
CANADA / JUDGMENT

Ferry v. Legebokoff

2013 BCSC 2054

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Supreme Court of British Columbia

DECIDED

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2013 BCSC 2054 Ferry v. Legebokoff

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ferry v. Legebokoff,

2013 BCSC 2054

Date: 20130924

Docket: E21624

Registry: Cranbrook

Between:

Dominique Ferry

Claimant

And

Daryl Bart Legebokoff

also known as Bart Daryl Legebokoff

Respondent

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Judgment

Counsel for the Claimant:

G.N. Kent

Counsel for the Respondent:

R.S. Miles

Place and Date of Hearing:

Cranbrook, B.C.

September 24, 2013

Place and Date of Judgment:

Cranbrook, B.C.

September 24, 2013

- [1] This is an application by the claimant, Ms. Ferry, for the summary determination of the question of whether she is barred by the operation of s. 1(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 from applying for spousal support. If she is successful in that application, she also seeks interim orders for spousal support and apportionment of the responsibility for the utility and mortgage costs associated with the homes that she and Mr. Legebokoff, the respondent, are currently living in.
- [2] I should say at the outset that I have concluded that this matter is suitable for summary determination under Rule 11(3) of the Supreme Court Family Rules. The determination of this issue in advance of trial will assist in the efficient resolution of the case. Further, while credibility is an aspect of my decision and the parties have made themselves available for cross-examination on their affidavits if required, I have concluded that this is one of the cases in which the application material itself provides a proper basis for reaching a decision, including with respect to credibility.
- [3] Most of the background facts are not disputed. The parties lived together in a marriage-like relationship for about 15 ½ years. Ms. Ferry is 48 and Mr. Legebokoff is 50. She works as a homecare aide for an elderly person, after previously working as a house cleaner. She deposes that she earns about \$37,400 a year. She says her employment is precarious because the person she cares for is in frail health. Mr. Legebokoff is a millwright who earns around \$100,000 per year, although he emphasizes that that particular level of income includes an amount of overtime that is not sustainable for him in the long term.
- [4] Their daughter together, Rowan, is now 19. Ms. Ferry also has a 22-year-old son, Kyle, from a previous relationship. It appears that Kyle was looked on as a son by Mr. Legebokoff during the relationship. Both young people are now living independently and their support is not an issue in this application.

- [5] It is common ground that the parties separated on January 26, 2010. Ms. Ferry stayed in what had been the family home. Mr. Legebokoff initially lived in an apartment. Rowan lived with her mother until 2012 and then lived with her father for several months (the exact duration is disputed) before returning to Ms. Ferry. Rowan moved to Calgary in April of this year. Except for about three months when he was on his own, Kyle lived with Ms. Ferry from the separation until he moved out in November 2012.
- [6] It is also common ground that Ms. Ferry did not file her notice of family claim in this matter until May 2011. That is more than one year after the parties had ceased to live together. Thus, her action for spousal support will be barred by the definition of "spouse" in s. 1(1) of the Family Relations Act, which applies to this action, unless Mr. Legebokoff is estopped from relying on that limitation because he has, by his conduct, deliberately led her into believing that he would not rely on that strict definition: see *W.A.S. v. D.W.T.*, 2003 BCSC 865, at para. 29. As Mr. Justice Groberman (as he then was) put it in that decision, the question is whether Mr. Legebokoff has, by his conduct, lulled Ms. Ferry "into the belief that support will be provided without the necessity of going to court".
- [7] To support her contention that Mr. Legebokoff has engaged in such conduct, Ms. Ferry relies on a documented process of negotiations that went on between them following the separation. She says that these negotiations went on from the separation until April 2010. Mr. Legebokoff's chronology is not significantly different. These negotiations consisted in the application record of five documents, which were apparently exchanged between March 23 and April 8, 2010, in which Mr. Legebokoff made fairly detailed offers to resolve their various issues and Ms. Ferry provided fairly detailed and critical responses. It is not disputed that Mr. Legebokoff referred explicitly to payments of spousal support, or to payments that can only have meant support of that nature, in each of the written proposals.
- [8] Despite their efforts, no agreement was concluded between them. Ms. Ferry says she retained a lawyer in July 2010. According to her, Mr. Legebokoff told her that he had retained a lawyer and, at least three times between July and November of this year, told her that his lawyer would be drafting a separation agreement. He also moved from the apartment that he had been living in to the family's former rental property, where he continues to live. She says that this changed the financial landscape for her and so she decided to wait for Mr. Legebokoff's lawyer to put forward a draft agreement, rather than have her lawyer continue with the draft that he had been preparing.
- [9] The first contact from any lawyer on Mr. Legebokoff's behalf to her was not until July 2011. She says that she first learned that her status as a spouse under the Family Relations Act was to be challenged in November of 2012, just prior to a mediation that the parties had arranged.
- [10] Ms. Ferry also points to periodic payments that she received from Mr. Legebokoff following the separation as indicating his ongoing willingness to recognize a spousal support obligation of some nature. These payments amount, by my very rough calculation, to

around \$12,000, deposited into her account at various intervals between June 2010 and April 2012. The records of her account have been attached to the material. She says he also paid her a total of about \$1,000, in cash, by three separate payments between February and August of 2010.

- [11] In addition, she attached as exhibits to her affidavit two undated documents in Mr. Legebokoff's writing. One is titled, "Bart's Budget" and it lists certain home-related expenses, as well as a series of expenses in a different column under the heading, "Support." A second document is titled, "Summary of Bart's Support for 25-Month Period, January 10 to February 12." It lists mortgage and other home-related expenses as well as dental bills amounting to payments of \$2,630 per month to Ms. Ferry. Her affidavit is silent on how she acquired these documents, but Mr. Legebokoff's authorship of them was not disputed.
- [12] Finally, she points to a note dated September 15, 2011 that she asserted was written by Mr. Legebokoff, but that it appears was actually provided by his tax preparer. On its face it purports to have been written by Mr. Legebokoff. Although it disavows any written agreement on spousal support, it describes: "An oral agreement whereby I am responsible for certain bills and expenses."
- [13] For his part, Mr. Legebokoff takes a different view of the understanding that existed between the parties regarding support after the separation. He says that a longstanding area of dispute between them, even prior to the separation, was the level at which she was prepared to work. He deposes that he repeatedly urged Ms. Ferry to take steps towards her own employment and security. He denies that he ever agreed to pay her spousal support and deposes that he said from the start that he would not be paying it. He only paid the mortgage and utilities for both residences so that Rowan and to some extent Kyle had roofs over their head. He concedes, however, that no specific amount was paid towards child support for Rowan, although the amounts that he provided to Ms. Ferry would exceed any amounts that he was legally required to pay under the Federal Child Support Guidelines.
- [14] He points out that he actually stopped paying the gas and hydro for the former family residence for the period that Rowan moved in with him and that he kept up the mortgage on the former family residence only out of fear that Ms. Ferry would no longer pay it and cause a foreclosure. He says that his initial written proposal, which was all that Ms. Ferry had attached to her first affidavit, was made only out of frustration at her insistence that she be paid spousal support for the rest of her life. He said that before that he had offered her "pretty well everything" in terms of the assets. He gave up on working something out with her directly when the negotiations fell through.
- [15] Most importantly, while Mr. Legebokoff acknowledges that he had considered the issue of spousal support early on, he maintains that no agreement on it was ever reached. Once he realized that she was not prepared to be reasonable, he took a wait-and-see approach. His references to "support" in the documents that he wrote were to describe child support for Rowan only, not spousal support or some combination of child and spousal support.

[16] In addition to the principle I have already extracted from the W.A.S. decision, I have found several other of the decisions that have been provided helpful.

[17] In *Waldie v. Hantel*, 2012 BCSC 888, at para. 18, Madam Justice Koenigsberg, dealing with the facts of her case, said as follows:

Here, no moneys were paid at all. However, the proper analysis does not require that money be paid whether directly for spousal support or indirectly for living expenses which would have been paid by the receiver of the money from spousal support. The test is broader -- it is "conduct" -- whether by word or deed. In my view, context of word or deed is crucial. [Emphasis added.]

[18] In *D.L.M. v. R.E.G.*, 2004 BCSC 364, at para. 88, Mr. Justice Joyce noted:

In this case, I am satisfied the defendant made voluntary payments in the nature of spousal support from the time he announced that the relationship was over until the end of December 2001. He continued to deposit his salary in the parties' joint bank account and the plaintiff, with the defendant's knowledge and agreement, continued to use that account to meet household expenses and her personal expenses. I am satisfied that by his conduct, though not by direct words, he led the plaintiff into believing that he would not rely on the strict definition of spouse contained in the Family Relations Act. Accordingly, the plaintiff is entitled to assert her claim for support and the defendant is estopped from relying on the limitation period contained in the definition of spouse. [Emphasis added.]

[19] I am alive to the distinction drawn by counsel between those cases in which an estoppel was found (such as *D.L.M.*, which I have just cited and *Pierce v. Pierce* (1997), 29 B.C.L.R. (3d) 111 (S.C.)) because of payments following the separation that could fairly be characterized as being in the nature of spousal support, and those cases in which it was denied (*W.A.T.* and *Waldie*) because there were only unconsummated negotiations or payments that were clearly intended only to preserve property. In particular, I have kept in mind the findings of *Groberman J.* at paras. 31 and 32 of *W.A.T.*:

[31] I find, that such grounds [that is, the grounds for finding an estoppel] are not made out in this case. Mr. T. did not make payments to Ms. S. that can be characterized as spousal support payments. He merely ensured that amounts were deposited in the parties' joint bank account so that the mortgage, insurance, and tax payments on the home would be paid, and, in addition, to ensure that there would be money for payments on some of the personal property that he kept.

[32] Ms. S. could not reasonably have concluded that the payments were for any purpose other than preserving property. I do not think that they could be characterized as payments for spousal support, nor do I think that she could have been misled by the payments into believing that Mr. T. was waiving his ability to rely on the limitation inherent in the definition of "spouse" under the Family Relations Act.

- [20] I do not think that, standing alone, Mr. Legebokoff's apparent commitment to paying spousal support or some amount in lieu of it during the immediate post-separation negotiations is sufficient to create an estoppel. Unless they are concluded, negotiations are just that -- suggestions about a potential resolution and no one could reasonably infer that the things offered by one party will be provided regardless of whether an agreement is reached. There is also nothing in the sequence in which counsel was retained by each party or in which they communicated or failed to communicate with each other about who would draft the separation agreement that in itself could reasonably have led Ms. Ferry to believe support was a given. Nor would targeted payments of amounts that could only have been seen as being directed to the preservation of property reasonably lull the other party into a state of complacency about support.
- [21] However, I conclude that both the intermittent payments to Ms. Ferry following the separation and Mr. Legebokoff's characterization of his "support" and what it actually meant were ambiguous in a way that would have led her reasonably to conclude that some level of support to her specifically would be an inevitable outcome of their dealings with each other.
- [22] Mr. Legebokoff's characterization of his support, including the intermittent payments of more than \$12,000 post-separation, as being solely intended either for child support or to keep a roof over the children's heads struck me as a process of reasoning backwards from a desired outcome rather than as an actual recollection of his thinking at the time. It also makes no sense that he would list his specific regular payments as "support", when they clearly consisted of property maintenance matters, unless he himself regarded them as serving at least in part that purpose of support. It would similarly be contrary to common sense and ordinary human experience to describe child support in that manner, even for someone without legal training. I also find that the reference in the tax document to payment of certain bills and expenses as part of an agreement between the parties undermines Mr. Legebokoff's current assertion that he was only interested in preserving the homes from foreclosure. Even if he did not write that document himself, he has not suggested that it was written without his approval.
- [23] In the context of what they had previously discussed but failed to agree on, I find that Mr. Legebokoff's payments, especially the intermittent deposits, could only have been seen as recognition on his part that spousal support was forthcoming in some amount regardless of the limitation period. I find, therefore, that he is estopped from relying on the s. 1(1) limitation at trial.
- [24] As to interim support, I am mindful that such support is meant to be a rough and ready stopgap until trial and that I should be careful not to embarrass the trial judge by ordering an amount that may not ultimately be sustainable on the full evidence at trial. I think it is fair to use the income amounts for the parties that are contained in the application record. Given all the circumstances, I conclude that there is both a need for and an ability to pay interim spousal support and that a payment by Mr. Legebokoff to Ms. Ferry in the mid-range of those incomes, that is, \$1,461 per month, commencing October 1st would be reasonable.

- [25] I also order on an interim basis that the parties will pay the utilities on the residence in which each of them is currently living. I am going to modify counsel's suggestion with respect to the sharing of these collective mortgage payments to reflect the net disposable income in the spousal support calculation that I have relied on. The combined mortgage payments of the two residences will be paid by the parties based on their respective net disposable incomes as shown in the DIVORCEmate calculations for this amount of spousal support, rounded up or down to the nearest zero. That will be 59% paid by Mr. Legebokoff and 41% paid by Ms. Ferry.
- [26] I think that she has had substantial success on this application and so costs will be to the claimant in the cause.

The Honourable Mr. Justice T.A. Schultes

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