

CANADA / JUDGMENT

Kerby v. Kerby

2020 BCSC 1078

COURT

Supreme Court of British Columbia

DECIDED

22 July 2020

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2020 BCSC 1078 Kerby v. Kerby

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kerby v. Kerby,

2020 BCSC 1078

Date: 20200722

Docket: E172712

Registry: Vancouver

Between:

Amanda Lea Kerby also known as Amanda Lea Hamilton

Claimant

And

Nathaniel Christopher Kerby

Respondent

Before: Master Muir

Reasons for Judgment

Counsel for the Claimant:

S.G. Label

Counsel for the Respondent:

R.K. Khunkhun

Place and Date of Hearing:

Vancouver, B.C.

July 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 22, 2020

introduction

- [1] This was an application by the respondent for an order pursuant to s. 89 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] for an interim distribution to him of \$100,000. The funds are to come from monies being held in trust, which are the net proceeds from the sale of the parties' former family residence.
- [2] The respondent is presently self-represented, allegedly due to financial difficulties. Counsel for the respondent, Ms. Khunkhun is only retained to represent him on this application but not to conduct the action generally.

Background

- [3] The parties were married in May 2014 and separated in May 2017. They dispute when they commenced cohabitation prior to marriage: the claimant says the relationship began in October 2008 and the respondent says that the relationship began in October 2012.
- [4] There are two children of the marriage, aged 5 and 3.
- [5] The parties separated on May 19, 2017.
- [6] The former family residence was sold in 2018 and the net proceeds therefrom, in the initial amount of \$415,435.01, are held in trust by the claimant's counsel. There is no other family property of significance.
- [7] The trial of this matter is scheduled for November 2, 2020 for seven days.
- [8] In her notice of family claim, the claimant seeks, amongst other things, periodic or lump sum spousal support, unequal division of property and debt, and a reapportionment of the proceeds of sale of the former family residence.
- [9] In his counterclaim, the respondent seeks unequal division of family property and debt, and makes an exclusion claim for a down payment he allegedly made on an earlier property purchase in 2008 in the amount of \$43,670. He alleges that the proceeds of the sale of that residence went to purchase the former family residence in 2015.

- [10] A FLA s. 211 report was prepared by Dr. Michael Elterman in 2017. The parties shared the cost of \$13,000 to 14,000 equally.
- [11] The respondent is a pilot. His income tax return Line 150 income was 162,061 in 2019, \$114,472 in 2018, and \$139,611 in 2017.
- [12] The claimant was an auxiliary worker with the Cities of Delta and Surrey, pre-COVID-19. She is currently laid off. Her Line 150 income was \$26,589 in 2019, \$12,292 in 2018, and \$14,542 in 2017, the 2017 income being EI maternity benefits.

The Parties' Positions

The Respondent

- [13] The respondent says the parties became spouses in 2012. Prior to that, he asserts that the claimant was renting a room in his house and although they were "occasionally intimate", they were not in a spousal relationship.
- [14] The respondent has been on short-term disability since October 2019, allegedly due to the stress of this litigation. As such, he receives approximately 85% of his base salary, which is presently \$104,000.
- [15] The only documentation that the respondent has produced in support of this is apparently a note dated November 6, 2019, said to be from a Dr. Adams, which reads: "Pilot seen today. Unfit to fly".
- [16] Should his disability continue through October 2020, the respondent will apparently be put on long-term disability and receive benefits of approximately 66% of his base salary.
- [17] As a result of this reduction in income, the respondent says that he has depleted all of his savings, withdrawn his employee share purchase funds, and amassed approximately \$40,000 in debt.
- [18] The respondent says that he has also paid approximately \$46,336 in child support payments as well as considerable s. 7 payments since separation, and continues to pay child support on a monthly basis.
- [19] This has been a very litigious matter to date. The respondent says that he has already spent approximately \$140,000 on legal fees.
- [20] He says he was forced to begin representing himself in September 2019 due to lack of funds.
- [21] The respondent estimates that it will cost him, at a minimum, between \$93,000 and \$188,000 in legal fees and expenses to get through the trial of this matter scheduled for November. That does not include the cost of new counsel getting up to speed on the file.

- [22] He says he has no resources to draw upon, requires counsel as he is unable to cope with the litigation on his own due to the stress and its impact on his health, and seeks an interim distribution of \$100,000 from the funds being held in trust to fund his anticipated fees and disbursements.
- [23] The respondent says that the claimant is being supported by her family and that she has a joint savings account with her mother in the amount of \$125,000.
- [24] Thus, he submits that he is at a financial disadvantage and requires the funds to defend his entitlement before and at the upcoming trial.
- [25] The respondent argues that I should weigh the evidence and conclude that this was but a short relationship and that, as a result, the claimant's claim for lump sum spousal support, if spousal support was to be entertained at all, would be minimal.
- [26] The respondent asserts that there is no harm or potential of harm to the claimant's position should I grant the interim distribution.

The Claimant

- [27] The claimant says that the parties lived together in a spousal relationship from 2008.
- [28] The claimant was laid off due to the COVID-19 state of emergency and does not know if she will be able to return to her auxiliary position with the Cities of Delta and Surrey. Presently, she is receiving the Canadian Emergency Response Benefits payments of \$2,000 per month and rental assistance of \$500 per month. She also teaches drumming and receives \$25 per week. She has applied for entrance into the Educational Assistant Program with the City of Delta, but does not know if she will be accepted.
- [29] Working as an educational assistant would allow her to work when the children are in school and her full-time salary in that position might be \$36,000 per year.
- [30] The claimant denies that she is being supported by her family and, instead, points to the debt that both the parties are alleged to have incurred to her parents during the relationship, and an additional debt of approximately \$40,000 that she has incurred to them since separation. She says that the \$125,000 in the joint savings account is not her property, but held in trust for her mother as an estate planning tool. This is confirmed by an affidavit from her mother.
- [31] The claimant says that the respondent did not pay child support from separation in May 2017 until November 2017, when he unilaterally began paying less than the Guideline amount. Since March 2020, the respondent unilaterally reduced child support to the present amount of \$668 per month. Further, the claimant alleges that the respondent withdrew \$6,900 from the home equity line of credit to make child support payments.
- [32] The claimant says that she has not received any spousal support since separation, despite the claim and her obvious need.

- [33] She says that the respondent has threatened to intentionally reduce his income and that he has taken several expensive holidays and incurred the cost for a new set of upper teeth, all while shirking his responsibility to her and the children.
- [34] The claimant argues that to allow an interim distribution on the facts of this case would, "turn the very purpose of s. 89 on its head". She argues that she is the economically disadvantaged spouse, not he.
- [35] The claimant says that her claim for lump sum spousal support alone could amount to \$184,000. Added to her prima facie entitlement to one-half of the funds being held in trust, her claim would be \$392,000.
- [36] Obviously, a distribution of \$100,000 to the respondent from the approximately \$416,000 being held in trust would eat into the claimant's entitlement, if she was successful in her claim.
- [37] As a result, the claimant argues that an interim distribution of \$100,000 to the respondent would have the effect of depriving her of her claims before the trial judge has a chance to consider them and thus the respondent cannot meet the threshold requirement for an interim distribution.

Legal Basis

- [38] 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.

- [39] The reasons of Justice Ballance from her decision in *I.F. v. R.J.R.*, 2015 BCSC 793 are often quoted and were relied upon by the claimant before me:

- [192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the FLA.

[193] In my opinion, the plain meaning of the phrase "harmful to the interests of the spouse" in s. 89 contemplates actual or potential economic harm, and is likely broad in its scope. Determination of the presence of harm requires the court to reasonably anticipate and then assess the consequences that may flow from the interim order being sought. That approach, in turn, invites a highly individualized component to the inquiry. For example, would the distribution being sought in the particular case require a sale of property or of the encumbering of assets; what income tax ramifications might be triggered and what other transactional costs would arise? The concept of harm under s. 89 would also encompass economic implications such as whether the distribution would adversely impact the other spouse's lifestyle or effectively undermine or prejudice his or her argument for reapportionment.

Analysis and Conclusion

[40] Looking at the "blunt purpose" of a s. 89 order, it is difficult to conclude that the playing field here is skewed against the respondent. Even on disability, the respondent has considerably more income than the claimant. Leaving aside the allegation that the funds held jointly by the claimant and her mother are available to the claimant, which I doubt and which is certainly in issue, neither the respondent nor the claimant has any assets to speak of other than the funds in trust.

[41] Clearly, the respondent expects a more lucrative financial future than the claimant, even if he remains on disability. Given his alleged threats to minimize his income and the lack of evidence as to his medical condition, I cannot conclude that his alleged disability is likely to be permanent.

[42] I do not agree that it is my duty to weigh the evidence and come to some conclusion as to when the parties' spousal relationship began and then assess the likelihood of significant lump sum spousal support being awarded to the claimant at trial.

[43] According to I.F., it is the "actual or potential" economic harm that I am directed to consider, and it is obvious that to allow the respondent's application would, "effectively undermine or prejudice [the claimant's] argument " for lump sum spousal support, unequal division or reapportionment.

[44] In other words, I cannot satisfy myself that the order would not be harmful to the claimant's interests and, as a result, the application is denied.

[45] The claimant will have her costs of this application in the cause.

"Master Muir"

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