

CANADA / JUDGMENT

Galac v. Farnsworth

2022 BCSC 620

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 620 Galac v. Farnsworth

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Galac v. Farnsworth,

2022 BCSC 620

Date: 20220304

Docket: E200432

Registry: Vancouver

Between:

Lana Galac also known as Lana Louise Galac

Claimant

And

Ryan Daniyel Corey Farnsworth

Respondent

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant, appearing via teleconference:

H.H. Graham

The Respondent, appearing via teleconference:

R.D.C. Farnsworth

Place and Dates of Trial:

Vancouver, B.C.

February 22-25, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 4, 2022

- [1] In this family dispute, the parties agree only that they should be divorced. The facts needed for a lawful divorce are present, and I grant an order for divorce accordingly.
- [2] Ms. Galac, now 39, and Mr. Farnsworth, now 43, met as students at UBC in 2004. They married on November 13, 2010, and separated on October 1, 2018. Their two children are a girl who is now nine and a son aged seven. From July 1, 2021, a shared parenting order is in place where the children are with Ms. Galac 57% of the time and Mr. Farnsworth 43% of the time.
- [3] Parenting issues have been addressed for this family in the Provincial Court. At issue before me are financial questions.
- [4] Regarding support, the Court is asked to determine: (1) the parties' incomes for calculating support; (2) whether the Respondent is entitled to spousal support, and if so, how much; and (3) retroactive and prospective child support, including s. 7 expenses.
- [5] The most contentious issues at trial had to do with the division of property. Under that heading, the Court must resolve: (1) what I will simply call for now the share portfolio issue; (2) whether an inheritance is excluded property; (3) the proper treatment of mortgage payments made by the Claimant after separation; (4) the Respondent's claim on the McLean Drive property; and (5) the proper treatment of the Respondent's debt from an accidental overpayment he received at work.
- [6] I will deal with the division of property issues first.

The Share Portfolio Issue

- [7] In 2013, the parties began to invest in the stock market. Each contributed money to a US dollar investment account. Mr. Farnsworth administered the account, dealing with the brokerage company that the couple had retained.
- [8] Mr. Farnsworth acknowledges that the account is a family asset such that its value should be shared equally. Ms. Galac takes that position too.

- [9] Where the parties differ is that Ms. Galac says the account should be valued not at its actual value at the time of trial but instead at the value it would have had at the time of trial if Mr. Farnsworth had never sold any of the shares from the account.
- [10] There is a significant difference between the two positions. The present balance in the account is \$26,172. The money Mr. Farnsworth withdrew from the account over time totals \$29,908. The total value is therefore \$56,080. Dividing that equally would give each side \$28,040.
- [11] If none of the shares had been sold, the value of the account at the time of trial would have been \$181,514. The drop in value to \$56,080 happened because after Mr. Farnsworth had sold shares from the account, to obtain his \$29,908, the market value of these shares went up. Had he sold no shares, the account would have been worth \$181,514 at the time of trial.
- [12] Ms. Galac agrees to an equal division of property provided she wins on this issue. Otherwise, she seeks an unequal division of property, which I will address later in these reasons.
- [13] What were the circumstances of Mr. Farnsworth selling these shares? On October 1, 2018, he suffered an acute psychotic episode. Ms. Galac, who is a registered nurse and a nurse practitioner, initiated Mr. Farnsworth's admission to hospital on October 1. He was held as a psychiatric patient involuntarily. He was held until November 6, 2018. On the day he entered psychiatric treatment, that is October 1, 2018, or within a day or two, Ms. Galac took all the money out of the couple's bank accounts, some \$87,000. In April of 2019, she accessed approximately \$75,000 from the couple's bank line of credit.
- [14] Mr. Farnsworth sold some shares in approximately December of 2018 and further shares on a few occasions between November of 2019 and February 28 or early March of 2020.
- [15] While Ms. Galac protested at trial that Mr. Farnsworth should not have done this, she wrote to his then lawyer on December 17, 2019, that Mr. Farnsworth's costs of having to hire professional supervision for his parenting time was not a barrier to him having access because, among other sources she said:
- [Mr. Farnsworth] has sole access to our family assets in the form of a stock portfolio totalling \$40,000.
- [16] Mr. Farnsworth's lawyer on December 19, 2019, wrote to ask Ms. Galac to return 25% of the funds she had earlier withdrawn in order for him to pay legal fees and supervision fees. Ms. Galac did not agree to this. Later that same day, she wrote to say that the funds available to Mr. Farnsworth to access were listed in her December 17 letter, which included the stock portfolio as described above. The first time Ms. Galac took the opposite position was two months later, in her lawyer's letter of February 20, 2020, when her lawyer wrote that Ms. Galac did not consent to Mr. Farnsworth selling her half share of the stocks.

- [17] In light of those facts, Ms. Galac's only proper claim in my view is to one-half of the actual value of the share portfolio at the time of trial, or \$28,040, as set out earlier in these reasons. Her position at trial that she should get half of what the portfolio would have been worth had no shares ever been sold is, in my view, an overreach given that she took all the couple's money from their accounts when Mr. Farnsworth was in hospital in October 2018, and when she refused to give him any of that money on the basis that he had the stock portfolio to fall back on.
- [18] As I noted earlier, Ms. Galac argues in the alternative that there should be an unequal division of assets because Mr. Farnsworth sold some of the shares when he did. The test she would have to meet here is that it would be "significantly unfair" to maintain the equal division that she concedes is otherwise called for. See s. 95 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. As our Court of Appeal said in *Singh v. Singh*, 2020 BCCA 21, at para. 130, the threshold for "significant unfairness" is high, including a real sense of injustice that would permeate the result. There is nothing of that sort here, and Ms. Galac's alternative claim for an unequal division of assets is dismissed.

Whether Mr. Farnsworth's Inheritance Is Excluded Property

- [19] In October of 2015, Mr. Farnsworth's grandmother left him in her will \$128,386. He seeks a determination that this inheritance be treated as excluded property.
- [20] Section 85(1)(b) of the FLA says that inheritances to a spouse are excluded from family property. Section 85(2) says that the spouse asserting exclusion "is responsible" for demonstrating exclusion. Exclusion must be proved on the balance of probabilities with "clear and cogent" evidence, although evidence that is less than certain or precise will be accepted in order to do justice between the parties. See *Shih v. Shih*, 2017 BCCA 37, at paras. 42-44.
- [21] There is no dispute that Mr. Farnsworth received the inheritance at the time he alleges and in the amount stated above.
- [22] However, he donated that money to the family's needs. He placed it in the couple's joint bank account which they used for the final three years of the marriage. The inheritance was spent on a whole host of family expenses. Notwithstanding s. 85(1)(b) of the FLA referred to above, it appears to be the law that if the excluded property, as defined in s. 85(1) of the Act, is mingled with other money and becomes part of the family's resources, so as to preclude tracing, the exclusion is lost. See *B.S.D. v S.K.D.*, 2021 BCSC 2327, at para. 322; and *Suidy v. Corbeil*, 2021 BCSC 1717, at paras. 36-40. Accordingly, I find that Mr. Farnsworth's claim for excluded property is dismissed.

Post-separation Contributions by the Claimant and Occupation Rent

- [23] From the time the parties separated on October 1, 2018, marked by Mr. Farnsworth's detainment in a hospital psychiatric unit, Ms. Galac made mortgage and insurance payments for the matrimonial home until March 2020 in the amount of \$55,384. That expenditure to maintain the matrimonial property is properly a family debt to be shared equally.
- [24] Incidentally, Ms. Galac received income by renting out a suite in the matrimonial home after October 1, 2018, and the net revenue from that rent must also be shared equally between the parties.
- [25] Mr. Farnsworth claims that Ms. Galac owes occupation rent on the matrimonial home from the date of separation until she no longer lived there. Mr. Farnsworth did not plead a claim for occupation rent, but in my view, so long as the occupation rent figure that is adopted is unarguably low, Ms. Galac has not been prejudiced by an amendment at this stage to claim occupation rent, and I allow that amendment.
- [26] The tests for occupation rent were summarized as follows by Butler J., when he was on this Court, in *Hodel v. Adams*, 2016 BCSC 910, at paras. 18-22:
- [18] Ms. Adams advances a claim for occupation rent as Mr. Hodel has continued to live in the Family Home since September 2014. Mr. Hodel opposes the claim on the basis that Ms. Adams was not ousted from the Family Home; she left voluntarily. Further, he says it would be inequitable to grant her a claim for occupation rent because she has not come to court with clean hands.
- [19] Claims for occupation rent are frequently advanced in family law cases. The leading cases in British Columbia on occupation rent are *Stasiewski v. Stasiewski*, 2007 BCCA 205; and *Oyama v. Oyama*, 2009 BCCA 114. In *L.M.R. v. J.F.R.*, 2010 BCSC 363 at paras. 27 to 36, Willcock J. (as he then was) reviewed the authorities and thoroughly summarized the law. I adopt his analysis of the principles which apply to claims for occupation rent. As he noted, the decision in *Oyama* does not alter the approach to occupation rent in family cases as set out in *Stasiewski*.
- [20] At common law, a co-tenant is entitled to claim occupation rent when he or she has been ousted from property. Absent an ouster from the property, there is no claim. However, if the tenant in possession seeks to recover property expenses from the departed tenant, the court retains a discretion to set off occupation rent against the expense claim. However, as noted in *L.M.R.* at para. 32, there is no absolute right to such a claim or setoff:

- [32] An allowance for occupation rent is not mandatory, even where there is a claim for expenses associated with occupation. It is an equitable remedy. In *Dacyshyn v. Semeniuk*, 2007 BCSC 71, the Court recognized the general rule described in *Bernard* but refused to allow a claim for occupation rent, despite a claim for expenses, on the ground that the remedy is an equitable one and is not available to a party who comes to court with unclean hands or where it is not necessary to address inequity.
- [21] When apportioning assets between the parties, the trial judge in *Stasiewski* expressly weighed the value of the husband's post-separation occupation of the matrimonial home having made an allowance for the costs incurred by him during that occupation. At para. 33, the Court of Appeal specifically approved of that approach:
- [33] His decision to credit the husband with occupation rent was an exercise of his discretion to do equity between the parties in the circumstances, and no basis has been shown upon which we could properly interfere.
- [22] The situation here is similar to what occurred in *Stasiewski*: Mr. Hodel has a claim for expenses which should be taken into account when dividing the equity in the property. However, as he is claiming those expenses, equity also requires that some allowance be made for occupation rent. Ms. Adams had a right to reside in the Family Home but, as a result of the separation and serious animosity between the parties, was unable to do so. She has had to pay her own rent since leaving the Family Home. It would be unfair to require her to contribute to the maintenance expenses without taking into account the benefit received by Mr. Hodel, who was able to continue in possession of the Family Home. The fact she was not ousted from the property is irrelevant given his claim for expenses. Further, there is no equitable basis for denying her claim for occupation rent. Her misbehaviour in relation to the personal property claims is not relevant to the apportionment of the Family Home.
- [27] In my view, the facts required to support a claim for occupation rent are present in the case before me, and I allow the claim in the amount of \$1,200 per month for the period Ms. Galac occupied the matrimonial home. Mr. Farnsworth claimed \$2,500 per month as occupation rent, but in my view, expert evidence or detailed factual evidence would be required to order occupation rent above the very conservative figure I have chosen.

The Respondent's Claim on the McLean Drive Property

- [28] Mr. Farnsworth alleges that after Ms. Galac took the \$87,000 out of their joint account in October of 2018, and withdrew \$75,000 from the parties' joint line of credit in April of 2019, she invested the money to acquire in whole or in part a property at 1023 McLean Drive in Vancouver. He thus claims an interest in that property.

- [29] The evidence does not support such a claim. The uncontradicted evidence of Ms. Galac shows that she holds only a 1/100th non-beneficial interest in the McLean Drive property, which is owned, in fact, by her new partner, and occupied by her as a tenant under a five-year tenancy.
- [30] Before leaving the division of property matters, I note that Mr. Farnsworth sought to include as a family debt a portion of his debt to his employer arising from his employer having overpaid Mr. Farnsworth at work. In my view, there is no basis in law for visiting that debt on Ms. Galac, and I do not allow that claim.
- [31] That concludes these reasons addressing the division of property. I turn to the issues of child and spousal support.

Incomes for Support Purposes

- [32] I find the parties' incomes at the relevant times to be as follows, as set out in Ms. Galac's written submissions:

Incomes for Support Purposes

14. The Claimant's income during the time she had primary residence of the Children is as follows:
 - a. 2018 \$111,491, less professional dues of \$842;
 - b. 2019 \$100,870, less professional dues of \$1,206;
 - c. 2020 \$101,651, less professional dues of \$1,359; and,
 - d. 2021 (6 months) \$87,199, no professional dues yet accounted for.
15. The Claimant's income during the time the parties shared parenting of the Children is as follows:
 - a. 2021 (6 months) \$87,199, no professional dues yet accounted for.
16. The Respondent's income during the period the Claimant had primary residence of the Children is as follows:
 - a. 2018 \$24,287, less professional dues of \$1,019;
 - b. 2019 \$49,231, less professional dues of \$1,023;
 - c. 2020 \$66,594, less professional dues of \$1,073; and,
 - d. 2021 (6 months) \$78,396, no professional dues yet accounted for.
17. The Respondent's income during the time the parties shared parenting of the Children is as follows:
 - a. 2021 (6 months) \$78,396, no professional dues yet accounted for.

Spousal Support

[33] Mr. Farnsworth claims retroactive spousal support but not ongoing spousal support. He advances his claim under s. 15.2 of the Divorce Act (R.S.C. 1985, c. 3 (2nd Supp.)), and s. 161 of the FLA. These two provisions have essentially common objectives, and s. 161 can be looked at to see what they are:

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[34] As the parties' incomes set out above for 2018-2021 demonstrate, Ms. Galac earned substantially more in those years than Mr. Farnsworth. The objectives to consider from s. 161 include, as far as practicable, the promotion of the economic self-sufficiency of each spouse within a reasonable period. Need alone may be sufficient to ground a claim for spousal support. See *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, at para. 43. Ms. Galac cited *Lee v. Lee*, 2014 BCCA 383, at paras. 61 and 65, for her submission that post-separation disparity of income is not on its own a basis for finding spousal support. I would observe that the facts in *Lee* were very different from those at bar, and that the Court of Appeal in *Lee* found that a "transitional" award for spousal support from the wife to the husband would have been appropriate. In the result, the court ordered that a \$17,500 payment by the wife to the husband before trial did not have to be repaid.

[35] I find from those authorities that Mr. Farnsworth is entitled to a relatively small payment for retroactive spousal support, in accordance with s. 161 of the FLA, as calculated by Ms. Galac in her submissions in the amount of \$11,000, which is a low range lump-sum amount for a period of four years.

Child Support

[36] With respect to ongoing child support, I accept this submission by Ms. Galac in her proposed, draft Final Order:

CHILD SUPPORT

1. The parenting arrangements made with respect to the Children qualify as shared parenting time within the meaning of the Federal Child Support Guidelines (the "Guidelines"). It is anticipated that the Children will live with each party not less than 40% of the time.
 2. The basic Child Support payable by the Respondent to the Claimant on his current Guidelines income of \$78,396 is \$1,216.
 3. The basic Child Support payable by the Claimant to the Respondent on her current Guidelines income of \$87,199 is \$1,347.
 4. In order to comply with Canada Revenue Agency requirements to allow the parties to claim the Children as qualified dependents as set out herein, and notwithstanding that Child Support should be calculated pursuant to the set-off formula and that the net result of the parties meeting their respective Child Support obligations has the Respondent receiving a net amount of \$131 per month, both the Claimant and the Respondent will have paid the support amounts set out in the preceding paragraph to each other.
 5. Commencing March 1, 2022, and continuing on the first day of each month thereafter until further review and agreement of the parties in writing or Final Order, the Claimant will pay the Respondent \$1,347 and the Respondent will pay the Claimant \$1,216 (the "Basic Child Support").
- [37] For the future reviews of child support, I adopt the standard provisions for doing so as found at paragraphs 11-13 in the draft Final Order Ms. Galac submitted with her closing submissions.
- [38] Turning to retroactive child support, Ms. Galac in her closing submissions, including her draft of a Final Order, claims \$4,933 from the Respondent. As I understood Mr. Farnsworth's closing argument, he submits that he owes a larger net amount than \$4,933, although his final "Scott schedule" calculates his retroactive child support owing by him to be \$2,721. From the evidence as a whole, I accept Ms. Galac's calculation of \$4,933 as the proper amount payable by Mr. Farnsworth for retroactive child support.
- [39] Regarding retroactive s. 7 expenses, Ms. Galac submits Mr. Farnsworth owes \$12,433. He says in his closing submission that she owes him \$1,588, but, as I understand his final "Scott schedule", that he owes her \$7,164. I find Ms. Galac's calculation originating in Exhibit 4, and finalized in Exhibit 5, to be the most reasonable, and order that Mr. Farnsworth pay \$12,433 under this heading.
- [40] There was debate at trial about how to address s. 7 expenses going forward. Over the years, Ms. Galac has incurred the majority of these expenses, in part because she had the children more of the time and in part because she appears more inclined to engage them in outside activities.

- [41] I accept her proposal that Mr. Farnsworth will pay her a lump-sum s. 7 expense amount from time to time without the need for her to show receipts for the expenditures. Ms. Galac proposed that Mr. Farnsworth pay \$500 per month. I award her \$400 per month under this head. That equates to \$2,400 per child each year. That figure approximates more than half of Ms. Galac's s. 7 expenditures in past years. When Mr. Farnsworth incurs a s. 7 expense, he will submit to Ms. Galac evidence that he paid for the expense and he is entitled to reduce his \$400 monthly payment to Ms. Galac by one-half of the amount of his s. 7 expenses incurred in that month.
- [42] The ongoing s. 7 expenses payment will be non-reviewable until June 2024, and is reviewable each June after that at the request of either party.

Miscellaneous Matters

- [43] The division of property payments, retroactive support and retroactive s. 7 payments ordered above in these reasons are "notional" in the sense that they will form part of the accounting for the final distribution between the parties of the money now held in trust from the sale of the matrimonial property.
- [44] Each side submitted lengthy proposed Final Orders in draft as part of their closing submissions. These reasons serve to modify those drafts in part. However, other parts of the drafts simply included proposed orders that were not the subject of evidence or argument at trial. The Final Order pursuant to these reasons can include such additional provisions if they are by consent. I can be contacted to assist in settling the Final Order if the parties require that.
- [45] Ms. Galac asked that the parties have the opportunity to address costs after these reasons are given, and that is acceptable.
- [46] I commend Mr. Farnsworth for his handling of his case, and I thank Ms. Graham for her capable and helpful submissions.

"Macintosh J."

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