

CANADA / JUDGMENT

F.C.S. v. C.E.S

2022 BCSC 1317

COURT

Supreme Court of British Columbia

DECIDED

21 June 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1317 F.C.S. v. C.E.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

F.C.S. v. C.E.S.,

2022 BCSC 1317

Date: 20220621

Docket: E203099

Registry: Vancouver

Between:

F.C.S.

Claimant

And

C. E. S.

Respondent

And

Ensure Holdings Ltd.

Respondent by Counterclaim

Before: The Honourable Justice Wilkinson

Oral Reasons for Ruling

Re Application for an Interim Advance From Family Property

In Chambers

Counsel for the Claimant (by video):

S.S. Silber

Y. Li-Reilly

Counsel for the Respondent (by video):

L. Rudovica

No further appearances

Place and Dates of Trial/Hearing:

Vancouver, B.C.

May 20 & June 1, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 21, 2022

[1] THE COURT: These are my reasons for judgment on an application by the respondent in this matter.

Introduction

[2] The respondent brings this application for an interim advance from family property.

Background

[3] The parties began to live together in a marriage-like relationship in August 2012 and married on June 13, 2015. The parties disagree on the date of separation. The claimant submits the date of separation was May 5, 2020, and despite agreeing with the date of May 5, 2020, in her response to family claim and in her counterclaim, the respondent submits in her notice of application that the date of separation was actually May 12, 2020.

[4] The claimant is a businessperson and is employed by Northfield Capital Corporation. The respondent is an artist and is otherwise unemployed.

[5] On October 11, 2016, the parties entered into a marriage agreement (the "Marriage Agreement") which provides, among other terms, that:

a) certain property of each of the parties will remain his or her separate property during the relationship and after it ends;

- b) any property acquired by a party during the relationship or marriage is the separate property of the party who acquires it unless it is registered in both parties' names, registered in the claimant's name solely, the parties record in writing that it is co-owned, or it is gifted from a third party to the parties jointly as recorded in writing; and
 - c) if the parties' relationship ends before June 13, 2021, regardless of whether the parties have children, the claimant will pay spousal support to the respondent of \$4,000 per month commencing on the 1st day of the month immediately after the end of the relationship and continuing on the 1st day of each month thereafter until the duration equivalent to half the length of the parties' relationship.
- [6] The claimant has been paying the respondent \$4,000 monthly in spousal support since June 2020 which he says is in accordance with the Marriage Agreement.
- [7] The respondent seeks to set aside the Marriage Agreement.
- [8] The parties have two children, M.S., born October 27, 2017, and L.S., born August 17, 2019, (collectively, the "Children"). The Children have been residing with the claimant since the parties' separation. The respondent has supervised parenting time with the Children. The claimant's father is currently the supervisor.
- [9] On May 19, 2021, the parties attended a judicial case conference, at which time it was ordered, by consent, that the claimant and the respondent agree to a section 211 assessor to prepare a report to assess parenting responsibilities and parenting time with liberty to apply if they are unable to agree to an assessor. The claimant has agreed to pay for the report.
- [10] On August 25, 2021, Master Taylor made the following orders by consent:
- a) The respondent will not consume or possess any alcohol or controlled substances within the definition of s. 2 of the Controlled Drugs and Substances Act, except as prescribed by a licensed physician, for a duration of 24 hours before exercising parenting time with the Children; and
 - b) The respondent is restrained from being within 200 meters of M.S.'s school during school hours, and she is not permitted to pick up M.S. from school.
- [11] A three-week trial has been set in this matter commencing November 14, 2022.

Application for interim advance

- [12] With regard to an application for an interim advance, s. 89 of the Family Law Act provides as follows:

Orders for interim distribution of property

89 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.

[13] From the authorities referred to me, including *I.F. v. R.J.R.*, 2015 BCSC 793; *Bartch v. Bartch*, 2018 BCCA 271; and *McKenny v. McKenny*, 2015 BCSC 1345, the purpose of the provision and each to be taken by the court under s. 89 is as follows:

- a) Section 89 of the FLA assists economically disadvantaged spouses to access justice and helps to level the playing field especially where one spouse controls all or the majority of the family wealth and assets;
- b) Such orders are extraordinary in nature;
- c) An interim distribution under s. 89 of the FLA is only available in relation to family property;
- d) The harm contemplated relates to actual or potential economic harm and would encompass adverse impact on the other spouse's lifestyle, trigger tax consequences, or effectively prejudice their argument for reapportionment or position, however, commercial inconvenience does not equal harm;
- e) Even if a recipient spouse can only repay the distribution over a reasonable period of time after trial that in of itself does not qualify as harmful to the other spouse;
- f) The applicant must show that an advance sought is necessary to mount a challenge to the other spouse's position at trial; and
- g) The applicant must show there is a reasonable prospect of success on her claim to set aside the Marriage Agreement if that is in issue.

[14] The property claimed as family property by the respondent is:

- a) bare land on Magnussen West Road in Sheridan Lake, Lone Butte, BC (the "Sheridan Lake Property");
- b) four vehicles: a Mercedes, two Ferraris and a Porsche; and
- c) the claimant's interests in investment companies and family trust.

- [15] The respondent estimates based on her lawyer's hourly rate and hours required for the 15 days of trial and preparation time is \$100,000. The preparation time I infer is based on advice she received from her counsel. I also infer from this that the distribution of funds will be used towards legal costs. However, this has not been made explicit.
- [16] The respondent's financial statement discloses no income other than spousal support of \$48,000 a year. In 2020, she treated the support payments as taxable, which is in accordance with the Marriage Agreement. The estimated equity in the Sheridan Lake Property is approximately \$400,000. The parties are registered as joint tenants on title. Its purchase was completed, and ownership transferred to the parties on May 5, 2020. The Mercedes, which is in her possession and registered in her name, has an estimated value of \$40,000. The other cars, Ferraris and a Porsche, are registered in the claimant's name.
- [17] The respondent lists \$16,300 in credit card debt.
- [18] She asserts she has no funds beyond funds used for living expenses. She pays no child support. The respondent provides no evidence of attempts of trying to obtain financing or gainful employment since the parties' separation. She simply states she cannot afford to pay her lawyer and that she will qualify for work in the film industry in 2022, at which point she will earn \$35 an hour, if offered work. That equates to approximately \$60,000 annually.
- [19] The claimant earns a salary of \$135,000 and receives a child tax benefit of \$6,000. He pays the Children's private school and nanny expenses, which total approximately \$70,000 annually. As noted, he also pays \$48,000 a year in spousal support. His father apparently pays the claimant's rent, which is \$4,500 a month. The claimant lists a series of promissory notes with his father advancing funds between 2015 and 2019, a car loan and a credit card with the balance outstanding as at May 2021 total \$1,300,000. The vast majority of that debt is comprised of the promissory notes. Loan payments are being made on the car loan at \$3,000, and I assume the credit card, payments are being made on that.
- [20] In addition to the Sheridan Lake Property, Ferraris and Porsche, the claimant lists financial assets of RRSPs, including RSPs of approximately \$620,000, which also includes approximately \$50,000 in RESPs for the Children. The value in the family business ventures is unknown, other than a \$40,000 placed on his shares in one of the family companies.
- [21] The family residence was sold on May 10, 2020. It was owned by the claimant and his father. The sale price was approximately \$5,600,000, but an accounting of the net proceeds has not been completed. That property is not mentioned in the respondent's counterclaim.
- [22] Assuming the claimant's position is correct and that the date of separation is May 5, 2020, and that the Marriage Agreement is valid, under the terms of the Marriage Agreement, property acquired during the relationship or marriage is shared property if it is registered in both the parties' names. Clearly, then, from the claimant's perspective, the Sheridan Lake Property should be shared property under the Marriage Agreement since it was acquired during the marriage.

- [23] As well under the marriage agreement, the relationship is deemed to have ended when the parties have lived separate and apart for a period of 90 days or on provision of written notice of intention to separate. Neither of those appear to have occurred as of May 5, 2020.
- [24] In order to make a claim that any property is family property under the FLA, the respondent must succeed in setting aside or replacing the Marriage Agreement with respect to property apart from the Sheridan Lake Property. Furthermore, if the date of separation is May 5, 2020, and not May 12, 2020, there is a question of whether the Sheridan Lake Property is "shared property" under the Marriage Agreement or whether the respondent will seek partition as the registered joint owner, if it is treated as acquired outside the relationship. I note the original closing date on the Sheridan Lake Property was April 30, 2020, and extended on April 20, 2020, to May 5, 2020. The state of title and timing would tend to lead to a reasonable likelihood that the Sheridan Lake Property is also family property under the FLA if indeed the Marriage Agreement is set aside.
- [25] The respondent makes two statements in support of her position that the Marriage Agreement should be set aside due to her signing under duress: that the claimant threatened to leave her if she did not sign it, and that he physically threatened her with harm. No dates, wording or other particulars are provided, including details about the drafting and execution of the Marriage Agreement. As it stands now, this is wholly insufficient to support a duress claim. The respondent also submits the Marriage Agreement should be set aside or replaced as it is significantly unfair.
- [26] No evidence was presented other than the current financial situation of the parties and the financial disclosure as made within the Marriage Agreement. Counsel for the respondent argued the increased value from the family residence is evidence of the significant unfairness. However, that property was valued at \$2,600,000 in 2016 and disclosed to be worth approximately \$5,500,000 within one year of building completion as set out in the claimant's asset schedule to the Marriage Agreement.
- [27] As well, there is a statement about use of an artist studio. However, that studio is not owned by the claimant, and the corporate owner was not a signatory to the Marriage Agreement. Without further evidence, this is insufficient to set aside the marriage agreement as being significantly unfair.
- [28] I find that the respondent has not shown that she has a reasonable prospect of success on her claim to set aside the Marriage Agreement.
- [29] However, if the Marriage Agreement stands, I do find she has a reasonable prospect of success in establishing that the Sheridan Lake Property is shared property under the Marriage Agreement. The respondent's claims for interests in property in addition to the Sheridan Lake Property and spousal support appear to be far in excess of what the Marriage Agreement provides.

- [30] With respect to satisfying the court of the necessity for an interim advance for the respondent, I accept the reality of the costs associated with enforcing the Marriage Agreement itself, but that would not require a 15-day trial. For the Sheridan Lake Property and parenting claims, I assess a reasonable costs of the time involved to be approximately \$30,000 based on the hourly rate provided.
- [31] This is not a case of a scorched earth approach to litigating the issues between the parties. The applications before me are the first to be brought since the claim was filed on December 7, 2020. The applications regarding interim supervision of parenting time prior to the trial is outstanding, but I note that the trial is set to be heard in less than six months. In fact, I think at this point it is less than five months.
- [32] The respondent has also not provided any evidence of her attempts to obtain employment over the past year, nor any evidence of attempts to obtain financing. She does not pay child support. Although no income has been imputed to her. Therefore, I find the respondent has not shown the necessity of the extraordinary relief being sought prior to financial determination of the issues. I will go on to discuss any possibly harm to the claimant.
- [33] The claimant's gross income is almost equal to the total of spousal support and childcare and private school payments he makes. The respondent did not submit that the private school costs are not special or extraordinary s. 7 expenses. He is also paying for the s. 211 report.
- [34] The claimant would likely have to incur financing costs in respect of the Sheridan Lake Property (if it could even be obtained on bare land) or sell or finance property which is either not subject to the respondent's claims or property which I have otherwise found does not have a reasonable likelihood of being found to be family property, since there is not a reasonable likelihood of setting aside the Marriage Agreement.
- [35] As well, the respondent has provided no plan or evidence of how she would repay the claimant if she was successful.

Conclusion

- [36] In all of the circumstances, I do not find it appropriate to order the extraordinary relief of interim distribution of family property in the circumstances.
- [37] The application of the respondent is dismissed.

(SUBMISSIONS ON COSTS)

- [38] THE COURT: Costs will be to the claimant in any event of the cause.

"Wilkinson, J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/13/2022BCSC1317.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/f-c-s-v-c-e-s-2022-bcsc-1317>

Prepared on 29 October 2026 · Esheria