
CANADA / JUDGMENT

K.S.P. v. J.T.P.

2022 BCSC 1017

COURT

Supreme Court of British Columbia

DECIDED

15 June 2022

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2022 BCSC 1017 K.S.P. v. J.T.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.S.P. v. J.T.P.,

2022 BCSC 1017

Date: 20220615

Docket: E162647

Registry: Vancouver

Between:

K.S.P. aka K.S.

Claimant

And

J.T.P.

Respondent

Before: The Honourable Justice MacNaughton

Reasons for Judgment

In Chambers

Counsel for the Claimant:

A.M. Ouellet

The Respondent, appearing in person:

J.T.P.

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 19-20, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 15, 2022

- [1] J.T.P. applies, pursuant to s. 89 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], for an interim property distribution for the purposes of funding litigation.
- [2] In J.T.P.'s notice of application, he sought the amount of up to \$100,000 to fund a trial retainer with his proposed legal counsel for this family file, a member of the firm of Nasser Allan LLP.

An Interim Distribution to Fund the Appeal of the Civil Judgment

- [3] During his submissions, J.T.P. handed up a draft of an order in which, in addition to the interim distribution to fund legal counsel in this family file, he also sought \$35,000 payable to Lakes Whyte for legal fees associated with an appeal of Justice Fleming's civil award of damages payable by J.T.P. to K.S. (the "Civil Judgment") and/or the appeal of Justice Fleming's costs award. Justice Fleming's Civil Judgment can be found at [S.] v. [P.], 2021 BCSC 2209 and her costs award at [S.] v. [P.], 2022 BCSC 455.
- [4] J.T.P. submits that I had jurisdiction to make an advance with respect to the civil case because, although K.S. chose to pursue her claim for civil damages separately, she could have done so in the family proceedings. He did not refer to any cases in support of that submission, and I could find none.
- [5] In the civil case, both parties sought damages from the other based on the intentional tort of battery (assault) as a result of a violent incident on September 16, 2018. K.S. did so in her notice of civil claim and J.T.P. did so in his counterclaim.
- [6] K.S. was successful in her claim. J.T.P.'s counterclaim was dismissed.
- [7] I conclude that I do not have jurisdiction under s. 89 of the FLA to award an interim property distribution for the purposes of funding the appeal of the civil case, a separate proceeding, based on tort.
- [8] Section 89 of the FLA provides:

Orders for interim distribution of property

[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.

[Emphasis added.]

[9] Although the violence that formed the basis of the damage claims in the civil proceeding arose in a family context, it was litigated in a separate proceeding and not brought under the FLA. No application was brought to have the civil case consolidated with, or heard at the same time as, the family case.

[10] J.T.P.'s application for an interim distribution to fund the appeal of the civil case is dismissed.

[11] J.T.P. also seeks to use some of the interim property distribution to pay municipal utility user fees and property insurance premiums for the property in which he resides (the "A Residence"). A similar order, in favour of K.S., was made on consent before Justice Mayer.

[12] As this order is not going on consent, I do not have jurisdiction to make that order as it does not come within the strict wording of s. 89. It is, of course, always open to the parties to separately consent to such payments being made as it is in their interests that the A Residence is insured.

An Interim Distribution for the Purposes of Retaining Counsel in This Family Case

[13] K.S. does not oppose J.T.P. receiving an interim property distribution, in the amount of \$100,000 for the purposes of this family proceeding.

[14] Although Nasser Allan LLP did not provide a litigation budget, which is the usual process in applications under s. 89, K.S.'s counsel does not take issue with the fact that it was not done in this case. She acknowledges that \$100,000 is not an unreasonable estimate of the legal costs for a new law firm to get up to speed and for trial in this case.

[15] However, K.S. opposes the interim advance being secured against the home in which she resides with the parties' children (the "B Residence"). Instead, she submits that any advance should be secured against the A Residence.

- [16] Both the B and A Residences are family property subject to division in this family proceeding. The A Residence is held by the parties as tenants in common. On title, J.T.P. has an 85 percent ownership interest, and K.S. has a 15 percent ownership interest. K.S. acknowledges that J.T.P. has an excluded property claim in the amount of \$175,000 with respect to the A Residence. At trial, he will argue for a higher amount. K.S. says that, subject to J.T.P.'s excluded property claim, the A Residence is family property subject to division in the family proceedings.

Previous Advances

- [17] On March 2, 2021, before Justice Mayer, the parties entered into a consent order pursuant to which, among other matters, he ordered a without prejudice s. 89 interim distribution, or, as defined in his order, a litigation advance, of \$250,000 to K.S.
- [18] The litigation advance was to be funded by borrowing on a line of credit or other debt facility secured against the B Residence (the "1st Mayer Order"). The 1st Mayer Order was without prejudice to the final apportionment of family property between the parties.
- [19] The 1st Mayer Order permitted K.S. to use the litigation advance to pay the overdue 2020 property taxes and insurance, inclusive of interest and penalties, on the B Residence without prejudice to future claims as to the obligation of each party to contribute to those payments. The balance was only to be used for litigation purposes.
- [20] The 1st Mayer Order also provided that the parties were to cooperate to apply for and obtain property tax deferral approval on both the B and A Residences.
- [21] On July 27, 2021, on consent, Justice Mayer amended the 1st Mayer Order in what I will refer to as the "2nd Mayer Order". It authorized an interim distribution of \$300,000. In relevant part, the 2nd Mayer Order provided that after deducting from \$300,000, the total interest payments, at an anticipated rate of 7.95%; and broker and lender fees, each anticipated to be \$3,000, 2/3 of the remaining amount was to be paid to Dunnaway, Jackson, Ouellet & Associates, as a s. 89 litigation advance for K.S. and the remaining balance of 1/3 was to be paid to YLaw Group, as a s. 89 litigation advance for J.T.P. In these reasons, I will refer to these litigation advances as the First Advances.
- [22] By consent, K.S. was permitted to use her share of the First Advances to pay the outstanding property taxes, including interest and penalties, for the B Residence.
- [23] Paragraph 5 of the 2nd Mayer Order provided that:

BY CONSENT, when the term for the Borrowed Funds is up and repayment is required, which is anticipated to occur in one-year from the date they are advanced, repayment will occur as follows subject to any order made by the trial judge in this matter who retains full discretion to make orders as to any different apportionments or terms of repayment:

- a. The Claimant will be responsible for \$200,000 which she will be required to repay or obtain refinancing for;
 - b. The Respondent will be responsible for \$100,000 which he will be required to repay or obtain refinancing for and he will not be permitted to secure any refinancing against the B Residence.
- [24] At the time the 2nd Mayer Order was made, this family proceeding was scheduled to go to trial at the end of 2021. But, as a result of J.T.P.'s counsel's illness, and his later withdrawal, the trial was adjourned to September this year. The First Advances are coming due on September 1, 2022.

The Current Application

- [25] J.T.P. seeks to retain new counsel to represent him, and he says that he needs a \$100,000 retainer. He had discussions with Stefanie Drdul, the mortgage broker who sourced the private financing for the First Advances, and was advised that the same lender has agreed to extend the term of his initial loan for up to another year, and to increase the amount of the loan to fund the further advance now sought by J.T.P.
- [26] J.T.P. submits that the previous lender has already done a title search and is comfortable with the equity in, and the loan-to-value ratio on, the B Residence. He also submits that legal and broker fees have already been paid once. As a result, he submits that it will be cheaper for the parties to extend the current private funding, and increase the loan amount, than to begin the process with another lender. There was no evidence as to what the actual costs would be with respect to the current lender, nor was there evidence about possible alternatives and what they would cost.
- [27] J.T.P. also submits that rather than have the interest deducted from the gross amount of the loan, as was the case with respect to the First Advances, the private lender is prepared to loan an additional amount, over and above the \$100,000, to cover interest and costs. The loan would be an interest-only loan, with the interest paid up front.
- [28] J.T.P. proposes that the same approach would apply to the renewal of the \$300,000 already advanced to the parties by the private lender. The lender would add the interest and costs for the renewal of the \$300,000 loan, obtained for the purpose of the First Advances.
- [29] K.S. points to the fact that this family has already expended hundreds of thousands of dollars of its family assets in litigation. Both parties have cashed in RRSPs.
- [30] As of J.T.P.'s October 2021 F8, in addition to the approximately \$100,000 he received from the First Advances, he has used or spent over \$168,000 of family property. In his April 2022 F8, he says that he will redeem his remaining RRSPs to "pay legal fees on credit cards" and his appellate lawyer's retainer in the civil matter.

- [31] J.T.P. is not currently working and is collecting employment insurance, which is being garnished by the Family Maintenance Enforcement Program. He has not paid child support in 2022. Pursuant to Justice Fleming's damage award in the civil case and her costs order, J.T.P. is subject to a judgment which may well approach \$800,000. Costs have not yet been assessed for the civil case. He has also been ordered to pay costs by two judges for interim applications in this family proceeding.
- [32] In addition to the approximately \$200,000 K.S. received of the First Advances, she has cashed in about \$56,000 of shares she obtained through her employment. She has also taken money out of retirement funds. The children reside with K.S., and she has paid for their private Catholic education and one child's therapy and tutoring without contribution from J.T.P.
- [33] During the submissions, I described the parties' current financial circumstances as tragic when compared to their relatively affluent position when the family was intact.
- [34] As it currently stands, the B Residence has been appraised at \$2,750,000. If it sold for the appraised value, after deducting estimated real estate commission, the first mortgage, the second home equity private mortgage for the First Advances, and unpaid property taxes, the remaining equity is approximately \$1,586,750.
- [35] The A Residence has been appraised at \$1,700,000. If it sold for the appraised value, after deducting estimated real estate commission, and a mortgage or home owner line of credit, the remaining equity is approximately \$1,028,000. K.S. acknowledges that J.T.P. has an excluded property claim of \$175,000 on this property.

Conclusion

- [36] The cases under s. 89 of the FLA recognize that an order pursuant to it is extraordinary in nature.
- [37] Having considered all of the submissions, and in order to ensure that J.T.P. has funds to retain counsel for the family trial, I have concluded that the parties have sufficient equity in the two residences, which are family property, to allow for a further advance on the B Residence. Neither property is required to be sold to fund the advance. In my view, J.T.P.'s having counsel may well reduce the litigation costs in advance of trial.
- [38] The interim distribution would not be harmful to the interests of K.S. and is necessary to fund all or part of this proceeding. It is in the interests of justice to order the advance: *Bartch v. Bartch*, 2018 BCCA 271 at para. 56, *aff'd* 2017 BCSC 210.
- [39] As the Court of Appeal said in *Bartch* at para. 75:
- [75] Section 89 is a special provision crafted to allow a financially disadvantaged spouse funds to participate in family dispute resolution by sharing in financial resources despite the parties' ultimate respective entitlement not having been determined. While sometimes this is referred to as "levelling the playing field", I would describe this as a measure to further

balanced participation in the dispute resolution processes. Every order under s. 89 entails a degree of risk the case will not turn out as expected, with prejudice to the distributing spouse. This special character demands careful application of the section, so to keep any distribution squarely within the parameters of s. 89.

- [40] While I understand K.S.'s concern about the debt being incurred against the residence in which she resides with the children, there is no evidence before me that there is a lender that is prepared to provide an interest-only mortgage on the A Residence. I would only be speculating that such financing could be arranged. Even if such a lender is found, the parties still have to refinance the First Advances before trial.
- [41] On the other hand, based on email correspondence from the mortgage broker who assisted the parties with obtaining financing for the First Advances, the lender is prepared to advance further funds and to refinance the loan for the First Advances. There is some urgency in proceeding quickly to ensure that J.T.P. is able to retain counsel for the pending trial.
- [42] As a result, I exercise my discretion and make the order that paragraph 5 of the 2nd Mayer Order be varied as follows:
- i. The parties will forthwith take all steps and execute all documents reasonably required to complete the private financing arranged by Stefanie Drdul of Invis Inc. secured against the B Residence in the amounts of:
 1. \$300,000 plus pre-payment of the interest and any lending fee thereon (the "Renewal Funds")
 2. \$100,000 plus pre-payment of the interest and any lending fee thereon (the "New Funds").(the "Second Advances")
 - ii. Repayment of the Renewal Funds and the New Funds will occur as follows subject to any order made by the trial judge who hears this matter and who retains full discretion to make orders as to any different apportionment or terms of repayment:
 1. The Claimant will be responsible for repaying or refinancing 2/3 of the Renewal Funds comprised of:
 - \$200,000 and
 - 2/3 of any pre-payments (interest and fees) in the Renewal Funds
 2. The Respondent will be responsible for repaying or refinancing 1/3 of the Renewal Funds comprised of:
 - \$100,000 and
 - 1/3 of any pre-payments (interest and fees) in the Renewal Funds

3. The Respondent will be responsible for repaying or refinancing all of the New Funds comprised of:

- \$100,000 and
- 100% of the pre-payments (interest and fees) in the New Funds.

iii. The New Funds will be distributed pursuant to s. 89 of the FLA to finance this litigation by payment to Nasser Allen LLP in trust on account of a s. 89 litigation advance for the Respondent and shall be used to pay a retainer, reasonable disbursements to third parties; and for any expert and advisory services related to this litigation.

iv. The advance of New Funds is without prejudice to either party's claims as to the apportionment of property on a final division of property.

v. The parties will cooperate and do all such things as are reasonably required to obtain and expedite securing the financing of the Renewal Funds and the New Funds including removing the CPLs and the registration of the Civil Judgment on the properties so that they do not interfere with the financing.

vi. The parties will cooperate to do all such things as are reasonably required to apply for and obtain a renewal of the deferral of the property taxes on both the B and A Residences for the 2022 tax year including, if required, removing the CPLs and the registration of the civil judgment.

vii. Once the financing for the Renewal Funds and the New Funds is in place, and the property tax deferrals are obtained on the B and A Residences, the CPLs and the registration of the civil judgment may be refiled.

viii. Pursuant to s. 91 of the FLA, and in consideration of the removal of the CPLs and the registration of the civil judgment, the parties are mutually prohibited from disposing of, transferring, converting, or exchanging into another form their interests in the B and A Residences.

[43] The costs of this application are in the cause.

"MacNaughton J."

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