [12] Currently, C.P. and the two children reside in the Former Family Residence, while D.P. lives with his parents. He continues to pay without prejudice interim child support based on the parties' sworn and filed F8 Financial Statements. He also pays property-related expenses associated with the Former Family Residence.

Legal Authority

- [13] Division 3 of Part 5 of the FLA deals with interim orders related to property. C.P. requests that the court make an interim order to advance funds from the Former Family Residence.
- [14] Section 89 of the FLA permits the distribution of family property to fund dispute resolution, including litigation. Section 89 reads as follows:

If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

[Emphasis added.]

- [15] Section 88 authorizes parties to apply for such distribution "at any time before a final agreement or final order is made in relation to a family law dispute respecting property division."
- [16] The British Columbia Court of Appeal in *Etemadi v. Maali*, 2021 BCCA 298 at para. 70, clarified that the primary purpose of a s. 89 financial advance is to "promote balanced participation in dispute resolution." Courts have also described such advanced financial distribution as necessary to assist economically disadvantaged spouses access the justice system, thereby levelling the litigation playing field: *I.F. v. R.J.R.*, 2015 BCSC 793 at para. 192.
- [17] Given that interim applications are made before the final resolution of property issues, courts have consistently applied a careful approach to s. 89 orders.
- [18] Based on case law, to determine whether an interim distribution is appropriate, the court must consider four primary issues. In *Jadavji v. Khadjieva*, 2021 BCSC 2267, Justice Ahmed succinctly summarized the principles set out at paras. 50-54 of *Etemadi* as follows:

- [9] Section 89 of the FLA allows the court to make an order for interim distribution of family property to provide money to fund a family law proceeding. In *Etemadi*, the Court of Appeal recently set out the principles applicable to s. 89 interim distribution orders at paras. 50-53. Those principles, written in the dissenting opinion of Justice Butler, were adopted by the Court. They are:
1. A chambers judge must determine whether the applicant is economically disadvantaged in relation to the prosecution of the litigation or otherwise in pursuit of dispute resolution. If so, then it may be appropriate to make an order that "levels the playing field" or provides for "balanced participation" in dispute resolution.
 2. The judge must go through a preliminary assessment of the circumstances that considers both of the s. 89 requirements: namely, whether the applicant can show that it would not be harmful to the interests of the other spouse and it is necessary for the purpose of funding dispute resolution.
 3. Whether an interim distribution is necessary involves careful consideration of the quantum required. A judge should not order distribution in an amount greater than what is necessary.
 4. The judge must always exercise the discretion conferred by s. 89 on the basis of whether it is in the interests of justice to grant the order sought.
- [10] Where a party raises a threshold issue on the merits, the applicant must show that there is a reasonable prospect of success on that threshold issue: *Bartch v. Bartch*, 2018 BCCA 271 at para. 19 citing *I.F. v. R.J.R.*, 2015 BCSC 793 at paras. 190-194.
- [19] Some case law has addressed whether a requested interim distribution must directly pertain to family property. In this case, however, there is no dispute on this issue, as the requested distribution unequivocally relates to the Former Family Residence, which is recognized as family property.
- [20] Orders under s. 89 are discretionary and depend on the unique facts of each case. The court must therefore weigh the parties' financial circumstances, the impact on the respondent, and the necessity of the requested funds.
- [21] D.P. argues that this Court does not have the jurisdiction to make an interim order related to the Former Family Residence as the parties Marriage Agreement governs the division of this property and displaces the authority of the FLA.
- [22] Section 92 of the FLA clarifies that spouses can make property agreements that depart from the FLA with respect to property division. Section 92 reads as follows:

Despite any provision of this Part but subject to section 93 [setting aside agreements respecting property division], spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:

- (a) divide family property or family debt, or both, and do so equally or unequally;

- (b) include as family property or family debt items of property or debt that would not otherwise be included;
- (c) exclude as family property or family debt items of property or debt that would otherwise be included;
- (d) value family property or family debt differently than it would be valued under section 87 [valuing family property and family debt]

[23] Section 94(2) of the FLA prevents a court from making an order respecting the division of property or debt that is already dealt with by agreement unless the court sets aside part or all the agreement in accordance with s. 93, which provides the basis upon which all or part of a property agreement may be set aside. Section 94(2) reads as follows:

- (1) The Supreme Court may make an order under this Division on application by a spouse.
- (2) The Supreme Court may not make an order respecting the division of property and family debt that is the subject of an agreement described in section 93 (1) [setting aside agreements respecting property division], unless all or part of the agreement is set aside under that section.

[Emphasis added.]

[24] C.P. does not challenge or ask this court to set aside the Marriage Agreement. Rather, she seeks to rely upon it.

[25] Although the Marriage Agreement governing property division is not being challenged, the parties do dispute the length of the marriage and how much of the matrimonial home's proceeds should be divided. These unresolved issues have contributed to ongoing acrimonious court proceedings.

Marriage Agreement

[26] The Marriage Agreement specifies that, upon the breakdown of the marriage, each party will retain the property they owned prior to the relationship, along with any growth in the value of that property. Additionally, any gifts received during the relationship, including any increase in their value, will remain the recipient's separate property.

[27] Regarding the Former Family Residence, the agreement stipulates that the net value of the property, after deducting debts and any initial payments, will be equally shared between the parties. In this case, the initial payment includes a \$1 million gift that the Respondent received from his father, which was used toward the down payment on the residence.

[28] The following provisions from the Marriage Agreement are worth noting:

G. D.P. and C.P. intend by this Agreement to achieve certainty and determine respective rights and obligations with reference to the ownership of Property (as hereinafter defined) acquired prior to or during their Marriage and, if there should be a Marriage Breakdown (as hereinafter defined), their respective rights and obligations regarding the ownership and division of Property and spousal support.

I. D.P. and C.P. recognize that there may be future changes to their respective financial circumstances, including adverse changes, but they intend by this Agreement that any present or future liability or obligation imposed by the Family Law Act (British Columbia), the Divorce Act (Canada), the Wills, Estates and Succession Act (British Columbia), or any other relevant legislation or law affecting the division of assets or financial support upon a Marriage Breakdown or death shall be deemed to have been fully satisfied and discharged by virtue of the provisions of this Agreement (other than child support), it being their wish to settle now between themselves, in accordance with the provisions of this Agreement, their respective present and future obligations to each other free from judicial or legislative intervention.

P. C.P. specifically acknowledges and agrees that her lifestyle during her relationship with David may be enhanced and it is reasonable expectation that it will continue to be enhanced, due to D.P.'s employment income, Bonuses and D.P.'s property, and that she:

- a. May receive economic advantages arising out of her relationship with D.P.; and
- b. Has no expectation that she will continue to live the same lifestyle, including travel, if a Marriage Breakdown should occur.

Issues

[29] The court must address the following issues:

- a) Jurisdiction under the FLA: Does the unchallenged Marriage Agreement preclude the court from exercising its jurisdiction to order an interim distribution of family property?
- b) Necessity and Financial Impact: Has the claimant demonstrated that the interim distribution is necessary and that it will not harm the respondent's financial interests?

Analysis on Jurisdictional Arguments

Jurisdiction to Order an Interim Distribution Under s. 89 of the FLA

[30] D.P. argues that the existence of a Marriage Agreement precludes the court from ordering an interim distribution under s. 89 of the FLA.

[31] Specifically, D.P. asserts that s. 94(2) prohibits the court from making any orders regarding the division of property or family debt which are addressed by the Marriage Agreement, unless the agreement is set aside in accordance with s. 93 of the FLA.

- [32] Since C.P. has not challenged the validity of the Marriage Agreement, D.P. contends the court lacks authority to order interim distribution under s. 89.
- [33] I find that this argument fails to consider the distinct purposes of s. 89 and s. 94 within the FLA. Section 94 is part of Division 4, which governs the final division of family property and debt. In contrast, s. 89 falls under Division 3, which addresses interim measures before a final court order is made.
- [34] Division 4 focuses on the equitable resolution of property issues after a relationship ends while Division 3 ensures fairness and access to justice during legal proceedings.
- [35] Therefore, I conclude that s. 89 operates independently of the restriction set out under s. 94. I find that this is also supported by the fact that s. 89 does not interfere with the Division 4's framework for the final resolution of property disputes.

Case Law on Interim Distributions and Marriage Agreements

- [36] D.P. relies on the case I.F. to argue that the unchallenged Marriage Agreement prevents an interim advance under s. 89. I do not accept D.P.'s interpretation.
- [37] In I.F., Justice Ballance made it clear that s. 89 does not prohibit interim orders, even when a Marriage Agreement exists. She wrote:
- [190] In none of the cases yet decided of which I have been made aware has the court confronted the thorny question of the impact of a marriage agreement that, if enforceable, would preclude the applicant spouse from the division of family property.
- [191] The provision itself does not bar the making of an interim order where there is an existing agreement concerning property division. I can conceive of no principled basis to read such a limitation into s. 89 or to otherwise consider the existence of such an agreement as an absolute bar to relief.
- [192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the FLA.

[Emphasis added.]

- [38] D.P. also relies upon para. 194 of I.F. which reads as follows:
- [194] In cases where the applicant may be precluded from entitlement to the family property based on a pre-existing agreement, the notion of being harmful to the other spouse's interests could also take the form of the court permitting a distribution so as to enable the funding of an unmeritorious claim. A reasonable way to attenuate that manifestation of

harm is to require the applicant to show there is a reasonable prospect of success of impeaching the subject agreement. The claimant in the case at hand has satisfied that hurdle.

- [39] Relying upon para. 194, D.P. also argues that C.P. must meet the "reasonable prospect of success" threshold before an interim distribution of funds can be awarded. However, I find this interpretation overly rigid and inapplicable to the facts of this case.
- [40] In I.F., the court applied the "reasonable prospect of success" test in the specific context of a pre-existing agreement that precluded the applicant's entitlement to the disputed family property. The court highlighted the potential harm to the opposing spouse if interim funds were advanced to support an unmeritorious claim, particularly where such funds could deplete assets that the entitled party might ultimately be unable to recover. At para. 194, the court concluded that requiring the applicant to demonstrate a reasonable prospect of success in challenging the agreement was a fair and practical way to mitigate this risk.
- [41] The present case is distinguishable. While there is a Marriage Agreement, it does not preclude C.P. from entitlement to the value of the assets she seeks. Accordingly, I find that the concerns addressed in I.F., namely, the risk of funding a claim that is contrary to the terms of a binding agreement do not arise here.
- [42] The language of s. 89 of the FLA permits interim distributions if they do not harm the interests of a spouse. In I.F., the court developed the "reasonable prospect of success" test to address the inherent risk to the other spouse of funding unmeritorious claims. However, there is nothing in I.F. to indicate that this test is a universal requirement in all cases involving interim distributions.
- [43] In this case, the Marriage Agreement does not exclude C.P. from entitlement to the value of the disputed assets. Therefore, there is no need to impose the "reasonable prospect of success" test, as the risk of harm identified in I.F. is not applicable to the facts before me.
- [44] In short, I find that reading I.F. in context, the court's analysis underscores the importance of balancing the applicant's need for funding against the potential harm to the opposing spouse. Here, C.P. seeks interim distribution of funds to which she is not precluded by the Marriage Agreement, making this balance straightforward and within the scope of s. 89 of the FLA.

Application of Section 89 in the Present Case

- [45] D.P. also relies on the decision in *Bartch v. Bartch*, 2018 BCCA 271, where the British Columbia Court of Appeal considered whether an agreement respecting property division barred the court from granting an order under s. 89 of the FLA.

- [46] In *Bartch*, the central issue was whether interim funding was warranted to challenge the existence and enforceability of an agreement related to the division of property. The court also recognized that interim distributions inherently involve some risk of harm to the payor. To address this risk, the court emphasized the importance of establishing a *prima facie* case of sufficient merit to justify interim distribution.
- [47] While the principles in *Bartch* guide the court's consideration of interim distributions, the facts of the present case differs significantly. Here, the existence and enforceability of the Marriage Agreement is uncontested and C.P. seeks an advance against an entitlement explicitly guaranteed under its terms.
- [48] Unlike in *Bartch*, where the enforceability of the agreement was contested and entitlement was uncertain, in this case, D.P.'s admission and arguments confirm that C.P. is entitled to approximately \$133,900 from the proceeds of the house sale, an amount exceeding the \$100,000 requested. Additionally, under the terms of the Marriage Agreement, C.P. has a minimum guaranteed entitlement to \$350,000 in spousal support, which could be used to offset any shortfall if the house sale proceeds are insufficient.
- [49] The absence of a challenge to the validity or enforceability of the agreement provides the court with certainty and strengthens C.P.'s position to an interim advance, as, regardless of the final disposition of the Former Family Residence, C.P. has a clear and guaranteed entitlement to more than the requested \$100,000.
- [50] The *Bartch* decision reinforces that s. 89 orders under the FLA are procedural tools aimed at leveling the litigation playing field. These orders are not determinative of final property entitlements but serve to ensure equitable access to justice.
- [51] In this case, the low-risk scenario aligns with the purpose of s. 89 orders. C.P. is the lower-income party. Advancing the funds therefore enables her to pursue this legal proceeding, and poses minimal risk to D.P., given that the funds are guaranteed to her under the uncontested Marriage Agreement.

Does the Marriage Agreement Displace s. 89's Jurisdiction

- [52] D.P. further argues that the court lacks jurisdiction under s. 89 of the FLA because C.P. seeks an interim distribution from property that does not qualify as "family property" under s. 84. He contends that the parties' Marriage Agreement classified their assets as either "shared property" or "separate property," and that this language displaces the statutory definition of "family property" within the FLA.
- [53] D.P. further asserts that s. 84 broadly defines family property as all property not classified as excluded property under s. 85, including the growth in excluded property. According to D.P., the parties opted out of the FLA statutory framework by defining their property differently within the terms of their Marriage Agreement.

- [54] I find that D.P.'s argument that the parties have opted out of the statutory definition of "family property" under s. 84 and, by extension, have opted out of the application of the FLA altogether, fails.
- [55] The principle that statutory rights and obligations remain operative unless explicitly displaced is well-established. In *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, the Supreme Court of Canada reaffirmed that statutory rights apply unless an agreement clearly and unambiguously excludes them.
- [56] Section 92 of the FLA permits parties to contract out of the property division provisions contained within the FLA, but any such agreement must explicitly displace specific statutory protections, and their mechanisms aimed to ensure equity between the parties. In this case, the Marriage Agreement does not address interim distribution and, as a result, s. 89 applies as the default procedural mechanism and remains applicable to the parties.
- [57] Additionally, s. 89 is procedural in nature, aimed at ensuring fairness during litigation. Interim advances under s. 89 are designed to promote equity and access to justice, particularly in cases where one spouse requires financial support to participate effectively in litigation. The Marriage Agreement's silence on interim distributions does not limit the court's jurisdiction to make such an order.
- [58] I therefore find that the statutory mechanism under s. 89 remains operative, as the agreement does not explicitly displace it. This ensures procedural fairness and allows C.P. to pursue her claim without undue disadvantage, consistent with the legislative intent of the FLA. I also find that the Former Family Residence falls within the definitions of family property set out in the FLA and that the court retains the ability to advance interim funds in accordance with s. 89.

Conclusion on Jurisdiction

- [59] Considering all the above, I find that this Court has jurisdiction under s. 89 of the FLA to order an interim advance and that the existence of the Marriage Agreement has not displaced this jurisdiction.
- [60] Having established that the court has jurisdiction to make an order for an interim advance, I proceed to assess whether D.P.'s claim should be granted.

Should an Interim Distribution be Granted?

Is C.P. Economically Disadvantaged in the Pursuit of Dispute Resolution?

- [61] The first factor the court must determine is whether C.P. is economically disadvantaged in pursuing litigation or other forms of dispute resolution. The evidence clearly demonstrates that the parties have engaged in contentious efforts to resolve their disputes, resulting in significant legal costs already incurred to date. While D.P. has assisted C.P. by covering the mortgage and related expenses for the Former Family Residence, there remains a notable disparity in both income and overall wealth between the parties.
- [62] Accordingly, I find that in this case, an order is required that "levels the playing field" and ensures "balanced participation" in the dispute resolution process.
- [63] Additionally, the disputed property in question, the Former Family Residence, qualifies as family property under the FLA. Although D.P. contends that the parties have defined property differently within their Marriage Agreement, I do not find this excludes the residence from qualifying under the definition of family property for the purpose of s. 89 of the FLA. This factor is therefore satisfied.

Will an Interim Distribution Harm D.P. Interests?

- [64] C.P. seeks \$100,000, an amount less than her guaranteed entitlement under the Marriage Agreement. She contends that D.P.'s personal wealth allows him to fund the advance without suffering financial harm.
- [65] D.P. asserts that paying \$100,000 would require him to sell or borrow against the Former Family Residence, as his finances are tied up in the home. He claims that he lacks liquid funds due to the parties' high spending during their marriage.
- [66] I find no evidence to suggest that granting the distribution will cause enduring harm to D.P.'s financial interests. On the contrary, the evidence demonstrates that D.P. maintains significant career stability through his direct involvement in the family business, possesses considerable personal wealth, and can borrow against the equity that C.P. seeks as an advance.
- [67] As noted by the court in McKenny v. McKenny, 2015 BCSC 1345, borrowing against family property is an acceptable method of distributing interim funds where sufficient equity exists. The Former Family Residence contains more than enough equity to support the \$100,000 request, rendering D.P.'s claims of a lack of liquidity unpersuasive.
- [68] I find that this second factor is satisfied.

Is the Distribution Necessary to Fund Dispute Resolution?

- [69] Based on the evidence before me, I am also satisfied that the requested funds are necessary to ensure that C.P. can secure legal representation and participate effectively in this litigation. The costs of proceeding to trial are substantial, and without the distribution, C.P. would face an unfair disadvantage.

[70] As emphasized in *Bartch*, s. 89 of the FLA is intended to "level the litigation playing field" by ensuring that both parties can participate meaningfully in the dispute resolution process.

[71] Based on the evidence of the legal costs incurred by C.P. to date, I accept that C.P. requires additional funds to continue to participate in this litigation. Consequently, I find that granting the interim distribution is therefore necessary to even the playing field and achieve the goals laid out in *Bartch*.

Is the Order in the Interests of Justice?

[72] The requested distribution is fair and proportionate. It represents less than C.P.'s entitlement under the Marriage Agreement and enables her to pursue litigation. It also does not place undue financial pressure on D.P. as he may borrow against the Former Family Residence to secure the required advance. The order also aligns with s. 89's purpose to ensure procedural fairness and access to justice.

[73] Given the above, I find that:

- a) C.P. is economically disadvantaged in pursuing litigation or other forms of dispute resolution with respect to the Former Family Residence;
- b) The distribution will not cause enduring harm to D.P.'s financial interests;
- c) The funds are necessary for C.P. to pursue dispute resolution; and
- d) Granting the order is in the interests of justice.

Disposition and Orders

[74] For the reasons outlined above, I find that the claimant, C.P., has satisfied the requirements under s. 89 of the FLA for an interim distribution of \$100,000. The Marriage Agreement does not preclude this finding.

[75] Accordingly, I make the following orders:

- a) The respondent, D.P., shall pay the claimant, C.P., the sum of \$100,000 as an interim distribution from family property within 30 days of this judgment.
- b) The respondent may satisfy this payment by:
 - i. Borrowing against the Former Family Residence, or
 - ii. Using alternative funding sources available to him.
- c) This interim distribution shall be credited against the claimant's entitlement under the terms of the Marriage Agreement.

[76] This approach ensures fairness and access to justice while addressing any liquidity concerns.

[77] Costs of this application are reserved pending the final determination of the parties' claims.

"Sukstorf J."

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