

CANADA / JUDGMENT

## Gallant v. Layco

2023 BCSC 2218

### COURT

Supreme Court of British Columbia

### DECIDED

15 December 2023

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2023 BCSC 2218 Gallant v. Layco

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gallant v. Layco,

2023 BCSC 2218

Date: 20231215

Docket: E17817

Registry: Salmon Arm

Between:

Cynthia Rae Gallant

Claimant

And

Mio Grusky Layco, Jake-Jay Construction Ltd.,

SPM Construction Ltd.

Respondent

And

Nest Grocers Inc.

Respondent by Counterclaim

Before: The Honourable Justice G.P. Weatherill

Reasons for Judgment

The Claimant appearing on her own behalf:

C. Gallant

Counsel for the Respondents:

D.L. Polley

Place and Date of Trial/Hearing:

Vernon, B.C.

November 16,

December 1 and 5, 2023

Place and Date of Judgment:

Vernon, B.C.

December 15, 2023

## Introduction

[1] The self-represented claimant applies for two orders:

- a) An interim distribution of \$80,000 pursuant to s. 89 of the Family Law Act S.B.C. 2011, c. 25 [FLA] in order to fund the prosecution of this litigation; and
- b) Exclusive occupation of 1595 Birch Drive, Revelstoke, BC ("Birch Drive Home") pursuant to s. 90 of the FLA.

[2] Both orders are strenuously opposed by the respondent.

## Background

- [3] The parties are not married. While they each have two children from prior relationships, they do not have children together. They started dating in 2015. The claimant was an employee of one of the respondent's companies. The parties do not agree on much of the factual background after they started dating. To name a few examples, they do not agree on:
- a) the date of their cohabitation. The claimant says it was May 1, 2016 and the respondent says it was July 1, 2018;
  - b) the date of their separation. The claimant says it was June 30, 2021 and the respondent says it was October 10, 2019;

- c) whether or not they were involved in a marriage-like relationship for over two years. The claimant says they were in such a relationship since May 2016 with intermittent periods of "cohabitation gaps". The respondent says that, to the extent they were involved in a marriage-like relationship, it was for a period of 15 months only, from July 1, 2018 through October 10, 2019, and was marked with tension, unhappiness and volatility;
  - d) the circumstances surrounding the purchase of the Birch Drive Home, why it was registered in joint names and whether the claimant holds her interest in trust for the respondent; and
  - e) the circumstance surrounding the claimant's arrest at the Birch Drive Home on November 23, 2021, following what the respondent alleges was the claimant's attempt to enter the upstairs suite at night and assault him ("Police Incident"). The upshot of the Police Incident was the claimant entered into an undertaking not to communicate with the respondent or attend the Birch Drive Home.
- [4] There is no dispute that the parties lived together for a period of 15 months from July 2018 to October 2019. It is also not disputed that they lived together briefly in 2016.
- [5] After the Police Incident and in order to become self-sufficient, the claimant opened a small grocery store business with the respondent's financial assistance. He arranged for a \$150,000 line of credit in both names, secured by a mortgage against the Birch Drive Home ("LOC"). The respondent says that the claimant drew down the entire LOC, purchased commercial property at 110A-1240 Powerhouse Road, Revelstoke, BC ("Powerhouse Road Property"), incorporated Nest Grocers Inc. and opened a grocery store at that location ("Nest Grocers"). To further assist the claimant in becoming self-sufficient, the respondent caused his company, SPM Construction Ltd. ("SPM"), to lend her an additional \$98,000 ("SPM Loan"). He says the agreement between the parties was that the claimant would repay both the LOC and SPM Loan, but she has so far failed to do so.
- [6] Nest Grocers struggled and by September 2022, went out of business. In May 2023, the claimant sold the Powerhouse Road Property for \$724,000 which was barely enough to pay out the financial encumbrances registered against it. There was no equity.
- [7] In January 2023, the claimant opened and now operates a bookkeeping/accounting/consulting business called Approach Business Solutions. She says although business is picking up, she is in financial need and has personal debt in the \$30,000 range.
- [8] The claimant filed the notice of family claim on January 17, 2022, over two years after the respondent says they separated in October 2019.

## Trial Issues

- [9] The core issue for determination at trial is the division of family property. The claimant asserts that the parties were involved in a marriage-like relationship continuously for over two years and she was therefore a "spouse" within the meaning of the FLA and entitled to claim an interest in family property. The other main issue is whether the claimant holds her one-half interest in the Birch Drive Home in trust for the respondent.
- [10] Neither issue can be resolved short of a trial on the merits.
- [11] The respondent says that the parties cohabited for a period of 15 months only. He maintains that the chronology of events is as follows:
- a) The claimant began employment part-time for SPM in the summer of 2014;
  - b) The parties began dating and became romantically involved in the fall of 2015;
  - c) They began living together in the respondent's rental accommodation at 1815 Hay Road, Revelstoke, BC, in May 2016;
  - d) The claimant moved into her own rental accommodation in November 2016;
  - e) The respondent purchased a home at 201 Third St. E, Revelstoke, BC, on November 15, 2017;
  - f) The respondent sold that home and purchased the Birch Drive Home and began cohabiting with the claimant there on July 1, 2018. Notwithstanding that the respondent paid the entire down payment and the claimant contributed no money for the purchase of the Birch Drive Home, it was registered in both names as joint tenants. The claimant says that the respondent intended to gift her the joint interest. The respondent denies this saying that the claimant pressured him to do so and that she holds her interest in trust for him;
  - g) The parties separated on October 10, 2019, after a rocky and often volatile relationship and he could no longer live with the claimant. The claimant moved all her belongings and two children into the Birch Drive Home's self-contained basement suite ("Suite") where she lived with her children separate and apart from the respondent until the Police Incident; and
  - h) Since the Police Incident, the claimant has not resided at the Birch Drive Home and the respondent has lived there exclusively with his two children.
- [12] The parties' positions on whether the claimant qualifies as a "spouse" within the meaning of the FLA, and their versions of the facts are diametrically opposite. For the claimant to be considered a "spouse" as that term is defined in s. 3(1) of the FLA and therefore be entitled to claim an interest in family property, she must prove that the parties lived with each other in a marriage-like relationship continuously for at least two years.
- [13] To support their respective positions, each party filed affidavits from friends, acquaintances, and business colleagues. By my count, there are six such affidavits in support of the claimant's position and ten such affidavits in support of the respondent's position. The

common theme in the affidavits is that the relationship was a strained, tense and unhappy one. Many affidavits suggest that prior to moving into the Birch Drive Home, the parties were in an on again/off again relationship that involved casual dating. They suggest that they managed their children separate from one another, such as going to hockey games and tournaments separately and staying in separate hotel rooms.

### Issues on the Application

[14] As noted above, there are two issues on this application:

- a) Whether an interim distribution of family property should be ordered to the claimant under s. 89 of the FLA; and
- b) Whether the claimant should be granted exclusive occupation of the Birch Drive Home under s. 90 of the FLA.

[15] Prior to discussing these issues, I note the limitations of time and evidence in an interim application. Caution must be exercised before delving into the merits of issues that can only be resolved at trial on viva voce evidence when credibility of the parties will be assessed. The greater the need to resolve contested issues of fact, especially those going to a threshold issue, the greater the concern that they are not made on an interim basis. Further, there is a greater need for caution when, because of an interim order, money will be paid on a claim that may be without merit. In such cases, interim decisions should only be made where it can be said that a prima facie case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, 2005 BCSC 1786 at paras. 14-17.

### Discussion

[16] As is usual with these types of applications, the outcome is fact driven.

[17] Whether or not the claimant is a "spouse" as defined in the FLA that would allow her to claim entitlement to family property, is an important threshold issue on this application. Accordingly, the proper consideration of the background facts as set out in the admissible evidence before me is of utmost importance. The ultimate question will be whether the parties, through time and commitment, crossed the threshold into matrimonial legal obligations such that those obligations should continue after separation: *Parke v. Veale*, 2015 BCSC 2554 at paras. 70-74.

[18] The overarching principle is that for the claimant to be entitled to any relief under the FLA, she must first demonstrate a prima facie case that she was the respondent's spouse continuously for a period of two years. Unless that threshold is met, neither s. 89 nor s. 90 of the FLA can be engaged.

[19] "Spouse" is defined in s. 3(1) of the FLA as follows:

3(1) A person is a spouse for the purposes of this Act if the person

- (a) is married to another person, or
- (b) has lived with another person in a marriage-like relationship, and
- (i) has done so for a continuous period of at least 2 years, or
- (ii) except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person.

[20] Section 3(3) of the FLA sets out when a marriage-like relationship begins:

3(3) A relationship between spouses begins on the earlier of the following:

- (a) the date on which they began to live together in a marriage-like relationship.

[21] Section 198(2)(b) of the FLA deals with when a claim for division of family property must be brought by a common law spouse:

198(2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,

- (b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.

[22] The respondent maintains that the claimant's claim is doomed to fail because they were not living together in a marriage-like relationship continuously for two years and therefore were not "spouses" within the meaning of the FLA. Furthermore, he says that the claimant is statute barred from bringing this proceeding because it was commenced well over two years since they separated.

[23] Although by no means determinative of these points and without deciding the issues, the weight of the affidavit material before me suggests that the parties only lived together as a couple continuously for 15 months, from July 1, 2018 to October 10, 2019, when they separated. Even during their cohabitation, their relationship was fraught with unhappiness, upset and discontent.

[24] On this backdrop, I shall deal with each issue in turn.

Issue #1 - Should the Claimant be granted an interim distribution of property?

[25] Section 89 of the FLA states:

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.
- [26] An order for an interim advance is extraordinary in nature and must be assessed carefully. Before such an order will be made, the claimant must show that she meets the definition of "spouse", that an advance is necessary to mount a challenge to the other spouse's position at trial and that an advance would not be harmful to the respondent's interests.
- [27] To show necessity, the claimant should provide details of anticipated expenditures for legal fees, expert costs and evidence and demonstrate why she is unable to meet these expenses from either her earnings or funds available from other sources: *Coglon v. Coglon*, 2021 BCSC 410 at para. 75; *Chung v. Harrison*, 2018 BCSC 1258 at paras. 13-15; *Etemadi v. Maali*, 2021 BCCA 298.
- [28] The claimant seeks an interim distribution of \$80,000 to fund this litigation. She says there is a significant financial disparity between the parties, and she needs \$80,000 to level the playing field. If no such order is made, she contends that she will be severely disadvantaged.
- [29] Although there is no appraisal evidence before me, the claimant asserts that the Birch Drive Home's fair market value is in the range of \$1.4 million with a mortgage against it of approximately \$532,000. Based on these numbers, she says there is close to \$1 million in equity. She argues that an advance of \$80,000 would amount to a mere 8% of the equity that she is entitled to as a one-half owner in any event.
- [30] Although she says lawyers have provided her with quotes for legal costs in the range of \$80,000-\$100,000, those quotes are not in evidence. Indeed, much of the facts upon which the claimant's application are based are not properly before me in the form of affidavit evidence. In addition, the claimant did not provide any up-to-date financial information setting out her present circumstances. Specifically, she has provided no details of her income, expenses, assets, liabilities or whether funds are available elsewhere. In other words, other than her say-so, she has not adduced evidence that the interim distribution she seeks is "necessary" to fund the litigation.
- [31] While it does not follow that the absence of such evidence will be fatal to a s. 89 application, and while I am satisfied that the claimant is the financially disadvantaged party, there is the distinct possibility that the claimant will not be able to prove that she is a "spouse" within the meaning of the FLA and that she will be found to hold her interest in the Birch Drive Home in trust for the respondent. Those distinct possibilities cannot be ignored.
- [32] The claimant maintains through general statements that the parties were living in "a marriage-like relationship". However, simply stating they were in such a relationship does not make it so. The claimant has the burden of proving that such a relationship existed continuously for two years, and that this litigation was commenced within two years of the parties separating before she can seek any relief under the FLA.

- [33] The evidence falls far short of showing that either was the case. For example, the evidence is that the parties kept their finances separate and neither claimed the other as a spouse on their respective income tax returns. The evidence also suggests that, while there was the beginning of a marriage-like relationship on July 1, 2018, it soon proved to be an unhappy and volatile one and not marriage-like in the sense of making a long-term continuous commitment to each other that would result in matrimonial legal obligations to one another.
- [34] Of concern is that, in bringing this application, the claimant is in essence seeking a preliminary ruling that she is a "spouse" and is entitled to an interim distribution of family property. She is also seeking a preliminary ruling in her favour denying the respondent's position that she holds her one-half interest in the Birch Drive Home in trust for him.
- [35] The respondent maintains that her claim has no merit. Although he concedes the parties tried cohabitation, they proved to be incompatible. The respondent says that he learned early on that cohabiting with the claimant was a mistake and after 15 months, asked her to leave. That is the point that their cohabitation ended, they separated, and she moved into the Suite with her children and all her belongings.
- [36] The respondent is strongly opposed to being required to fund the claimant's unmeritorious claim against him.
- [37] Regardless, in addition to requiring money to fund the litigation, s. 89 of the FLA requires the claimant show that an order for an interim advance would not be harmful to the respondent's interests: *I.F. v. R.J.R.*, 2015 BCSC 793 at para. 194.
- [38] The meaning of the phrase "harmful to the interest of the spouse" in s. 89 contemplates actual or potential harm and is broad in scope. It requires the court to reasonably anticipate and then assess the consequences that may flow from the interim order being sought. To attenuate that manifestation of harm, the claimant should show that she has a reasonable prospect of success in her claim against the respondent: *I.F. v. R.J.R.*, 2015 BCSC 793 at para. 193.
- [39] I am not persuaded that the claimant has satisfied that hurdle. Nor has she shown that, should she be unsuccessful at trial, she has the capacity to repay the claimant any advance that was made, even if repayment occurred over a reasonable period. I note as well that the respondent has counterclaimed against the claimant for some \$248,000 representing the current outstanding balances of the LOC and SMP Loan which were made well after he says the parties separated. There is no evidence that if the respondent were to succeed in his counterclaim, the claimant would have any ability to repay him. She has provided no plan for how she would repay the respondent if he was successful at trial.

- [40] This case is distinguishable from the cases the claimant refers to where there was no question to entitlement to family property and an interim distribution was ordered, or where the claimant's standing to advance a claim was not in question and the claim was not lacking in merit. Accordingly, given that an interim distribution would effectively amount to a distribution exceeding the claimant's claim to family property, a great degree of caution is warranted: Etemadi at paras. 76-77.
- [41] In sum, I am not persuaded that an interim distribution of family property should be made. There are many areas of conflict in the various affidavits. In my view, the claimant has not made out a prima facie case that she was involved in a marriage-like relationship for a continuous period of at least two years. This issue will have to be addressed at trial when the evidentiary record is complete.

Issue #2 - Should the Claimant be granted exclusive occupation of the Birch Drive Home

[42] Section 90 of the FLA reads:

90 (1) For the purposes of this section, "family residence" means a residence that is

- (a) owned or leased by one spouse or both, and
  - (b) the ordinary place of residence of the spouses.
- (2) The Supreme Court may make an order granting a spouse, for a specified period of time,
- (a) exclusive occupation of a family residence . . .

[43] The test for exclusive occupancy of a family home is balance of convenience. A claimant seeking exclusive occupation of a family home must first establish that the shared use of the family home is a practical impossibility and that she is the preferred occupant on a balance of convenience: Bateman v. Bateman, 2013 BCSC 2026 at para. 44.

[44] The parties agree, and the evidence confirms, that it is a practical impossibility for the parties to live together. Thus, the first branch has been satisfied. However, the claimant must still demonstrate that the balance of convenience favours the removal of the respondent and his children from the Birch Drive Home and that she should have exclusive possession of it.

[45] The Birch Drive Home was purchased in June 2018, using over \$200,000 of the respondent's funds as the down payment. The claimant contributed no funds to its purchase. The claimant asserts that the respondent "gifted" her a one-half interest in the property when he registered her as a joint tenant. The respondent denies this and says that he added the claimant as a joint tenant only because she pressured him into doing so. He maintains that any interest she has is by way of a resulting trust in his favour.

[46] The respondent has lived in the Birch Drive Home continuously since purchasing it in June 2018. He lives there with his two children from a prior relationship. He says that throughout the couple's complicated dating, there were regular disagreements and arguments. He

describes their relationship as being mostly unhappy, unstable, and often volatile. By October 2019, he says that he could no longer tolerate living with the claimant and on October 19, 2019, asked her to leave. The claimant complied and moved into the Suite where she lived separate and apart from the respondent until the Police Incident. Since the Police Incident, the claimant has resided elsewhere. She is currently renting a home at 1962 Aspen Crescent, Revelstoke, BC.

- [47] The respondent also points out that since the Police Incident, the Suite has been rented to an arm's-length tenant and is subject to a tenancy agreement pursuant to the Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA]. On March 16, 2023, and contrary to the RTA process, the claimant attempted to disrupt the tenancy by posting an eviction notice on both the door of the Suite and the front door. Her reason for doing so was that she felt, as a registered co-owner, she was entitled to occupancy of the home.
- [48] I conclude that the long-term status quo should continue pending trial with the respondent having exclusive occupancy of the Birch Drive Home and the claimant continuing to reside at her current residence. In my view, the balance of convenience clearly favours the respondent.
- [49] I have already identified the two core issues in this case which are hotly contested. If the orders were granted and the claimant was unsuccessful in proving both that she is a "spouse" and that the respondent gifted her a joint interest in the Birch Drive Home, the disruption to the respondent and his children would have been for naught.
- [50] Accordingly, the claimant's application for exclusive occupancy of the Birch Drive Home pending trial is dismissed.

## Summary

- [51] For the above noted reasons, the claimant's application for an interim distribution of property and for exclusive occupancy of the Birch Drive Home is dismissed.
- [52] The respondent is entitled to Scale B costs.

"G.P. Weatherill J."

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