

CANADA / JUDGMENT

E.O. v. F.O.

2023 BCSC 1488

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1488 E.O. v. F.O.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.O. v. F.O.,

2023 BCSC 1488

Date: 20230825

Docket: E222977

Registry: Vancouver

Between:

E.O. also known as E.A.S.J.E.

Claimant

And

F.O.

Respondent

Before: Master Hughes

Reasons for Judgment

Counsel for Claimant:

T. H. Hopman

Counsel for Respondent:

B. Danaei

Place and Date of Hearing:

Vancouver, B.C.

July 24, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 25, 2023

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- [1] The respondent father, F.O., brings this application for interim child support and spousal support pursuant to the Divorce Act, RSC 1985, c 3 (2nd Supp) ("Divorce Act"), and for production of the claimant mother's medical records pursuant to Supreme Court Family Rules ("Rules") 9-1(10) and (15).
- [2] The father also sought an order setting aside a without notice protection order made by Master Muir on December 12, 2022. I granted that order, by consent, at the hearing of this application.
- [3] Without seeking short leave, the claimant, E.O., filed a cross-application just three business days before this hearing seeking several orders including the sale of two real properties. F.O. had no opportunity to file responding materials, and I declined to hear E.O.'s application due to the unreasonably short notice and lack of sufficient time to hear both applications in the one day scheduled. The Rules provide for specified notice periods and a process for seeking short leave in the case of urgency. The practice of setting down cross-applications on insufficient notice, particularly where the relief sought is unrelated to the original application, is inappropriate, contrary to the Rules, and to be discouraged.

Background

- [4] The parties were married on February 17, 2001. There is a dispute as to the separation date: the claimant says it was July 24, 2021, and the respondent says December 12, 2022. While I am unable to resolve that discrepancy, nothing turns on it in the context of this application. There is one child of the marriage, D., born in 2007.
- [5] On December 12, 2022, the claimant applied without notice and obtained orders for exclusive occupancy of the family home, a restraining order pursuant to s. 91 of the Family Law Act, SBC 2011, c 25 ("FLA"), and a protection order.
- [6] The parties attended a Judicial Case Conference ("JCC") on February 9, 2023, at which time they consented to various orders including shared parental responsibilities and equal parenting time with D.. No orders were made regarding child support or spousal support, despite the significant disparity in the parties' incomes. This matter is scheduled for 10 day trial commencing October 2024.
- D.
- [7] D. has continued to live in the family home since the parties' separation, initially with the claimant and subsequently with the respondent. Master Muir's exclusive occupancy order was varied at the JCC to give the respondent exclusive occupancy of the family home effective April 1, 2023.
- [8] D.'s relationship with the claimant is somewhat strained. Despite the parties agreeing to an order for equal parenting time, D. has chosen to stay with her father in the family home. After vacating the family home, the claimant still picked up D. and took her to school each day, and D. started working part-time in the claimant's medical office in May. Although the parties agreed at the JCC that they would encourage D. to attend counselling, she has not done so.
- [9] The claimant argues that she had an equal amount of D.'s spare time, resulting in equal parenting time as defined in s. 9 of the Federal Child Support Guidelines, SOR/97-175 ("Guidelines"). Despite the JCC order, it is clear that D. has chosen to reside exclusively with the respondent father and I find that s. 9 of the Guidelines does not apply.
- [10] D. is an outstanding student, having completed grade 12 at the age of 15 while being highly active in extracurricular pursuits. She will be starting university at McGill in Montreal this September, at the age of 16, studying international relations. D. will be living in residence at McGill, and the parties' Registered Education Savings Plan ("RESP") will completely cover the cost of her tuition and residence fees including a meal plan, for at least the first two or three years.

Claimant

- [11] The claimant is a medical doctor who, until recently, operated her suburban medical practice through an operating company, Dr. E.O. Inc. ("Med Co."). The claimant also has a numbered holding company ("Hold Co."). The respondent is a shareholder in both companies, although his ability to deal with his shares or assets of the companies is constrained by the s. 91 restraining order.
- [12] The claimant's line 15000 income for the past three years is:
- a) 2020 - \$159,328.91
 - b) 2021 - \$182,805.15
 - c) 2022 - \$197,756.52
- [13] E.O.'s line 15000 income includes employment income, dividends, rental income from the parties' property in France, and other income.
- [14] Med Co. had pre-tax income of:
- a) 2020 - \$407,780
 - b) 2021 - \$326,030
 - c) 2022 - 287,331
- [15] The respondent submits that some of Med Co's income is available to the claimant, and should be attributed to her as income pursuant to s. 18(1) of the Guidelines for support purposes. He asks that income be imputed to the claimant in the total amount of \$381,431 for support purposes.
- [16] If the claimant's medical practice was continuing to operate, I am satisfied that this would be a reasonable estimation of her available income. However, two intervening factors will have a significant impact on the claimant's future income.
- [17] The first of those factors is that on June 2, 2023, the claimant and her two business partners entered into a contract to sell the commercial property from which their medical practice operates. The completion date of the sale was anticipated to be August 5, 2023 and the possession date January 5, 2024. The claimant provides no evidence as to how the decision to sell the property was made, although her counsel advised in submissions that her two partners have been wanting to retire for some time.
- [18] Second, and more significant, is that on June 1, 2023 the claimant provided written notice to her patients that she would be closing her practice and taking indefinite personal leave after July 19, 2023.

- [19] The claimant's evidence is that she has suffered from migraines since she was 15 years old and has been under the care of a neurologist for chronic migraines since 2019. She deposes that she suffers from depression, anxiety and stress. These conditions have exacerbated her migraine symptoms over recent years, to the point where she is unable to provide responsible care to her patients.
- [20] E.O. plans to take a one year leave of absence. She says in her 2nd affidavit, at para. 43:
- I need some time to get my mental and physical health in order and to reduce my stress level. I will need to take some time for myself, so that I can get healthy, and to decide what I want to do career wise going forward. I know there are a lot of options for me, but right now I feel that I can only make short term decisions.
- [21] The claimant expects that her income while on leave will be \$6,000 per month, increasing to \$11,000 per month, if she qualifies for disability benefits after an initial 120 day waiting period. This totals \$132,000 per year, plus rental income from the French property.
- [22] In support of her decision to take a leave of absence from her practice, the claimant has provided an affidavit from her neurologist, Dr. Robinson. The respondent objects to Dr. Robinson providing expert evidence in this form. While I have some concerns about the form and nature of this evidence, it is clear that Dr. Robinson supports the claimant's decision to take a medical leave from her practice. In his consultation report dated May 8, 2023, Dr. Robinson notes "I believe it unlikely that she will be able to continue practicing as a general physician until conditions improve for her. She asked about the process for taking a medical leave and I encouraged her to talk to Dr. David Unger at the College. Ideally, she should see a psychiatrist but this will be difficult to arrange." There is no evidence that E.O. has seen or even been referred to a psychiatrist.
- [23] Dr. Robinson's recommendation appears to be based largely on self-reporting from the claimant regarding the stressors in her life, including the parties' separation. She expressed feeling overwhelmed and barely functioning when seeing patients. Despite the alleged self-serving nature of this reporting, the reality is that no-one other than the claimant can describe what she is experiencing.
- [24] The respondent says that the claimant has experienced migraines for years, and has still worked long hours, despite his encouragement to cut back. He says in his 3rd affidavit at para. 37: "In the last five years, the Claimant has increasingly made verbal threats to me to the effect that she will stop working, render herself disabled and use up all of the family money. The most recent verbal threat of the same tenure was just before we separated." "Threat" is a somewhat subjective description, although this allegation is not denied by the claimant.

[25] On balance, after considering the evidence provided by both parties, I accept that the claimant has health issues which negatively affect her current ability to continue working the long hours that she has been working at her busy family practice, and that some reduction in her workload is justified. The reasonable form of such reduction, and whether it needs to be short-term or long-term, remains unclear to me.

[26] The respondent asks that income be imputed to the claimant on the basis that she is intentionally unemployed or underemployed. Section 19(1)(a) of the Guidelines provides that:

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

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

[27] As noted by our Court of Appeal in *Barker v. Barker*, 2005 BCCA 177 at para. 18:

[18] Under s. 19(1)(a) of the Guidelines, the important question is whether the payor spouse has demonstrated an intention to be underemployed, with the consequence that his children do not benefit from his potential earning capacity. This does not mean a parent must work the long hours Ms. Barker puts in to earn her significant income. It does mean that a parent who chooses to work less than a regular work week must justify that choice by the needs of the children or suffer the loss personally. He cannot effectively transfer part of the cost of that choice to his children.

[28] It is notable that E.O. has not indicated whether she has considered any alternative other than a year-long complete withdrawal from practice. Other options, such as taking a shorter leave of absence, reducing her hours, or working in a different practice setting or as a locum, would be logical options for someone with E.O.'s experience. There is simply no suggestion in the evidence provided by either the claimant or Dr. Robinson that any alternatives have been considered. To the contrary, she simply says "I know there are a lot of options for me, but right now I feel that I can only make short term decisions." Dr. Robinson does not opine on whether other treatment options have been considered and, if so, why they have been rejected.

[29] In the absence of sufficient medical evidence, I am not satisfied that a complete withdrawal from practice for an entire year is the best or only option available to E.O. to address her health issues. To use the language of *Barker v. Barker*, the claimant has not presented sufficient evidence to justify her choice.

[30] Taking the "rough justice" approach commonly used on interim applications, I impute income to the claimant in the amount of \$175,000 per year, being a little less than half of the income that was available to the claimant in 2022.

Respondent

[31] The respondent is an engineer, employed as the head of engineering for a fluids management company. He is a salaried employee whose income is not in dispute. His line 15000 income for the past three years is as follows:

- a) 2020 - \$140,004.57
- b) 2021 - \$164,423.03
- c) 2022 - \$106,371.00

This income includes dividends from Med Co., which the respondent has not received since September 2022, and a share of rental income from the French property.

[32] On his form F8 financial statement sworn on February 3, 2023, the respondent declares his employment income to be \$115,000.

[33] F.O. claims to have made career sacrifices, including passing up promotions, due to his extensive involvement managing the household and caring for D.'s needs. He says these sacrifices were necessary while E.O. worked long hours establishing and maintaining her career. His income has decreased post-separation, as he no longer receives the dividends from Med Co. that he received during the marriage.

[34] Unsurprisingly, E.O.'s evidence contradicts that of F.O. regarding his career sacrifices and assumption of domestic responsibilities. She says that the offered "promotions" were lateral moves with increased hours but no change in compensation. She says they both adjusted their work hours to accommodate D.'s needs and that she was primarily responsible for household management and D.'s care. I am unable to resolve this evidentiary discrepancy on an interim application.

Child support

[35] Based on D. living primarily with the respondent and the claimant being found to have an imputed Guidelines income of \$175,000, the claimant is to pay interim child support to the respondent in the amount of \$1,551 per month, commencing July 1, 2023 and continuing on the first day of each month thereafter until further court order.

[36] There was no claim for s. 7 expenses, as D.'s post-secondary educational expenses will be paid from the RESP.

Spousal Support

[37] The relevant provisions of the Divorce Act are as follows:

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.

[38] In *Robles v. Kuhn*, 2009 BCSC 1163, the court summarized the applicable considerations on an interim support application at para. 12:

[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.*

- [39] I am not satisfied on the evidence before me that the respondent has established a prima facie entitlement to spousal support. He is a well-paid professional who, by agreement, has exclusive occupancy of the mortgage-free family home. His evidence is that he earns a comfortable wage, but has had to curtail some of the more lavish spending that the parties enjoyed during their marriage.
- [40] In any event, based on incomes of \$175,000 for the claimant and \$115,000 for the respondent, the Spousal Support Advisory Guidelines indicate that no spousal support would be payable at the low or mid-points of the range.
- [41] Under the circumstances, I am not ordering that any interim spousal support be paid at this time, and that application is dismissed. The respondent's claim for retroactive spousal support can be addressed at trial.

Production of claimant's medical records

- [42] Finally, the respondent seeks production of the claimant's medical records relevant to proving her disability. In particular, he seeks production of the records of the claimant's neurologist, Dr. Robinson and her general practitioner, Dr. Bolina. He quite reasonably seeks the order in Halliday format, so that the claimant's counsel has the opportunity to redact those records for relevance, privacy and privilege.
- [43] In response to the claimant advising that she had some recent health problems requiring some time off work, the respondent made a written demand for "complete medical and counselling records" on April 28, 2023. The claimant responded on June 2, 2023, indicating that the request was too broad, and that the claimant would not comply unless her concerns about confidentiality and privacy were addressed.
- [44] The respondent has now narrowed his request to the period from January 2018 to present.
- [45] At the hearing, the claimant disagreed with the necessity of obtaining the records, essentially arguing that they cannot add any more to the evidentiary record than Dr. Robinson's affidavit. In this respect, I strongly disagree. The clinical records will show the number and frequency of E.O.'s appointments, symptoms disclosed, tests ordered and/or conducted, treatment recommended, etc. They are relevant and to go proving or disproving a material fact, namely whether the claimant's health issues affect her ability to work and therefore her income.
- [46] Ultimately, counsel advised that the claimant was not opposed to production, so long as the records are redacted for privilege and relevance.
- [47] Accordingly, the order for production of the claimant's medical records is granted, in Halliday format, as sought in Schedule B to the respondent's notice of application filed July 11, 2023.

Costs

[48] With respect to costs, the respondent has been largely successful on this application, including the termination of the protection order which was consented to at the last minute, and is entitled to his costs.

"Master Hughes"

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