

CANADA / JUDGMENT

Dickenson v. Dickenson

2023 BCSC 1447

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Supreme Court of British Columbia

DECIDED

23 June 2023

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2023 BCSC 1447 Dickenson v. Dickenson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dickenson v. Dickenson,

2023 BCSC 1447

Date: 20230623

Docket: E-230934

Registry: Vancouver

Between:

Edmund Arthur Dickenson

Claimant

And

Elaine Mary Dickenson

Respondent

Before: Master Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

K.S. Perrick

Counsel for the Respondent:

S. Ahuja

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 15, 2023

Place and Date of Judgment:

Vancouver, B.C.

June 23, 2023

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] The claimant brings this application for an order under s. 90 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") that he have exclusive occupancy of the former family home (the "FFH") or shared use, namely through occupation of one of the suites in the FFH, along with an interim spousal support order pursuant to s. 165 of the FLA.

Background

- [3] By way of background, the claimant is 76 and the respondent is 71. They have one adult child who is 35 and lives in Alberta. Both are retired with their only sources of income being derived from pension, CPP, and old age security, along with some rental income from a second house.
- [4] They began living together in 1986, and were married on April 16, 1987. After 36 years of marriage, they separated, although there is some dispute as to when that was, the circumstances of the separation, and circumstances of the claimant leaving the FFH, as gives rise to this application.
- [5] The claimant's evidence is that "all hell broke loose" after he served the notice of family claim on the respondent following which, in May 2023, she changed the locks while he was out.
- [6] The respondent's evidence is that, prior to the lock change, the claimant had left the home voluntarily and had mostly moved out. The respondent alleges that she found out around that same time that the claimant was seeing another woman, but she ultimately made the decision to change the locks believing he had moved out when she noticed that he had removed his gun from the home. She deposes that she was fearful that he was going to hurt her, given the previous threats she alleges he had made in that respect. In addition, she phoned the police who, she understands, went to the house where the claimant was staying and retrieved the gun.

- [7] There are a couple of instances, mostly described as incidents of pushing or shoving, in the recent history of these parties where the police were called and become involved. The claimant describes all of these reports to the police as "false complaints".
- [8] As best as I am able to determine, the parties own two separate houses with clear title, that being the FFH, which is in Pitt Meadows, and a home that is rented to a friend of the parties' adult son, which is in Port Coquitlam (the "Rental Home"). The FFH is in both parties' names. The Rental Home is in the respondent's name alone. The respondent has been receiving the rent for the Rental Home, that being \$1,650 per month, which she says barely covers her holding costs. On her financial statement, she discloses the net income from the property as being \$9,000, which is \$750 per month.
- [9] The lease was not put into evidence. I was advised that the respondent continues to pay the utilities on addition to the other holding costs such as insurance, and taxes for the Rental Home, although I note that the property taxes have been deferred.
- [10] The claimant says he has been paying the holding costs in respect of the FFH, including property taxes, which again on the evidence appear to be largely deferred. While not in evidence, during submissions, the claimant argued that they were not all deferred and that he did pay some of them.
- [11] The parties have each filed financial statements. However, the claimant says his is based on a best guess, as the claimant dealt with his finances and he does not have a complete picture of his own affairs. In this respect, he does not use his computer or online banking, such that he is not able to get a full picture of what his income is. For example, he did not know the amount that he receives in respect of a U.K. pension, although it is deposited into his own bank account. There is no explanation as to why he did not attend at his bank for statements so that the income could be determined more closely or more accurately.
- [12] In any event, as the U.K. pension has been split between the parties 60/40, based on the respondent's evidence, it appears that the claimant's income is \$2,101 per month or \$25,212 per year, notwithstanding that in his financial statement he declared his income at only \$1,286 per month, or \$15,432 per year.
- [13] The respondent's income, including the income from the rental property, is \$30,635.40. But for the net rental income of \$9,000 per year, which is entirely collected by the respondent at this time, the parties' income, it appears, would be largely equivalent.
- [14] The parties both lived in the FFH at the time of separation. There is some dispute as to the living arrangements in that respect. The claimant says that the FFH is set up as two suites, each with its own kitchen, and that they had been living in the separate suites within the home. The respondent disputes that they were each living in separate suites, although does seem to admit that she was trying to spend her time in the downstairs suite. She says, however, that her use was impeded due to certain actions of the respondent, such as him tampering with the furnace and thermostat so that it was too cold downstairs to be

comfortable. In addition, she argues that the claimant would come down from time to time, for example when she was entertaining friends, interfering with her quite enjoyment of the downstairs suite.

- [15] The claimant was diagnosed with colon cancer in 2019, which has now spread to his liver. He deposes that he is terminal. While there is no dispute as to this diagnosis, the respondent does take issue with the fact that no medical evidence is before the court to confirm the exact prognosis.
- [16] The claimant says that he has likely has less than 12 months to live. He deposes that his health is deteriorating, that he is frail, particularly given his chemotherapy and that, in this respect, he wishes to stay in the FFH to "die with dignity". He has had various radiation therapies, two recent surgeries with respect to the colon cancer, and is on various medications.
- [17] The claimant deposes that the relationship with the respondent changed when, while at a doctor's appointment, the respondent asked his doctor how long the claimant was going to live with a tone that, the claimant interpreted, was one showing that she was in fact eager for him to die.
- [18] The respondent denies that characterization and disputes that the claimant is in fact undergoing chemotherapy at all as, she deposes, the claimant posted on Facebook that he was stopping treatment. However, the post itself is not in the evidence before the court.
- [19] The respondent paints a picture of longstanding verbal abuse, belittling, and bullying by the claimant throughout their relationship. There are also allegations that he threatened to kill her and, for the first time, became physically aggressive in March 2021 when he pushed her, as a result of which she phoned the police.
- [20] The respondent also says that she suffers from her own health issues, including high blood pressure, which she says started only after learning that the claimant has been seeing other women. There are no medical records in support.
- [21] As a general comment as to the evidence before the court today, the evidence of both parties as to their history, financial, and living circumstances is generally and mutually vague, with numerous conflicts, including as to the details of the separation and volatility of their relationship.

Discussion

Exclusive Occupation

- [22] Neither party disputed the test for exclusive occupancy.

- [23] The court's jurisdiction to make such orders is set out in s. 90(2) of the FLA. In order to make an order, the court must be satisfied that the continued shared use is a practical impossibility and that, on a balance of convenience, the applicant is the preferred party with an increased emphasis on family violence in considering that test: see *Bateman v. Bateman*, 2013 BCSC 2026 at para. 41; *Evans v. Mahtoy*, 2015 BCSC 2141 at para. 28; and more recently *Priebe v. Baker*, 2022 BCSC 306.
- [24] The test as to whether the continued cohabitation is a practical impossibility is an objective one.
- [25] On an interim application such as this, it is not possible for the court to resolve all of the significant conflicts in the evidence, including as to whether there is family violence where there are conflicts in the evidence, as exist here. It is not, however, necessary to make a finding of family violence to find that continued cohabitation is a practical impossibility.
- [26] In the circumstances of this case, it is clear that the parties' relationship is toxic with allegations of family violence resulting in police attendance, albeit with no charges. Even though the circumstances of the altercations are in dispute, the involvement of the police and level of acrimony between the parties with both deposing that the other is cruel to them, support such a finding. Some of those allegations, insofar as the claimant's conduct is concerned, is supported by evidence from third parties, including the parties' adult son, although I note that the claimant now provides hearsay evidence that the son wishes to retract that evidence.
- [27] Regardless, there is sufficient evidence for an objective finding that cohabitation is a practical impossibility. I do not need to determine which version of the events is the true and accurate one in order to make that finding.
- [28] Turning then to the second branch of the test as to which party is the preferred occupant, the court in *Sun v. Cook*, 2007 BCSC 2045 at para. 16, set out a set of non-exhaustive factors for the court's consideration in this respect, namely:
- a) any acquiescence or delay by either party;
 - b) the conduct of the parties;
 - c) the economic position of the parties;
 - d) alternative living arrangements available to either of the parties; and
 - e) other relevant circumstances such as health.
- [29] Turning to each of those considerations, there cannot be said to be any acquiescence or delay of either party in this case.

- [30] As to the conduct of the parties, given the conflicts in evidence which cannot be resolved on this application, the conduct of either of the parties can not be determinative on this application.
- [31] Turning then to the economic position of the parties, the parties' financial circumstances are largely equivalent, but for the rental income from the Rental Home. The respondent argues that the claimant earns cash income from the carpentry work he performs, but he did not disclose that. It seems unlikely on this application that any such income would be significant, particularly given the claimant's poor health.
- [32] As a result, the most significant factors in the circumstances of this case are those related to the claimant's health, along with the options and proposals that each party has.
- [33] In the claimant's own words, he simply wants the dignity of being able to live his final days in the FFM, whatever they may be and however long they may be, but which he believes will likely be around a year.
- [34] The primary position of the claimant is that they can share the FFM, with him living in the upstairs suite and the respondent living in the bottom suite, and that all is needed is that a lock be put on the door between the two suites to ensure privacy.
- [35] The respondent disputes that the property can be adequately split in that respect with enough security to ensure that she is safeguarded from the insults and cruelty and physical violence to which she alleges to have been subjected.
- [36] The respondent relies on the unreported decision of Mr. Justice Riley: *Kotlyakov v. Kotlyakov* (May 29, 2020), Chilliwack Registry E-17135 (B.C.S.C.). In that case the allegations as to family violence were of a similar nature, and the proposal was that one of the parties occupy a self-contained suite. The court noted as follows at paras. 19-22:
- [19] I have given careful consideration to this. The evidence on this point is not particularly satisfactory in the sense that I have not been given any concrete evidence as to the layout or floorplan of the house and whether it is practicably manageable for the parties to live separately in the same house.
- [20] Mr. Kotlyakov refers in his affidavit to there being a basement suite with a separate entrance. I have no reason to doubt there is a separate entrance through the basement level of the house, but the use of the term "basement suite" without any further detail is not helpful.
- [21] Mr. Kotlyakov says in his affidavit that the basement has a bedroom, bathroom and a shower, but no kitchen. He also refers to the possibility of there being some further renovations. He says he will stay away from what he refers to as the common areas of the house, the living room and the kitchen.
- [22] In the end, I cannot conclude on this description that there is in fact a separate basement unit that is distinct enough from the main level of the house to say there are two separate residences here. Even if there was an entirely separate unit, Ms. Kotlyakov expresses

concern that she and the children would not feel safe with Mr. Kotlyakov living in the basement level. In the end, an arrangement where Mr. Kotlyakov would live in the basement level, with Ms. Kotlyakov and the children living in the balance of the house, seems to me to be unwise and unworkable, and therefore practically impossible.

- [37] While handwritten floor plans of the house have been put into evidence by the claimant to suggest that the basement may be separated into a self-contained suite, there is also evidence from the respondent that the basement can not be separated. Among other issues, the claimant may be able to control the furnace, with the allegation being that he has done so as part of the dominance he is alleged to have exerted over the respondent.
- [38] As things currently stand, the two units are not completely separately contained and secured. While the evidence is that a lock can be installed, there is a necessity for work to be done for them to be able to be separated.
- [39] In this respect, the conclusion made by Justice Riley is equally relevant here; that such a solution seems unwise and unworkable in all of the circumstances, and that such an arrangement would result in the respondent not feeling safe in her own home.
- [40] As to each party's options for alternative living arrangements, both parties say the other can live in the rental house if the tenant moves out. Of course, that means that the income from that rental will no longer be available to the parties. Notably, the respondent has said that she will pay \$20,000 to the claimant to cover his moving costs and living costs until the tenant vacates. It is not entirely clear how this would be paid and from what resources. However, the claimant has approximately \$71,000 in financial assets, most of which are claimed to be exempt, as I believe being an inheritance from her mother. No reciprocal offer was made by the claimant.
- [41] The respondent also says that the claimant can live with his friend, as he has been doing so since separation. While the claimant admits that he has had that accommodation, he deposes that this is temporary by necessity. It is not comfortable or fair to impose upon this friend. Further, he cannot afford to pay her any rent. He says all of his income goes to the holding costs for the FFH, which he continues to pay, namely the utilities and insurance and property taxes although, as noted, those are largely deferred.
- [42] The respondent deposes that Hydro and Fortis are approximately \$1,500 per year.
- [43] Another factor is that the FFH houses various vintage cars and classic cars that the claimant works on. He submits that he requires access to the garage and the cars so that he can continue with that hobby.
- [44] Nonetheless, having regard to all of the circumstances, I agree that the best resolution is one where the respondent continues to occupy the FFH.

- [45] While most of the factors are equal as to the preferred occupant, the fact that the respondent is willing to advance \$20,000 to the claimant to cover his costs for the move is a factor that tips the scale into the respondent's favour. Of course, if the claimant is not living in the FFH, and their incomes are otherwise equal, then he ought not be responsible for payment of the utilities or holding costs of that property.

Spousal Support

- [46] The seminal case as to interim spousal support is *Robles v. Kuhn*, 2009 BCSC 1163, where Master Keighley set out the factors for consideration at para. 12. On an interim application such as this, the means and needs of the parties take on particular significance and the court is generally asked to achieve rough justice.
- [47] The claimant's submissions on the needs for the spousal support were brief, presumably because they are largely tied to the outcome of the exclusive occupation application. If the claimant is unable to live in the FFH, he will require accommodation and he says he needs income for that. If he was able to live in the FFH, then perhaps that would not be necessary.
- [48] I accept the respondent's evidence as to the claimant's income as noted, as it is more reliable. In that respect, the parties' income from their respective pension incomes is largely equal, with the respondent also collecting the rental income of \$9,000 per year on the one hand, and on the other, the claimant allegedly earning some cash from the carpentry.
- [49] However, with the claimant moving into the Rental Home, the rental income will be lost, meaning that their incomes will then be largely equal. In other words, their means and needs are going to be equivalent. The payment of spousal support will not benefit any party without significant prejudice to the other.
- [50] As such, I am not satisfied that this application is an appropriate one for spousal support to be granted on an interim basis, particularly given the orders I am making as to payment of certain expenses and holding costs which, in my view, addresses the financial circumstances of these parties.

Rental Home

- [51] Having determined that the application for exclusive occupation and spousal support is dismissed, I will now address the Rental Home and parties' out-of-pocket expenses.
- [52] As noted, the Rental Home provides the parties a source of income. That income is lost if the claimant moves into the Rental Home. Given the results of this hearing, the parties may still determine that moving into the Rental Home and losing a tenant who, by all accounts, appears to be a good, long-term tenant is not a preferred outcome. Nonetheless, the claimant needs accommodation and that is the most obvious place for him to live. It seems appropriate to allow the claimant to make that decision as to where he wishes to live, rather than the court say that he must live in the Rental Home.

[53] As such, he should have time to advise the respondent if he intends to take up residency in the Rental Home, at which time, and if he does, the parties will do all things necessary to end the tenancy. If the claimant moves into the Rental Home, he should be responsible for all utilities in respect of the Rental Home. If, however, the claimant chooses to live elsewhere, then the respondent, who will then continue to receive rental income, shall share that income with the claimant and pay him \$375 per month.

Summary and Conclusion

[54] In summary, the orders I make are as follows:

- a) the application for exclusive occupation is dismissed;
- b) the application for spousal support is dismissed;
- c) the claimant shall not have any obligation to pay the utilities, property tax, or insurance in respect of the FFM, with such costs to be paid by the respondent;
- d) by July 14, 2023, the claimant shall advise the respondent if he wishes to occupy the Rental Home. If so, the respondent will take all necessary steps to end the tenancy in accordance with the requirements of the Residential Tenancy Act, S.B.C. 2002, c. 78, and, upon its termination, the claimant may assume residence, and upon doing so, will assume all obligations for payment of the utilities and contents insurance, if any, with the respondent continuing to pay property insurance and taxes, if any, and subject to any deferrals obtained;
- e) if the claimant chooses to obtain new accommodations rather than occupy the Rental Home, effective August 1, 2023, on an interim basis, the respondent shall pay the claimant \$375 per month as his equal share of the net rental income on a without prejudice basis and subject to a final allocation and accounting of property claims;
- f) by consent, the respondent will arrange for \$20,000 to be paid to the claimant for his moving and rental costs, to be paid to him by July 14, 2023.

[55] There are also allegations by each party as to improper dealings with the parties' assets. By consent, they agree to a mutual asset restraining order pursuant to s. 91 of the FLA, except as needed for ordinary living expenses. I confirm that I made that order at the conclusion of the hearing on June 15, 2023, and that is a standalone order made as of that date.

[56] As a final comment, I agree with the sentiment of the respondent's counsel that the best way forward for these parties is for a mediated settlement that also takes into account their estate-planning objectives given that, as things currently stand, it may end up being necessary that one of the two properties have to be sold in order to divide their assets, an outcome that may not be the desired outcome of either party, given that there may be a better or a more pragmatic resolution, having regard to other factors that may not be legally relevant in these family proceedings.

- [57] I hope that with the assistance of their counsel, that can be done.
- [58] I will hear quick submissions as to costs.
- [59] CNSL K. PERRICK: Well, Your Honour, our submission as to costs is that the costs should be in the cause, which is to be determined on a later date, given the outcome and balance of the proceedings that are still ahead of us.
- [60] THE COURT: Yes, thank you. Mr. Ahuja?
- [61] CNSL S. AHUJA: My -- I would have to say that there was substantial success. We did try to settle this matter previously. My friend and I had some very good discussions. Unfortunately it did come to court. I would be asking for costs payable to my client, just not in -- it doesn't have to be immediately, but just costs to the respondent, is all I'd be asking for.
- [62] THE COURT: The respondent has had substantial success in this application, so I agree that it is appropriate that the respondent shall have her costs in any event of the cause and, as noted, payable at the conclusion of the matter. Any questions? Thank you.
- [63] CNSL S. AHUJA: Your Honour, I apologize, I was on mute. Is it costs in the cause, or costs in any event of the cause, just not payable forthwith? I apologize, I didn't hear you.
- [64] THE COURT: Costs in any event of the cause.
- [65] CNSL S. AHUJA: Thank you.
- [66] THE COURT: Costs in any event of the cause, payable at the conclusion of the matter.
- "Master Robertson"

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