
CANADA / JUDGMENT

Fawdry v. Fawdry

2022 BCSC 2420

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Supreme Court of British Columbia

DECIDED

7 December 2022

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2022 BCSC 2420 Fawdry v. Fawdry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fawdry v. Fawdry,

2022 BCSC 2420

Date: 20221207

Docket: E130565

Registry: Kelowna

Between:

Janice Marilyn Fawdry

Claimant

And

Glenn Herbert Fawdry

Respondent

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

H.A. Taylor

Counsel for the Respondent:

G. Peacock

Place and Date of Trial/Hearing:

Kelowna, B.C.

December 6, 2022

Place and Date of Judgment:

Kelowna, B.C.

December 7, 2022

- [1] THE COURT: This judgment addresses two applications, one filed by each party.
- [2] In her application filed November 16, 2022, the claimant seeks an order for interim spousal support retroactive to the date of separation which was in October 2020; a litigation advance of \$50,000 to be paid by the respondent; certain disclosure orders; and the appointment of an appraiser to conduct a current appraisal of the property that the respondent currently lives in.
- [3] The respondent does not dispute the claimant's entitlement to spousal support, but they disagree on the determination of the respondent's guideline income for that purpose. They also disagree whether the order should be made retroactive.
- [4] In his application filed December 1, 2020, the respondent seeks an order for immediate listing and sale of the property in which the claimant currently lives, and an order that the proceeds be split equally.

BACKGROUND

- [5] The parties had a 26-year relationship. They began living together in either 1993 or 1994. They married in 2010 and separated in October 2020. Both parties were in the process of divorcing former spouses when their relationship began.
- [6] Both parties are retired. The claimant is 68 and the respondent is 75.
- [7] During the marriage, the claimant was the primary homemaker looking after groceries, meals, and the house in support of the respondent's continued career. She also did some work for the respondent's company, as well as at another job.
- [8] The respondent started a business building homes in 1982. He incorporated his business in 1987, and the business operated through the company (Fawdry Industries Limited) since then. A part of that company was sold a number of years ago, although the respondent still receives income from that company.

- [9] The respondent deposed they entered into an agreement prior to marriage "in order to keep the property that we had accumulated prior to the relationship separate in the event that we separated". He claims to have been concerned about protecting his business.
- [10] In her response affidavit, the claimant deposed that she approached the lawyer to draft an agreement to protect her interest in property that she owned and at the time had recently purchased ("Devon Court").
- [11] Neither party can locate a copy of that agreement.
- [12] Before me, counsel took a different view on the legal impact of that agreement. The claimant submits that if it applied to the company, it simply would have stated that the value of the shares in the company at the time the cohabitation started would be excluded, but not the shares themselves.
- [13] The respondent appeared to suggest that the shares themselves would be excluded from family property, not only at the time cohabitation started but throughout the 26-year relationship.
- [14] The parties have adduced no evidence about what the shares might have been worth at the time the cohabitation started or what they are worth on the date of separation.
- [15] The claimant provided some evidence about the status of the company at the time of cohabitation. She claims it was not in a very healthy financial state. She deposed that she pledged her home as security for a loan given to the company for \$50,000.
- [16] In my view, at this stage of the litigation, the existence and/or terms of that agreement cannot have much bearing on the issues before me. There is no agreement in writing in the evidence. The parties' evidence on the reason they entered into the agreement in the first place is inconsistent. The legal significance and/or impact of any agreement is an issue for trial. I am not satisfied I have sufficient evidence about its existence nor legal effect to have a material impact on my analysis.
- [17] There is also a dispute in the evidence about how the Longridge property (on which they built the family home) was purchased. The respondent claims he bought the property.
- [18] The claimant disputes that and states she got a mortgage on tDevon Court to secure against the purchase of a plot of land in 2002. That lot was sold, and with proceeds from that sale, together with other monies, she then bought the lot where the house was built. The property was registered in her name only. It was appraised on December 1, 2021, at \$1.43 million.
- [19] The respondent lives in a home in which the parties are registered as joint tenants, which is located on Rocky Point Drive. It was appraised in January 2022 at \$1,095,000. The respondent claims he started renovations on that property before separation and needed to complete those in order to live in it. The claimant's evidence is that it had an occupancy permit and was livable without the renovations.

- [20] The respondent did not borrow money to buy that home, but he used funds from the company. This has led to significant tax complications.
- [21] The parties were informed by an accountant that unless significant amounts were repaid to the company, a non-eligible dividend of about \$1.4 million dollars would have to be reported, which would be subject to taxation at a rate of just under 49 percent. The parties decided to use proceeds of sale from their Arizona property, which they owned jointly, to repay a large amount of the shareholders loan.
- [22] The claimant deposed that the respondent has drawn about \$240,000 out of the company on the shareholders loan account since separation. She is aware that about \$60,000 of that was used for tax payments. However, she submits the bulk of the money was used for personal expenses, including the purchase and renovations at Rocky Point Drive.
- [23] In his response, the respondent says the funds were used for renovations although he admits not all funds were used for that purpose. He also deposed that some of the funds went to pay "our credit cards". No further details are given; nor does he dispute the amount of money withdrawn from the company.

Current Financial Situation

- [24] As of June 2021, the claimant's annual income was \$20,000 consisting of old age security of about \$550 a month, and payments on a loan she gave to a friend.
- [25] However, she no longer receives old age security and has incurred a large tax debt because the sale of the Arizona property because the capital gains was reported on her income tax. Furthermore, the personal loan that was being paid by a friend has stopped because that friend apparently has become ill.
- [26] Currently, the claimant's income is around \$800 a month, amounting to less than \$10,000 annually. As of May 2022, she had an RRSP of just over a \$141,000.
- [27] The respondent is retired, although it may be that he still does some work as a consultant. He draws the majority of his income from dividends from his company, as well as a RIF, a pension, and CPP.
- [28] Last year his gross annual income reported on his income tax was over \$560,000. He currently lives in a home jointly owned by the parties, which was appraised in January of this year at just over a million dollars. He has a RIF in the amount of \$550,000 and just over US\$78,000.

- [29] The Arizona property sold for over \$700,000. The proceeds from that, as indicated before, were used to pay down a loan deficit in the company and to cover income tax. Capital gains from that sale are listed on the claimant's tax return, as a result of which she lost the entitlement to old age security which represented about \$500 a month, and she incurred just under \$28,000 in tax liability. The respondent also incurred larger than normal tax liability because not all of the money was repaid back into the company.
- [30] The claimant pays for taxes and all expenses associated with the upkeep of the property that she lives in, and she estimates that amounts to about \$40,000 a year. She has already paid \$20,000 in legal fees and owes another \$26,000. She provided details about the estimate needed to further the litigation before trial, and that is what justifies her request for a \$50,000 advance.
- [31] Both parties have already received a \$25,000 advance on a without-prejudice basis from the company.

The Litigation

- [32] The notice of family claim was filed in March 2021, and the response and counterclaim were filed in June 2021.
- [33] Both parties have filed F8 financial statements. A Judicial Case Conference took place in July, as well as a mediation, but neither resolved the litigation. My understanding is that there have been no examinations for discovery. The parties did agree to a consent order in November 2021 to restrain the selling of any assets.
- [34] This matter is set for trial for five days in July 2023.

SPOUSAL SUPPORT

- [35] Given their respective roles during the marriage and the length of the marriage, there can be little dispute that the claimant is entitled to interim spousal support. The respondent does not dispute entitlement, but disagrees with the claimant's position as to the determination of his income and whether the spousal support should be ordered retroactively on the interim application.
- [36] In analyzing these issues, I am mindful of the principles well-established in the case law about the nature of interim applications. Those were set out in, among others, *Robles v. Kuhn*, 2009 BCSC 1163. Among those principles are the following:
- a) On interim applications for support, there is more emphasis placed on the applicant's needs and the respondent's ability to pay.
 - b) Interim support should be sufficient to allow an applicant to continue to enjoy living at the same standard as before separation, to the extent that the payor's income can accomplish that.

- c) The court does not embark on an in-depth analysis of circumstances but is engaged in what has been termed rough justice at best.
 - d) The court should not unduly emphasize any one of the statutory considerations above any others.
 - e) The need for the recipient spouse to achieve economic self-sufficiency is often less significant.
 - f) The amount ordered should be within a range as set out in the guidelines, unless there are exceptional circumstances.
 - g) The order should only be made where there is a prima facie case made for entitlement.
- [37] Both parties agree that the respondent's income as reported on his income tax for 2021 was an anomaly because of the consequences of his withdrawal of funds from the shareholders loan account to purchase Rocky Point property and to pay for the renovations. As noted, his income was reported to be over \$500,000. That being the case, the issue is how to determine his income for the purpose of spousal support.
- [38] The respondent is the sole shareholder in his company, which provides his primary source of income, as it did throughout their relationship. I agree with the claimant that it is appropriate to look at the pre-tax income from the corporation to determine his income for spousal support. In 2021, that amount was \$111,893.
- [39] The claimant submits, in the alternative, that the court should average the last three years as permitted by the Guidelines, and in that case the amount would be \$93,400.
- [40] The respondent highlighted that he is unable to withdraw money from the company because of the restraining order entered into in November. His proposal was that the Court permit him to withdraw \$60,000 to pay interim spousal support, starting in January 2023.
- [41] It is not clear to me why the restraining order should affect the determination of his past income. No authority was cited to explain how I would fairly assess his income to be \$60,000 for the purpose of spousal support when his pre-tax income last year was over \$100,000, and his reported income tax was over \$500,000.
- [42] I do agree that the pre-tax income from the company has been variable over the last number of years. For that reason, I find it useful to use an average from the last three years in order to determine his income.
- [43] Therefore, the respondent's income for the purpose of calculating spousal support is \$93,400. Taking into account the claimant's income, monthly spousal support at the low range would be \$3,984, at the mid-range \$4,648, and at the high range \$4,829.

- [44] In light of all the circumstances, especially the goal of having the parties to have an equivalent standard of living to which they had before separation, I am satisfied that the appropriate amount that the respondent must pay to the claimant is \$4,800 per month in spousal support.
- [45] As discussed later, the respondent has not been diligent about financial disclosure. Specifically, there is an investment worth over a \$100,000 that was not listed on his F8. Counsel have sought disclosure of the details of that, including how easily it could be sold, and that information have not been provided. There have been other requests that have not been complied with either.
- [46] The claimant directed me to a statement from the shareholders loan account from the company, which is in the record. It shows very strong indications that the respondent is using it for personal expenses. In response to that allegation, his affidavit was vague at best.
- [47] In all those circumstances, I see no reason why the spousal support should not be ordered to be as of the date of separation, namely October 2020.

ADVANCE

- [48] Turning to the issue of the advance, the parties did not disagree on the appropriate legal test for ordering an advance payment under s. 89 of the Family Law Act, S.B.C. 2011, c. 25. In both *Bartch v. Bartch*, 2018 BCCA 271, and *MacFarlane v. Ponds*, 2019 BCSC 544, Madam Justice Ballance's decision in *I.F. v. R.J.R.*, 2015 BCSC 793, was quoted with approval. At para. 192 of *I.F.*, I J. said that the blunt purpose of s. 89 is to level the litigation playing field that is so often skewed when one spouse controls all or the majority of wealth and assets.
- [49] The factors the court must consider are whether ordering interim distribution would be harmful to the interests of the spouse and whether it is necessary for litigating the claim. Harm here refers not to disadvantage in one's current financial position, but jeopardy to the spouse's legal claim regarding the family asset.
- [50] The respondent submits given the existence of the marriage agreement, it would harm him to order distribution. In effect, he was arguing that the company is not a family asset, and therefore s. 89 should not be invoked.
- [51] There are several flaws with that position:
- I find his position is difficult to reconcile with his own pleadings which states in his response that he is opposed to a determination of the shares in the company until the valuation can be done. In other words, his position is that her interest should be determined before anything is paid out. That is not the same as saying she does not have any interest.
 - Neither party can produce or find a written copy of the agreement, and it is not in evidence.

- c) It is not even clear from the respondent's own evidence that anything other than the value of the shares at the time, at the beginning of the relationship, might be excluded, rather than the shares themselves. Certainly, that would accord with the usual rule that everything that the parties own in their names is family property over the course of a long marriage. In order to displace that usual rule, I would need better evidence than the statement in this affidavit, which is vague.
- [52] For those reasons, I do not agree with his position that there is no reasonable prospect of success in the claimant's position that she is entitled to an equal share or some portion of the value of the company. That is relevant because where an advance would be used to advance an unmeritorious claim, that might qualify as harm in the words of s. 89 (see MacFarlane at para. 16).
- [53] In my view, based on the evidence on the record before me, the claimant has more than a reasonable chance of success, which weighs in favour of ordering distribution.
- [54] The respondent suggests that the claimant has not demonstrated need. I disagree. Because of the parties having to pay back money taken out of the company, she was deprived of the ability to use the proceeds from the sale from the Arizona property towards her living expenses. In addition, she has been deprived of a significant source of income, about \$500 a month, from old age security. She also has incurred a significant income tax liability. While it is true that the respondent apparently is also not getting old age security and incurred a larger than normal tax liability, the important difference is that is because he had been withdrawing money from the company for his own use since the date of separation.
- [55] The respondent also suggests that the claimant does not have a need because she has money in an RRSP and a RIF that she could access. In other words, he implies she should be first to cash those out with significant higher tax rates. That argument has little merit when he, too, has more investments and assets from which he could access and pay the interim distribution without withdrawing money from the company. His position was that having to be forced to take money out of the company would harm him because he had to be taxed on that. As I have noted, it is not clear to me that that is the only place he would have to get the money. I also do not agree with his proposition that having to pay tax in the normal course is harm captured by s. 89. Harm refers to jeopardizing his legal claim to the asset at issue.
- [56] The claimant also has put forward evidence regarding the litigation expenses, and no issue is taken with any of that evidence. She points out that the parties are willing to sell the Longridge home that she has been solely responsible for upkeep and maintenance. Recently a washer and dryer apparently failed, and she will also have to spend money to replace that, as well as to hire help to prepare the house for sale. Those expenses can be significant.

- [57] The respondent submits there is no need to order interim distribution. His position is that rather than order the interim distribution (which he submits would have to come from the company), I should order the sale of the home and distribute those proceeds, as he seeks in his application.
- [58] I do not agree. Even though the claimant is not opposed to the sale of the home, she currently lives in it. She seeks conditions in order to allow her to get equivalent accommodation, which the respondent opposes.
- [59] More importantly, whether the property sells, and for how much it sells, is in neither party's control. Having found that she has demonstrated a need for an interim distribution, and not being satisfied there would be any harm to the respondent's position, the order as sought should be granted. I do not agree that the order should be denied on the basis that the granting of a different order in favour of the respondent might eliminate some of the claimant's need.
- [60] I am satisfied that the claimant has met the burden to demonstrate the need for an interim distribution. I am satisfied that there is a lack of harm to the respondent's legal claim to the property, and that there is more than a reasonable chance of success that the claimant will get an equal division of the company, even taking into account the possibility that there was an agreement. Accordingly, I do order that the respondent pay an interim distribution of \$50,000.

SALE OF PROPERTY

- [61] The respondent's application seeks an order for an immediate sale of the house in which the parties lived in during the majority of the relationship. Rule 15-8(1) provides that a court can order a sale if it appears necessary or expedient that the property be sold. This confers a discretion on the court to order an interim sale. I understood that neither party disagreed that the home, despite being registered only in the name of the claimant, is family property.
- [62] In *Morrison v. Greenwood*, 2020 BCSC 1356, Madam Justice MacNaughton considered the meaning of the word "expedient" at paras. 29-31. Expedient, when necessity is not an issue, is that the proposed sale will be advantageous to both parties, quoting from *Kapoor v. Makkar*, 2020 BCCA 223 at para. 21.
- [63] In *Kapoor*, the Court of Appeal cited *Bodo v. Bodo* (1990), 66 D.L.R. (4th) 700 (B.C.S.C.), where it was stated that the onus should be on the spouse seeking to change the status quo pending trial, and any doubt should be resolved in favour of the status quo.
- [64] The claimant submits the order for sale should only be granted on certain conditions, including to delay the sale until spring when the market is better. Also, she seeks to receive the first \$1,095,000.00 in order to allow her to purchase alternate property and/or to be able to rent something. She said the balance would go into trust.

- [65] She proposes other orders that are not contested, primarily that there be a joint conduct of sale and that any cash offers within five percent of the list price would be accepted.
- [66] The respondent submits there is no basis upon which the claimant can claim a right to a majority of the proceeds of sale from the house. The claimant says that doing so is a way to equalize their real property. Her position is that she should not be forced to move to one place while waiting for trial to get the full division of assets in which case she would probably have to move again.
- [67] I do not find that the immediate sale of the house is necessary. That leaves the question as to whether I should exercise discretion because I find it would be expedient.
- [68] Normally, the proceeds would be held in trust subject to any equal distributions to which the parties agree. However, in this case, I find that doing so would be more advantageous to the respondent than the claimant.
- [69] The respondent denies that the company is a family asset subject to equal division. The claimant seeks equal division of the family assets in her notice of family claim. Thus, to sell the home, forcing the claimant to move now rather than after trial, raises the very real possibility that she will have to move twice.
- [70] Also, the respondent will get the benefit of an early equal distribution of a major asset, while maintaining his view that the company is not a family asset.
- [71] The parties are far apart as to what the appropriate distribution would be if the house did sell, not only because of the claimant's suggestion, but because of the underlying dispute about the company.
- [72] In those circumstances, I do not find it expedient at this point to order the sale, and I decline to do so.
- [73] The parties are, of course, free to come to an agreement, if they choose to do so, but I am not satisfied that the respondent has established that a change in the status quo is appropriate under his particular terms.

DISCLOSURE

- [74] The respondent has not responded to requests for financial disclosure for about six months. No acceptable reason has been offered for that failure.
- [75] He agrees to disclosure but seeks that he be given 30 days to provide it. His counsel tells me that he is "out of town" but gives me no other details. There is no good reason for lack of disclosure of basic financial documents. This is especially true when it appears that he has neglected to include a major asset on his F8 statement.

- [76] The claimant also seeks personal bank statements. The respondent resists, submitting their relevance is unclear. He also says that perhaps after an examination for discovery that relevance might be made clear.
- [77] Financial disclosure is perhaps the single most critical element in ensuring fair litigation in family law cases. In this situation, the respondent controls the company that generated the family's income for years. He admits to withdrawing money from that corporation even after repeated requests that he not do so without disclosure of what the money was spent on. His withdrawals caused the parties to face possibly devastating income tax consequences, leading to the loss of entitlement to old age security.
- [78] The claimant has sound and meritorious reasons to be suspicious of the respondent's adherence to his legal obligation to provide full and accurate financial disclosure. In particular, his evidence about withdrawals from the shareholders loan account was vague and unhelpful.
- [79] In those circumstances, I am satisfied it is appropriate that he disclose bank statements. Accordingly, I grant all of the orders sought in paras. 5-8 of the notice of the claimant's application. The respondent must provide all that disclosure no later than 14 days from today.

APPRAISAL

- [80] Lastly, the claimant seeks an appointment of an appraiser to get up-to-date appraisals of the home the respondent is living in. The appraisal was done in January, and apparently, the cost of another one is nominal.
- [81] The respondent says that given the trial is coming up in July, it makes little sense to order an appraisal now. I agree.
- [82] If the parties get to the point where they are having settlement discussions, they can always agree to have joint appraisals of both properties, given that I am not ordering a sale of hers right now. In my view, it does not seem necessary, with a relatively close trial date, to order the appraisal now.

COSTS

- [83] The claimant was substantially successful in both applications and seeks costs. The respondent's position is that costs should be in the cause.
- [84] I am satisfied that the applications were interrelated. While the respondent is obviously free to seek an interim sale of the home, it appears his application was motivated, in part, by the claimant's seeking an interim distribution. However, his application did not take up a lot of the parties' evidence or time at this hearing.

[85] As I noted in the judgment, I am concerned by the respondent's lack of diligence with regard to financial disclosure. I am also concerned by his affidavit which was unhelpful and vague on certain important matters regarding his use of money from the company. In addition, it seems that his position put before me on these applications may not have been consistent with his actual pleadings.

[86] In all those circumstances, the claimant is entitled to her costs of both applications in any event of the cause.

"Sharma J."

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