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CANADA / JUDGMENT

## Harper v. Harper

2022 BCSC 950

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COURT

Supreme Court of British Columbia

DECIDED

6 May 2022

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2022 BCSC 950 Harper v. Harper

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harper v. Harper,

2022 BCSC 950

Date: 20220506

Docket: E212932

Registry: Vancouver

Between:

Donna Mary Harper

also known as Donna Mary Gallant

Claimant

And

Scott Alan Harper

Respondent

Before: The Honourable Justice Blake

Oral Reasons for Judgment

(In Chambers)

Counsel for the Claimant

appearing via videoconference:

J.L. Desilets

Counsel for the Respondent

appearing via videoconference:

A.E. Rebane

Place and Date of Hearing:

Vancouver, B.C.

May 5, 2022

Place and Date of Judgment:

Vancouver, B.C.

### **May 6, 2022**

- [1] THE COURT: The claimant, Ms. Harper, applies for orders that Mr. Harper pay her interim periodic spousal support, that the matrimonial home be sold, and that \$100,000 be released to her counsel in trust as a without prejudice interim distribution of family property to fund family dispute resolution. She also seeks an order pursuant to s. 91 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] that Mr. Harper be restrained from disposing of, transferring, converting or exchanging into any other form, any family property in which she has an interest, and the costs of the application.

### **Background**

- [2] The parties married on November 14, 1994 and separated on January 21, 2021, after 26 years of marriage. They have three daughters: Ms. Harper's daughter from a prior marriage whom they agree Mr. Harper stands in the place of a parent for, and two other daughters. Their youngest daughter is 21 years old and is the only daughter who may still be a child of the marriage. She currently lives with Mr. Harper and is attending a post-secondary program. The issues of whether she is still a child of the marriage, and the child support payable if she is, are not before me on this application.
- [3] Ms. Harper is currently 59 years old and lives in a home located on Prince Edward Island, which was referred to by counsel as "Nail Pond". She was in a motor vehicle accident in February 2018, and since late 2018 her sole income has been approximately \$1,200 per month from a disability pension (or approximately \$14,400 annually). She has received no spousal support since separation.
- [4] Mr. Harper is currently employed full-time and earns approximately \$77,000 per year. He currently lives in the family home located at 201 Holdom Avenue North in Burnaby with two of their daughters. I will refer to this property as the "Family Home". He advises his intention is to retire July 1, 2023.

- [5] Pursuant to an order made at the Judicial Case Conference, the parties obtained an appraisal of the Family Home, which appraises it as at April 18, 2022 at \$2,375,000. There is currently a mortgage on the Family Home of \$275,000. The estimated net equity in the Family Home, without accounting for any real estate commissions, is approximately \$2,100,000. Mr. Harper has been advised that he tentatively qualifies for a \$786,500 CHIP reverse mortgage loan based on the appraised value of the Family Home of \$2,375,000.

#### Sale of The Family Home

- [6] The most contentious issue on this application is whether the Family Home should be sold.
- [7] By way of background to this issue, in 2017 the parties (by virtue of a gift in the amount of \$630,000 from Mr. Harper's mother to Mr. Harper) were able to purchase the Family Home, which was worth \$1,260,000 at the time. Mr. Harper takes the position that he is entitled to an excluded property claim in the amount of \$630,000. Ms. Harper disagrees with this, and takes the position that due to a series of events that occurred after Mr. Harper received the gift from his mother, he has lost this exclusion. The merits of Mr. Harper's excluded property claim are not an issue before me today.
- [8] Ms. Harper takes the position that she is entitled to an excluded property claim in the amount of at least \$115,000. Mr. Harper disagrees with this. Again, the merits of Ms. Harper's excluded property claim are not an issue before me today.
- [9] Both of these issues will need to be resolved at the trial, which is currently scheduled for five days commencing April 17, 2023, if they cannot be resolved by the parties before.
- [10] With respect to the value of the Nail Pond Property, Ms. Harper relies on an appraisal that was obtained for the Tignish Credit Union of the Nail Pond property, as at August 4, 2021, as evidence for her position that the property is valued at \$154,000. Mr. Harper, however, believes the Nail Pond property is worth between \$250,000 and \$350,000. He objects to Ms. Harper's bank appraisal as expert evidence of the value of the Nail Pond property, says I cannot rely on the bank appraisal as expert evidence, and takes the position that a joint appraisal of the property should be ordered before her application for sale of the Family Home is determined.
- [11] The value of the Nail Pond property is relevant to this application as Mr. Harper takes the position that he is likely able to purchase Ms. Harper's interest in the Family Home when the value of the Nail Pond property is properly accounted for in the division of their family assets, and he says it is neither necessary nor expedient for it to be sold at this time. He wishes to preserve the status quo until such time as he can determine whether it is possible for him to retain the Family Home.

[12] Rule 15-8 of the Supreme Court Family Rules, B.C. Reg. 169/2009, provides that where it appears necessary or expedient that a property be sold, a court may order such a sale; see *Kapoor v. Makkar*, 2020 BCCA 132, at para. 46; and *Karrington v. Morrison*, 2020 BCSC 1797, at para. 122. In *Kapoor*, our Court of Appeal set out a number of factors to consider in determining whether the sale is necessary or expedient, including:

- a) whether the sale is necessary;
- b) whether the sale will promote early settlement;
- c) whether the sale is inevitable or whether a spouse might be able to retain it on a division of assets; and
- d) whether a sale would effectively eliminate accommodation for a spouse and children or whether alternative accommodation is available.

If there is any doubt, it should be resolved in favour of the status quo: *Kapoor* at para. 64, citing from *Bodo v. Bodo*, 1990 CanLII 2291 (BCSC).

[13] Ms. Harper argues that the sale of the Family Home is both inevitable and advantageous to both parties. She says it is inevitable as she argues Mr. Harper does not have the ability to purchase her interest in the Family Home even if he were to succeed on his legal arguments that he is entitled to an excluded property claim of \$630,000, she is not entitled to an excluded property claim of \$115,000, and the Nail Pond property is worth \$300,000. Based upon his own evidence, Ms. Harper says even if Mr. Harper is successful on all of these legal arguments, he is still short by approximately \$200,000 to purchase her interest in the Family Home. She notes this shortfall fails to account for Mr. Harper's necessary legal fees to take this matter to the end of trial, which is what she argues would be required for Mr. Harper to succeed with his best position. She says to be successful in his legal arguments requires a full trial, and when the costs of a trial are considered it becomes obvious that Mr. Harper does not have the ability to purchase her interest in the Family Home. Ms. Harper's position is that it is necessary and inevitable that the Family Home be sold as Mr. Harper has not demonstrated he can purchase her interest in the Family Home. She argues that it is advantageous if the Family Home is sold at this time, as she says that if it is not it is inevitable there will be a trial.

[14] Mr. Harper, however, objects to the sale of the Family Home. He wishes to continue to live in it with his daughters, wishes to remain in the Vancouver real estate market, and wishes to be able to obtain a formal appraisal of the Nail Pond property to determine whether he is able to amass the funds necessary to purchase Ms. Harper's interest in the Family Home. Mr. Harper argues that depending on the appraised value of Nail Pond, he may be able to purchase her interest in the Family Home by offsetting his interest in the Nail Pond property. He has deposed he tentatively qualifies for a CHIP reverse mortgage loan in the amount of \$786,500, which after payment of the outstanding mortgage of \$275,000, would leave him with cash of \$511,500.

[15] He also deposes in paragraph 9 of his affidavit sworn April 18, 2022:

In further response to paragraph 44 of Donna's Affidavit, the PEI Property has not been appraised and until it has been appraised it is not 100% certain as to whether or not I can buy out Donna's interest in the Family Home but I am optimistic that I can. In addition, based on discussions I have had with friends and family, I am optimistic that I can access up to \$200,000 in loans from friends (or up to a \$100,000 from my mother) to cover any shortfall between buying out Donna's interest in the Family Home and the reverse mortgage. Of course, until the dollar value of Donna's interest in the Family Home is determined, I cannot determine which of my friends and family is a most suitable lender.

[16] Without a formal appraisal, I am not satisfied at this time that it is necessary or expedient that the Family Home be sold. Accordingly, I am adjourning Ms. Harper's application for the sale of the Family Home for a short period of time in favour of preserving the status quo. However, I must caution that, even if the bank appraisal is highly inaccurate, I find it unlikely the Nail Pond property will be appraised at the \$250,000 to \$350,000 Mr. Harper argues it is worth.

[17] I believe that the sale of the Family Home may very well prove to be necessary and expedient. As Ms. Harper's counsel argued, it may very well be inevitable. However, I agree with Mr. Harper that before reaching that conclusion, it is necessary to obtain a formal appraisal of the Nail Pond property. With a formal appraisal, the parties will have the information necessary to determine whether Mr. Harper has the potential ability to purchase Ms. Harper's interest in the Family Home, and whether he can demonstrate that financial ability. To be clear, Mr. Harper must demonstrate that he has the potential ability to do so, after he has spent the necessary legal funds to see this matter through to the conclusion of trial.

[18] It appears highly improbable that Ms. Harper would agree to Mr. Harper's best results at trial, and so for him to successfully demonstrate that it is neither necessary nor expedient for the Family Home to be sold, he must be able to demonstrate that he can purchase her interest in the Family Home after the legal fees are expended to the completion of trial. This is an uphill battle for him that I find doubtful he will be able to accomplish.

[19] Should this application be reset once the Nail Pond property assessment is obtained, I note Mr. Harper must provide evidence he has actually secured the necessary and appropriate financing and not merely provide evidence he has qualified for or expects to be able to do so. I would hope that once the parties obtain a joint expert appraisal of the Nail Pond property, they will be able to reach agreement on the wisdom of selling the Family Home without the necessity of resetting this application.

[20] However, at this time I find it is premature to determine that it is necessary or expedient to order the sale of the Family Home, and I order that:

- a) Ms. Harper's application for sale of the Family Home and for an interim distribution be adjourned, not to be reset for at least five weeks; and
- b) the parties obtain a joint expert appraisal of the Nail Pond property within the next three weeks.

Given the parties' current financial circumstances, and Mr. Harper's request for the appraisal, Mr. Harper is to pay for the joint expert appraisal, and the issue of the appropriate proportionate sharing of the cost of that expert appraisal is to be dealt with either by the judge hearing the application or the trial judge. For clarity, should it be necessary to reset the within application, it may be set before any judge of this Court.

### Interim Spousal Support

- [21] Ms. Harper also seeks interim, without prejudice, periodic spousal support pursuant to ss. 160 and 162 of the FLA. Mr. Harper acknowledges her entitlement but he seeks to have income of \$6,400 annually imputed to her.
- [22] Ms. Harper has not worked since late 2018 and lives in a remote area of Prince Edward Island. Her employment opportunities are limited by both her disability and her location. On the evidence before me I do not accept it is appropriate to impute income to Ms. Harper at this time. That would be an issue for the trial judge to determine with fulsome evidence of Ms. Harper's current circumstances. Nothing in these reasons is intended to fetter the discretion of a judge hearing any future applications, or the trial, to determine whether Ms. Harper's current medical diagnosis and circumstances renders her disabled such that she is not able to work part-time.
- [23] Ms. Harper seeks interim, without prejudice, spousal support in the amount of \$2,000 per month. Based upon Mr. Harper's income of \$77,689, and Ms. Harper's CPP disability benefits, the Spousal Support Advisory Guidelines provide for a range of spousal support from \$1,970 at the low end to \$2,353 at the high end. I find Ms. Harper's proposal of spousal support of \$2,000 per month appropriate, and accordingly, I order that pursuant to the FLA Mr. Harper pay Ms. Harper monthly spousal support in the amount of \$2,000 per month, on an interim without prejudice basis, commencing on May 15, 2022 and continuing on the 15 of each and every month thereafter, until further order of the court.

### Interim Distribution

- [24] Ms. Harper also seeks an order pursuant to s. 89 of the FLA that \$100,000 be released to her, in trust with her counsel, as a without prejudice interim distribution of family property to fund this family dispute. She seeks this payment be paid from the sale proceeds of the Family Home or such other family property as this Court deems just.

- [25] However, unless the Family Home is sold, the only other family property available to fund such a distribution is from either Mr. Harper's RRSP (which has a cumulative value of \$193,741) or Ms. Harper's RRSP (which has a cumulative value of \$201,204.46). Ordering an interim distribution from either RRSP at this time would be neither tax efficient nor prudent given, the parties' current financial and personal circumstances.
- [26] Accordingly, as already set out above, I am adjourning this portion of Ms. Harper's application, to be set down to be heard at the same time her application for the sale of the Family Home is reset for. I would note that it is necessary for Mr. Harper to demonstrate that he has made appropriate arrangements for an interim distribution to be made to allow each party to be able to fund their ongoing litigation, as it appears necessary both parties have such an interim distribution. However, the ultimate decision on whether, and how much, of an interim distribution should be made, is an issue for the judge hearing that application after the appraisal of the Nail Pond property is obtained.

### Restraining Order

- [27] Section 91 of the FLA provides that on the application of a party, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under Part 5 or Part 6 of the FLA until or unless the other spouse establishes that a claim made under those parts will not be defeated or adversely affected by the disposal of any property.
- [28] I am satisfied such an order is appropriate, and order that pursuant to s. 91 of the FLA both parties are prohibited from disposing of, transferring, converting, or exchanging into any other form, any family property at issue in the proceeding, in which either party may have an interest, expressly excepting the parties' personal chequing and savings accounts and personal credit cards, without agreement of the parties or a Court Order.

### Costs

- [29] Ms. Harper seeks the costs of her application. As she has been successful on the issues of interim spousal support and the restraining order, she is entitled to her costs of this application, to be assessed under Scale B of Appendix B to the Supreme Court Family Rules.
- [30] Thank you very much, counsel. Is there anything arising from those reasons?
- [31] COUNSEL: Madam Justice, if I can just confirm the timeframes for the appraisal?
- [32] THE COURT: I am happy to. The appraisal to be within three weeks from today.
- [33] COUNSEL: Thank you.
- [34] THE COURT: And Ms. Harper's application not to be reset for at least five weeks from today.
- "Blake J."

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