

CANADA / JUDGMENT

Doucet v. Doucet

2020 BCSC 1250

COURT

Supreme Court of British Columbia

DECIDED

17 March 2020

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2020 BCSC 1250 Doucet v. Doucet

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Doucet v. Doucet,

2020 BCSC 1250

Date: 20200317

Docket: E29397

Registry: Cranbrook

Between:

David John Doucet

Claimant

And

Margaret Heather Doucet

(by her Committee & Litigation Guardian Amie Doucet)

Respondent

Before: Master J. Keim

Oral Reasons for Judgment

Counsel for the Claimant:

M. Matthews

Counsel for the Respondent Margaret Doucet (by her Committee & Litigation Guardian Amie Doucet) appearing on March 16, 2020:

J.M. Hogg, Q.C.

Counsel for the Respondent Margaret Doucet (by her Committee & Litigation Guardian Amie Doucet) appearing on March 17, 2020:

J.J. Olynyk

(as Agent for J. Hogg, Q.C.)

Place and Date of Hearing:

Cranbrook, B.C.

March 16, 2020

Place and Date of Judgment:

Cranbrook, B.C.

March 17, 2020

[1] THE COURT: This application is brought by the claimant seeking the following orders, pursuant to s. 91 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]

- a non-disposition order;
- an interim order for spousal support;
- an order compelling the respondent to file a Form 8 financial statement; and
- costs.

[2] At the start of the application, this court was advised that the respondent had filed a financial statement and therefore that relief was no longer being sought. Further, both parties indicated that they consented to a mutual s. 91 non-disposition order and that order is granted. The primary issue before this court is whether or not the respondent should pay interim spousal support to the claimant.

[3] The action was started by the claimant in August 2019, when he filed a notice of family claim seeking spousal support, equal property division, and a divorce. In the pleadings, the claimant set out a separation date for the parties of September 2017. The notice of family claim was amended on November 20, 2019 to change the style of cause to include a reference to the respondent's committee, Ms. Amie Doucet. The respondent filed her response and counterclaim on December 9, 2019. The respondent is seeking a divorce, unequal property division, and states that the date of separation is September 1992.

[4] The parties began their relationship in the late 1960s and were subsequently married on November 7, 1970. The claimant is currently 74 years old and the respondent is 67. The parties had two children together, both of whom are independent adults.

- [5] In 1997, the respondent suffered a serious injury as a result of a car accident. The claim was settled in 1999 and resulted in the respondent receiving, among other monies, a monthly annuity which is indexed. As a result of her injuries, the respondent is unable to manage her affairs and needs constant care. The parties' daughter was appointed committee of her mother, the respondent. In September 2017, the respondent was moved into a care facility in Ontario near where her daughter lives. There is very little else that is agreed to by the parties in the evidence that is before me.
- [6] The claimant states that he and the respondent remained in a committed relationship right up until 2017. His evidence is that, aside from a short period in the early 1990s, when the respondent was pursuing education, the parties always lived together. Even during that time, he deposes that the parties saw each other regularly and took holidays together. He states that after the accident, he provided constant care to the respondent and the parties decided to relocate to Cranbrook once the respondent's case was settled. The parties decided to purchase a home in Cranbrook with part of the settlement monies and the home was put into joint tenancy. The claimant received \$1,500 a month which was increased to \$2,000 a month from the respondent's money via the committee during the time that the parties resided together. The claimant states that he was taken by surprise when the parties' children unilaterally decided to relocate the respondent to Ontario.
- [7] The respondent, whose evidence comes by way of her committee, the parties' daughter, presents a very different view of the parties' relationship. She alleges that the claimant was abusive throughout the marriage and that, when she left to enter school in 1991, she received her GED. Following that, in 1992, she undertook a two-year program in Castlegar while the claimant remained in Kimberley. After she finished her program, the respondent moved to Golden and began working and remained there until the accident occurred in 1997. The committee deposes that the respondent indicated on many occasions that she would never again reside with the claimant. The respondent acknowledges that the claimant began living with her again after the accident, but states that it was no longer a marriage, but rather an arrangement by which the claimant was paid monies to provide care for the respondent. The respondent alleges that she suffered further abuse from the claimant during this time and thus the decision was made to relocate to Ontario.
- [8] There is simply no way for the court, on an interim application, to resolve the factual differences between the parties' evidence. That can only occur at a trial where the trial judge will be able to make assessments of credibility and make findings of fact. On an interim basis, the court is able to at best achieve a form of rough justice that will enable the parties to meet their needs pending the final outcome of this matter.
- [9] The applicable law comes from s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) [DA] which states:

Spousal support order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

- (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

- (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [10] Respondent's counsel referred this court to *Robles v. Kuhn*, 2009 BCSC 1163 at para. 12, where the court sets out a number of factors to consider on interim applications. The court states:
- [12] On interim support applications, the application of these provisions must be qualified by certain established considerations:
1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: *Gibb v. Gibb*, [2005] B.C.J. No. 2730 (S.C.);
 2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: *Grossi v. Grossi*, [1993] B.C.J. No. 878 (S.C.);
 3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: *Randhawa v. Randhawa*, [1999] B.C.J. No. 3299; *Newson v. Newson*, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);
 4. The courts should not unduly emphasise any one of the statutory considerations above others;
 5. On interim applications the need to achieve economic self-sufficiency is often of less significance;
 6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: *Ladd v. Ladd*, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.);
 7. Interim support should only be ordered where it can be said a *prima facie* case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, [2005] B.C.J. No. 2966, 2005 BCSC 1786 (S.C.);
 8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support: *L.G.B.*

- [11] The challenge in the case before this court is that virtually every aspect of this matter gives rise to an issue that will require the court to make a determination prior to making the final order.
- [12] For instance, the home in Cranbrook was purchased exclusively with funds from the respondent's settlement monies. This, argues the respondent, will be viewed as an excluded asset to which the claimant should have no claim. The claimant argues that the home was put into joint tenancy which is an indication that the parties both agreed that they would share equally in the asset. This issue cannot be resolved through affidavit material.
- [13] Respondent's counsel also referred to *C.J.B. v. A.R.B.*, 2017 BCSC 1682, as support for the respondent's argument that the Cranbrook home is excluded property. That argument, however, is more properly made at the trial of the matter and is not applicable on this interim application. Further, the respondent argues that she should be entitled to an occupational rent amount given that the claimant has continued to live in the home since the respondent's departure. As the home has no debt owing and the respondent has continued to pay one-half of the taxes, the claimant has had the benefit of an extremely low cost of living while the respondent has not had any access to the benefit of that asset.
- [14] The respondent has been receiving her annuity for 20 years. As a result, she is currently receiving \$9,782.48 per month tax free and thus these monies do not appear on her tax return. The respondent argues that the annuity is not a family asset by definition and, therefore, any monies that flow from the annuity are not appropriately included in any consideration of spousal support. The claimant argues that, although the annuity itself may be excluded property, the income derived from the excluded asset is still available for a spousal support calculation. Neither party submitted case law to support their position and, again, this becomes an issue that must be resolved at trial.
- [15] The evidence before me, stripped of any conflicting evidence, is that the parties were married in 1970 and, up to 2017, there were no formal indications of any intention to separate or to live as other than man and wife. Respondent's counsel referred to *L.G.B. v. M.A.C.M.*, 2005 BCSC 1786 at paras. 14-17 in which the court states:
- [14] From the foregoing, four points may be distilled. First, given the limitations of both time and evidence which necessarily constrain interim applications, caution should be exercised before descending into the merits of an issue. The greater the need to resolve contested issues of fact, especially those going to a threshold issue as in this case, the more likely it is that the decision ought not to be made on an interim basis.
- [15] Second, the need for caution is all the greater when, as a result of an interim order, money will be paid and there is an issue as to whether it can be recovered following a trial if it is determined that the recipient is not entitled to the funds.

- [16] Third, and related to the first, where an interim issue requires a determination of credibility, there is a risk that such a finding may embarrass the trial judge when called upon to make findings of credibility in relation to the very same issue. When this is so, even greater circumspection is required before making such an order.
- [17] Finally, to minimize the mischief inherent in the first and third of these observations, interim decisions should only be made where it can be said that a *prima facie* case for entitlement has been made out.
- [16] The primary issue in the L.G.B. case was whether or not the parties' common-law relationship met the applicable criteria in the Family Relations Act. In the case before me, the parties have been legally married for 47 years with some level of shared living expenses and joint assets present throughout. In applying the factors as set out in the DA, I find that, regardless of the characterization, this is a long-term marriage in which the parties cohabitated for a significant length of time.
- [17] Both parties acknowledge that the claimant, since the time of the respondent's accident, provided daily care to the respondent. At the time of the settlement, the claimant was 53 years old. While the parties disagree completely as to the level and standard of care, there is no dispute that the claimant and the respondent were living together and he was primarily responsible for her daily care. There is no evidence before me of any order or arrangement between the parties relating to spousal support.
- [18] Turning to the factors listed from Robles, I further find that the respondent has an ability to pay and the claimant has some level of need. Prior to the respondent's move, the claimant had enjoyed a standard of living based on the receipt of monies from the respondent, although I acknowledge that the reason for the receipt of monies is very much in dispute. This court has worked from the premise that both parties have accurately stated their income and expenses. The claimant has made out a *prima facie* case for support as the parties are legally married and the conflicting evidence regarding the nature of their relationship cannot be tested and resolved based on solely affidavit material.
- [19] Accordingly, I find that it is appropriate to make an order for interim spousal support. I note that if the court ultimately decides that spousal support is not appropriate and, even if the respondent is successful in having the Cranbrook home determined to be 100 percent her asset, then there will be sufficient monies available to repay the respondent for any interim spousal support paid since the claimant has just over \$82,000 in various savings accounts, which are now to be held at their current level given the s. 91 non-disposition order.
- [20] The next question to be determined, then, is what amount of support is appropriate? On an interim application for spousal support, it is incumbent upon this court to turn its mind to the condition, needs, and means of both parties as set forth in the legislation. The claimant deposes to annual expenses of just over \$21,000 and says that he is suffering a shortfall of \$3,000 per year as his income consists solely of pension monies totalling just over \$18,000 per year. The claimant submits that his expenses are very reasonable with very little non-

essential spending. The claimant acknowledges that he is assisted in keeping his expenses low as a result of continuing to reside in the Cranbrook home which is debt-free and costs him only one-half of the City taxes and 100% of the utilities.

- [21] The claimant submits that the respondent has a surplus of at least \$36,000 per year and, therefore, the appropriate order for spousal support is \$3,000 per month. In support of this position, the claimant has provided a Spousal Support Advisory Guidelines [SSAG] calculation that sets out a range of \$3,800 to \$5,000 based on an income for the claimant of \$18,000 and for the respondent of \$140,995. Claimant's counsel relied on *Primeau v. L'Heurux*, 2018 BCSC 740 at para. 140, for the proposition that the SSAG amount is the appropriate amount for a spousal support award. Thus, the claimant argues that they are seeking spousal support that is well within the respondent's ability to pay and is, in fact, below the SSAG range.
- [22] There is no evidence before me that the claimant needs what would amount to a 66% increase in his income in order to comfortably meet all of his expenses.
- [23] The respondent's income from her tax return is \$30,820 per year consisting of pensions and a small amount of investment income. She also has significant savings of \$787,000. Not included in her taxes, as mentioned, is the \$117,389.76 tax-free amount that she is receiving from her annuity. Her expenses are stated to be \$105,937 per year. Claimant's counsel submits that the expenses are overly generous, but on an interim application and absent further evidence, it is challenging for this court to simply assume that various items are overstated. What is known is that the respondent has a significant housing and care cost that the claimant does not.
- [24] I am not satisfied on an interim basis that the SSAG is the appropriate amount since the SSAG are predicated upon the parties having similar needs. That is clearly not the case here as the respondent must pay the costs for her 24-hour-a-day care and I accept that, as a result, she will require a greater portion of the funds available to the parties. I accept that the respondent has the following appropriate monthly expenses that are linked directly to her care expenses: care home rent - \$5,600 per month and B.C. Trustee and Committee fee - \$1,000 per month for a total of \$6,600 per month. When that amount is deducted from her current monthly annuity amount of \$9,782.48, the respondent has \$3,182.48 remaining each month from her annuity to meet her additional expenses.
- [25] At that point, the parties are in a relatively equal position of each having no housing or care costs weighing on their budget given that the claimant has very few housing costs, some of which continue to be shared by both parties. If this amount were to be equalized as between the parties, it would give rise to an interim monthly spousal support amount of \$1,591.24. However, there is also a \$12,000 differential between the parties' pension income. To equalize those amounts, the respondent would have to pay \$500 a month to the claimant.

- [26] The net result to equalize the income of the parties, after taking the respondent's special needs into account, would be an interim spousal support payment by the respondent to the claimant in the amount of \$2,091.24 per month. Therefore, I order that, commencing April 1, 2020, the respondent pay to the claimant interim spousal support in the amount of \$2,100 per month. I make that order in full recognition of the fact that the annuity amount is tax free to the respondent. I have chosen to not gross up the monies paid given that (1) I am satisfied that the respondent has a greater need for financial resources than the claimant; and (2) the claimant's shortfall on his expenses, which are extremely modest, is such that an award of \$2,100 per month, even if taxable, will more than meet his current needs.
- [27] In making this order, I am satisfied that the objectives of the DA for spousal support orders are being met. The economic advantages or disadvantages arising from the breakdown of the marriage are being balanced by the provision of some spousal support from the respondent to the claimant that will relieve the economic hardship arising from the marriage breakdown, while recognizing the respondent's extraordinary circumstances and need for a greater share of the monies available to the parties. This interim order will enable both parties to meet their current needs. I urge both parties to move this matter forward for a final determination. I can see no impediments to getting this matter set down for trial so that a trier of fact may undertake a more fulsome analysis of the parties' circumstances, weigh the issue of credibility, and making findings of fact that will determine the primary questions regarding the nature of the parties' relationship, the appropriate treatment of any assets found to be excluded property, and the entitlement, if any, to spousal support.
- [28] In summary, this court orders:
1. Pursuant to s. 91 of the FLA that the parties be restrained from disposing of, transferring, converting, or exchanging into another form of property in which either party may have an interest;
 2. Commencing April 1, 2020, the respondent shall pay to the claimant interim spousal support in the amount of \$2,100 due and payable on the 1st of each month thereafter until further court order or written agreement between the parties.
- [29] Ms. Matthews, do you have any submissions regarding costs?
- [30] MS. MATTHEWS: Yes, Your Honour, but just before I do that, I wonder if the court will reconsider the commencement date given the date that the notice of application was filed?
- [31] THE COURT: Ms. Olynyk, do you have any comments on that?
- [32] MS. OLYNYK: Sorry, can you repeat that?
- [33] MS. MATTHEWS: I am asking that the court reconsider the date of commencement of the support so that it start the month after the application was filed which I --
- [34] THE COURT: It was filed in December 2019.

- [35] MS. MATTHEWS: So it would be January 1st, then.
- [36] MS. OLYNYK: Okay, I mean I guess at this point we say that we would disagree with that, that moving forward on an interim basis that payment can start and, if this is going to proceed to trial, any backpay can retro. It can be part of the submission at trial.
- [37] THE COURT: Thank you. Yes, I was not provided with any information in regards to the application and the delay between it being filed in December and not being heard until March. I have no idea if that is just a scheduling issue or if the parties themselves were not able to turn their minds to it. I am content to leave the order as is, Ms. Matthews, simply because, as Ms. Olynyk pointed out, at trial, you can certainly still argue that there is retroactive support that should have started sooner if you are successful. More importantly, I am concerned about expecting the respondent to come up with an immediate payment to catch up arrears over the past three months given her situation. The commencement date of April 1st will stand.
- [38] MS. MATTHEWS: Thank you, Your Honour, and in regards to your initial --
- [39] THE COURT: You may have to speak up --
- [40] MS. MATTHEWS: Sorry.
- [41] THE COURT: -- because I am not sure how well Ms. Olynyk can hear you in this courtroom.
- [42] MS. MATTHEWS: Yes, Your Honour, in regards to your first question which was submissions in regards to costs, so yes, Mr. Doucet is seeking costs of this application. He was more than substantially successful. He was definitely successful in getting an order for interim support and there was no basis to deny the interim support. This application should not have been necessary. The parties should have been able to resolve this issue. So he is seeking costs payable forthwith, Your Honour.
- [43] THE COURT: Thank you. Ms. Olynyk, any submissions regarding costs?
- [44] MS. OLYNYK: I think the -- well, on the basis of interim support, there is a payment that was ordered. As you saw from the submissions of Mr. Hogg and the affidavit evidence, we are still in a position where we believe that there is a lot of conflicting evidence that needed to be sorted out and, while Mr. Doucet was successful, this application still needed to be heard.
- [45] THE COURT: Thank you. I am mindful of the fact that when this matter is finally heard by the court and the conflicting evidence is resolved by the court - and by that I mean starting first and foremost with what was the parties' separation date - was it 1992 or was it 2017 - that the more fulsome evidence that will be presented to the court at the trial at that time may lead to a different conclusion in regards to any obligation to pay spousal support. For that reason, I am going to order that costs be in the cause and left to the trial judge.

"Master J.M. Keim"

MASTER KEIM

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Prepared on 27 October 2026 · Esheria