
CANADA / JUDGMENT

L.A.R. v. E.J.R.

2015 BCSC 189

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 189 L.A.R. v. E.J.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.A.R. v. E.J.R.,

2015 BCSC 189

Date: 20150211

Docket: E130074

Registry: Vancouver

Between:

L.A.R.

also known as L.A.C.

Claimant

And

E.J.R.

Respondent

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment on Application for Directions

Counsel for the Claimant:

L. Spencer

Appearing on his own behalf:

E.J.R.

Place and Date of Hearing:

Vancouver, B.C.

October 28, 2014

Place and Date of Judgment:

Vancouver, B.C.

February 11, 2015

I. INTRODUCTION

- [1] On May 30, 2014, I gave reasons for judgment following a trial in this family law matter. The neutral citation for those reasons is 2014 BCSC 966.
- [2] The claimant L.R. ("L.") has now applied for:
- clarification of parts of the judgment that deal with the former family home and with another property that was also jointly owned with the respondent E.R. ("E.");
 - an order that E. pay for damage that he caused to a former family vehicle that he was to turn over to L. pursuant to the trial judgment;
 - clarification of E.'s obligation to share in daycare and nanny costs for the parties' children; and
 - an order fixing the trial costs.
- [3] When the hearing of this application began on October 28, E., who represented himself in the trial, had not provided an affidavit or any other supporting material, although he had referred to various relevant facts in his Application Response.
- [4] After he and L.'s counsel had made oral submissions, I adjourned the application to give E. the opportunity to submit evidence in support of his position, and for L. to provide additional material addressing some concerns about her position on the property issues that I had raised during the submissions.
- [5] L. has now provided a supplementary affidavit. E., despite a written reminder, still has not provided anything. I think it is appropriate for me now to render a decision without input from him.
- [6] I will be referring only to those aspects of the trial judgment that are relevant to the current application.

II. PROPERTY

(a) Background

- [7] The parties are the owners of two properties: the former family home on Cottonwood Drive in Maple Ridge, which L. occupied with the children after the separation, and a house on Westsyde Road in Kamloops.
- [8] In the reasons for judgment, I accepted L.'s evidence that E. earned his living as a marihuana grower and that the Westsyde home had been used to house a growing operation.
- [9] The parties agreed on values for both homes for the purposes of trial.
- [10] I found that there was \$97,000 in equity in the Cottonwood home, after subtracting an alleged debt to L.'s uncle, which I concluded she was under no firm obligation to repay.
- [11] The parties owed \$35,000 more on the mortgage on the Westsyde home than its agreed value, and there were mortgage arrears of \$12,000. The parties were also liable for a penalty in the event of a foreclosure, or would have to pay commission if the home could be sold.
- [12] L. had been paying the mortgage on both properties since the separation.
- [13] The unpaid property taxes on these two homes totalled \$3,500.
- [14] In addition, as of the trial dates the parties owed \$25,000 to Envision, \$40,000 to Vancity and \$15,000 on a credit card. There was evidence that E. had withdrawn \$21,000 for his own use from one of their joint accounts or lines of credit after separation.
- [15] L. had a tax liability of just under \$21,000 based on a reassessment of her 2012 tax year. I found that this was a family debt.
- [16] In his closing submissions at trial, L.'s counsel had argued that both properties should be vested in her, so that she could deal with the shortfall on the Westsyde home in a manner that preserved the Cottonwood home:
155. The focus of the Court is on an examination of the assets and debts to ensure that there is a fair division. Given that this marriage was a joint economic enterprise between [E. and L.] the division of assets and debts should be equally borne by the two of them. As several witnesses testified this was a "modern" relationship where each was contributing to the income of this family as well as to the care of the children. The debts, including the debt to Mr. Jeff Code [L.'s uncle, whose loan I decided should not count against the equity in the Cottonwood home], were all incurred for the family benefit. Now that the total of the assets and liabilities leave a roughly \$80,000.00 shortfall [L.] should not be the one solely responsible for paying that debt. Rather there should be a compensation payment in the amount of approximately \$40,000.00 payable by [E.] to [L.].
156. Given that under the FRA a [contingent] liability which cannot be valued at the time of the trial can be divided between spouses; [Stein v. Stein, [2008] 2 S.C.R. 263] at paragraph 12 and 13. The Court in the case at bar should vest title to all property in [L.] as her testimony was that if the parties defaulted on the mortgage on the Westsyde property that the bank would

come after her for the Cottonwood property as well. [L.] needs to be able to deal with the banks directly having the title vested in her and make arrangements for the payment of the mortgage and the sales of the property. [E.'s] testimony and actions of simply walking away from the Westsyde property now that it is not of any use to him have left the burden squarely in [L.'s] lap. The Court should give her the power to deal with the Westsyde property as well as deal with the contingent liability of the mortgage and possible foreclosure.

157. While the focus of the [trial] was on the children and there was less evidence lead on the financial issues there is sufficient evidence for the Court to make Orders relating to property. The Court should do its best on the evidence provided by the parties to set the value of the contingent liability now and make an Order for Compensation by [L.] in a specific amount. Admittedly, this may cause a slight injustice to either [E.] or [L.] but this slight injustice would be outweighed by the parties benefitting from the certainty of knowing financially where they each stand.

[17] The relevant portion of my judgment on this issue was:

[130] L.'s counsel candidly acknowledged that the main focus of the evidence in the trial was on parenting. The result of that emphasis is that the financial and property evidence was not as clear or detailed as I would have preferred.

[131] Because of the date of this action, division of property will be dealt with under the Family Relations Act, R.S.B.C. 1996, c. 128. The critical issue in this case is how the significant amount of family debt should be addressed. Unlike its successor, the Family Law Act, S.B.C. 2011, c. 25, the Family Relations Act does not provide explicitly for the reapportionment of family debt. However, debt has been recognized as a factor that can lead to reapportionment of the family property pursuant to s. 65(1)(f) of the Family Relations Act: *Mallen v. Mallen* (1992), 65 B.C.L.R. (2d) 241 (B.C. C.A.). If debt was incurred "to acquire a family asset, to maintain a family asset, to discharge a family burden, or to maintain the family members" (para. 6) then it is likely that fairness will require property to be reapportioned to achieve fairness.

[133] I am reluctant to go behind E.'s agreement on the value of the Westsyde property, but it seems unrealistically low in light of the fact that someone was prepared to pay \$327,000 for it in mid-2013 before that would-be purchaser's financing evaporated. It is also not clear to me why no subsequent sale was possible at a figure that is only moderately lower than that offer, rather than at the catastrophically low value that is now alleged. Even at a somewhat higher selling price there may still not be much equity in light of the amount of the mortgage amount, but I am not convinced that as significant loss as E. has calculated will result.

[134] Further, it is not appropriate to count both the penalty in the event of a foreclosure and the listing agent's commission in the event of a sale against the equity in the Westsyde property, when only one will result.

[137] What I cannot do of course is make orders concerning the responsibility of each spouse to third party creditors (see *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at para. 248) which creates problems in a case like this one where the debts exceed the assets. Except in the case of the houses, which are secured by mortgages, the line of credit, which is secured against at least one of the properties, and the Pathfinder, which I can infer will be seized if the loan on it is not kept up, a reapportionment of property in one spouse's favour here would not necessarily relieve the other spouse from liability for some or all of the remaining debt. Whatever I order, the parties will continue to have to deal with the unsecured debt to the banks and credit card companies on a joint basis.

[138] I am not convinced that it is necessary to vest all of the property in L. to achieve fairness. While it might operate unfortunately for her if the mortgagee were to proceed against the family home for any shortfall after a foreclosure on Westsyde, there is no intrinsic value in her being able to maintain ownership of the family home for property division purposes. Nor does her financial position require her to retain that home as an aspect of her ongoing support. The fact that E. has essentially abandoned the Westsyde property is reflected in the fact that she has conduct of sale of it, which for some inexplicable reason she did not exercise before trial.

[139] Therefore I will make the following orders for property division.

[140] L. and E. will share equally in:

- The equity in the family home, which will be determined by the difference between the value of the home as determined by a qualified valuator retained by L. within 30 days of this judgment, and the amount owing on the mortgage and any line of credit that is secured by the property on that date, plus the outstanding property taxes on it. L. may purchase E.'s interest in the property by paying him one-half of that amount within 90 days of this judgment. If she does not do so by then, the home will be sold, with L. having conduct of sale, and the net proceeds divided equally.
- The net proceeds of the sale of the Westsyde home, if any, deducting from those proceeds any costs of sale, mortgage penalties, outstanding property taxes and any mortgage payments made solely by L. since the separation.

[141] If L. purchases E.'s interest in the family home and the line of credit is secured against that property, she will receive the RRSPs. This is because if the line of credit is secured against the home then as a practical matter L. as the owner is the one who will be pursued by the bank, at the risk of losing the property, to repay it. If she does not purchase E.'s interest in the family home, the interest that the net amount of the RRSPs after the tax costs of redeeming them will be divided equally.

[142] L. will receive the Altima vehicle. E. will receive the Pathfinder. My intention here is to reflect E.'s post-separation withdrawal of \$21,000 from the bank account by awarding him the vehicle that is not paid for and therefore effective responsibility for the loan which apparently exceeds the vehicle's value.

(b) Application

[18] In her application for directions on this issue, L. provided an affidavit describing the unfairness that would result from her having to pay E. 50% of the equity in the Cottonwood home, when as a practical matter she will be the only one of them who is likely ever to contribute to the family debts.

[19] She deposes that the equity in Cottonwood is \$90,494.29.

[20] Since the trial ended the parties have received an offer of \$292,000 to purchase the Westsyde home. The prospective buyer did not accept their counter offer, the amount of which L. does not include in her affidavit. At that point, the buyer referred to the extensive amount of upgrading that would have to be done on the home.

[21] Only \$979 more was owed on the mortgage than this offer, which presumably could have resulted in a sale if the parties had accepted it.

[22] L. provides a list of the required repairs to the Westsyde home and submits that the result will be a net loss on the property of \$89,420.30 if it is ultimately sold for \$292,000, the amount of this most recent and unsuccessful offer.

[23] The 2014 assessment value for Westsyde was \$233,400.

[24] Further L. has updated the family debts that I described previously (Envision, Vancity, credit cards, her tax liability) as totalling \$106,382.95.

[25] L.'s counsel emphasized the point made in *K.M.J. v. J.H.D.N.*, 2014 BCSC 1895, (albeit in the context of the current Family Law Act) that a spouse should not be financially punished for having assumed responsibility for post-separation family debt. That would be the exact effect on L., he argues, if the trial judgment on property division is allowed to stand.

[26] I raised the concern during the hearing that the lack of reliable evidence of the value of the Westsyde home, as referred to in my reasons for judgment, left open the possibility that L. could successfully avoid a loss on it and also negotiate her responsibility for the other family debts, thus making the vesting of the Cottonwood property in her a windfall.

[27] To address those concerns, L. has provided a supplementary affidavit. In it she consents to an order that she deduct 50% of any reduction to the family debts that she is able to negotiate in the family debts from the amount of a compensation order that E. would otherwise have to pay her. In addition to consenting to such an order, she offers to provide an undertaking to the court to that effect.

- [28] She also offers to deduct 50% of any net proceeds of a sale of Westsyde from E.'s obligation under a compensation order, although I note that she stipulates that the cost of the extensive repairs that she identified as being required in her first affidavit would have to be deducted from any such proceeds.
- [29] In L.'s view, the vesting of both properties in her would also benefit E., by giving her greater flexibility to deal with them, and not requiring him to be involved in the sale of the Westsyde home.
- [30] Finally, she provides assurance that the only family debts that she is seeking to have reflected in this order are those that existed at the time of separation. She explains that she has had to increase the amount owed to one of the credit unions for her own needs since then.
- [31] It was difficult to determine E.'s precise position on this issue. At one point during the hearing he said that he would be content to walk away from his share of the equity in the Cottonwood home, but then he appeared to retreat from that statement when I questioned him on his understanding of its implications.

(c) Discussion

- [32] First of all, I do not think that L.'s application on this issue can fairly be characterized as a request for clarification of the reasons for judgment, as it is described in the Notice of Application. She did not point to any ambiguity in the findings or the resulting order concerning property division that needs to be elaborated on.
- [33] Instead, the application is more accurately seen as a request that I reconsider my decision on this issue, based on an elaboration by L. of its perceived unfairness to her, and on some additional evidence.
- [34] Strictly speaking, L.'s reliance on additional evidence would require a re-opening of the trial on this issue to adduce it. The requirements for reopening were helpfully summarized in *Zhu v. Li*, 2007 BCSC 1467 at para. 20; leave to appeal ref'd, 2008 BCCA 239:
1. Prior to the entry of the formal order, a trial judge has a wide discretion to re-open the trial to hear new evidence.
 2. This discretion should be exercised sparingly and with the greatest care so as to prevent fraud and abuse of the court's process.
 3. The onus is on the applicant to show first that a miscarriage of justice would probably occur if the trial is not re-opened and second that the new evidence would probably change the result.
 4. The credibility of the proposed fresh evidence is a relevant consideration in deciding whether its admission would probably change the result.

5. Although the question of whether the evidence could have been presented at trial by the exercise of due diligence is not necessarily determinative, it may be an important consideration in deciding whether a miscarriage of justice would probably occur if the trial is not re-opened.
- [35] I cannot say that there is any likelihood of a miscarriage of justice occurring if the current order remains in place. The only potential unfairness to L. here is caused by the absence of a debt-allocation regime under the Family Relations Act and the ineffectiveness of reapportioning assets to reflect responsibility for family debts when the parties have no net equity. That unfairness does not stem from the merits of the trial judgment.
- [36] I also cannot say that the potential new evidence is likely to change the result. If anything, I find L.'s new evidence with respect to the Westsyde home even less satisfactory than her evidence at trial. Now we have evidence that an offer was made to purchase the home for almost exactly what was owed on the mortgage. Inexplicably, L., who as I have noted has conduct of sale, counter-offered rather than accepting. The thwarted purchaser's description of the necessary repairs was provided only in the course of rejecting the counter offer.
- [37] More mystifying still is L.'s representation that the approximately \$89,000 in necessary repairs supposedly reduce the value of the home below \$292,000, when the offer made in that amount to purchase it did not require the repairs to be made.
- [38] And, there continues to be no justification provided for the request that E. pay compensation to L. as a part of this process. An equal division of property was ordered at trial, so if she wishes to keep the former family home then, in the absence of any additional orders, she is the one who would have to pay compensation to him.
- [39] As a result, even if this new evidence were admitted, I would likely continue to reject L.'s assertion that there is minimal net equity when the properties are considered together. The reality is that one property is worth nothing, or can be disposed of at a small loss, and the other has roughly \$90,000 in equity that is properly divided between them under the trial judgment.
- [40] However, while I am not satisfied that the trial should be re-opened to admit new evidence, L.'s submissions have demonstrated a proper basis to reconsider this aspect of the judgment.
- [41] I accept that it would be unfair to require L. to pay 50% of the equity in the Cottonwood home to E. to carry out the equal property division if she ends up being the only one who ever makes payments on the family debts. The difficulty is that in neither her trial evidence nor her supplementary submissions has she provided any information about how she plans to approach the debts. I am willing to infer, based on the evidence that was led that her higher earnings, her greater access to credit for refinancing and the undesirability in her business of being pursued by creditors make it more likely that she will be the one to take responsibility for them. But I cannot deprive E. of the equal share to which he is otherwise

entitled without a mechanism in place to ensure that it is applied to family debts.

- [42] The limitations of the Family Relations Act prevent me from allocating a particular portion of those debts to L. in a manner that would bind a third party creditor, but I think that it is open to me to make her obligation to compensate E. for his share of the equity in the Cottonwood home subject to any ongoing efforts that she may make to repay that debt on both of their behalves. These debts are not contingent in the same way as the ones that were dealt with in Stein, since their amounts are currently known, but the uncertainty about the extent to which L. will assume responsibility for them makes it appropriate for her obligation to pay compensation to E. to take effect only upon the occurrence of certain events.
- [43] Therefore, I will make the following order in substitution for the property division that I ordered in paras. 140 and 141 of the reasons for judgment:
1. The Cottonwood and Westsyde homes and the RRSPs will be vested in L., provided that she pays E. compensation to in an amount equal to 50% of:
 - The equity in the family home, which will be determined by the difference between the value of the home as determined by a qualified appraiser retained by L. within 30 days of these supplementary reasons, and the amount owing on the mortgage on that date, the outstanding property taxes on it and the cost of the appraisal;
 - Any net proceeds of the sale of the Westsyde home, deducting from those proceeds the costs of sale, mortgage penalties, outstanding property taxes and any mortgage payments made solely by L. since the separation; and
 - The net amount of the RRSPs after deducting the tax costs to L. of redeeming them.
 2. The "family debts" will be the amounts owed to Envision and Vancity, the credit card debt and L.'s 2012 tax reassessment, as described in the reasons for judgment following trial, as they stand at the date of these supplementary reasons, less any amount that L. has increased any of these debts herself since separation and any reduction in them that she may be able to negotiate from time to time.
 3. L.'s obligation to pay compensation to E. pursuant to subpara. 1 above is suspended for as long as she makes reasonable monthly payments towards each of the family debts. "Reasonable" means not less than \$200 per month paid towards each debt. Her obligation to pay the compensation to E. will resume on the month following her failure to make a payment towards any of the family debts. L. has liberty to pay off one or more of the family debts in full at any time, in which case the requirement of monthly payments towards that debt as a condition of suspending the compensation order will cease.
 4. Fifty percent [50%] of each payment that L. makes towards these family debts will be deducted from her obligation to pay compensation to E.

5. Fifty percent [50%] of any payment that L. has made towards these family debts since separation will also be deducted from her obligation to pay compensation to E.
6. The requirement that she pay compensation to E., pursuant to subpara. 1 above will cease when the amounts deducted from them pursuant to her payments of the family debts brings the amount of compensation to be paid pursuant to subpara.1 above to zero.
7. L. will provide an annual accounting to E. of the amounts paid and deducted pursuant to this order. E. may seek an accounting from the registrar if the information provided by L. is not satisfactory.

III. DAMAGE TO THE NISSAN

- [44] L. deposes that despite the order in para. 142 of the trial judgment that she was to receive their Altima vehicle and her repeated requests, E. refused to return it to her. Once she got the police involved, he left a set of keys for the vehicle at the police station and parked it near a high school and skateboard park. When she picked it up, she found that the front end was damaged, garbage was strewn throughout the interior and in the trunk, and someone had urinated inside. It cost her \$659.45 to have the vehicle cleaned and an overdue engine servicing carried out, and to cover the insurance deductible for body repairs.
- [45] E. denied responsibility for any of this damage in his oral submissions but, as I have said, he has not taken advantage of the opportunity that I gave him to support his position with evidence.
- [46] I think the inescapable inference is that E. caused this damage out of spite. The only question is whether I should treat this as an application to find him in contempt of the trial order.
- [47] I think a more accurate characterization of this situation is that he has failed to comply with a duty that was obviously implied in my judgment -- to return the Altima in a usable condition. The cost to L. of putting it back to the state that it should have been in when she received it seems to me to be an ancillary cost of the division of property that has been ordered. Accordingly, she may deduct \$659.45 from the amount of compensation that she is otherwise contingently required to pay E. in relation to the division of their assets, as I have described in the preceding section.

IV. DAYCARE COSTS

- [48] In my trial judgment I said this about s. 7 expenses:
- [170] E. will pay L. 28% of the children's s. 7 expenses. L. will decide on any appropriate educational programs and extracurricular activities for the children after consultation with [E.] His responsibility to contribute to those programs or activities will be capped at \$100 per month. His responsibility to contribute to medical or dental expenses will not be capped in this fashion.

- [49] L. now questions the omission from this aspect of the judgment of any reference to daycare and nanny expenses, for which she pays \$2,330 per month and which are essential to her ability to carry on her business. She seeks confirmation that these expenses are included in the order and that they are not subject to the capping provision that applies to the costs the children's activities. Her counsel points out that "child care expenses as a result of the custodial parent's employment" are specifically referred to in s. 7(1)(a) of the Federal Child Support Guidelines, SOR/97-175.
- [50] L.'s final submissions at trial were:
167. Section 7 expenses for the children should be split 66/34, based on incomes of \$45,000.00 and \$87,000.00. Tutoring for each child of at least 45 minutes a week will always be considered a necessary section 7 expense and the Children may be enrolled in more than one activity at a time with the Claimant being at liberty to decide which activities the Children shall be enrolled in. Section 7 expenses will be deemed to include swimming lessons, sporting activities, dental and orthodontic work and would include all of the activities the children are now enrolled in. All medications, eyeglasses and medical or dental treatment would be covered, first by applying any medical dental coverage that the Respondent is entitled to for the Children and then on the 66/34 basis for the remaining uncovered cost;
- [51] This is not a case in which I had child care and nanny expenses in mind from the submissions but simply failed to refer to them explicitly. As the last sentence of para. 170 suggests, I had in mind as essential expenses, to which no capping of E.'s responsibility applied other than his overall 28% share of them, the medical and dental insurance premiums under s. 7(1)(b) and the health-related expenses under s. 7(1)(c). I do not think it would be fair to add this additional very significant expense to E.'s support obligations now, when it was not sought at trial.

V. TRIAL COSTS

- [52] Finally, L. asks me to exercise my discretion to fix the trial costs that E. is required to pay in accordance with a draft Bill of Costs that her counsel has submitted. In support, she refers to the relatively straightforward nature of the costs tariff for family law matters and E.'s failure to respond to her counsel's communications concerning payment of the trial costs.
- [53] There will certainly be cases in which it is undesirable to require family law litigants to take the further step of having their costs assessed by the registrar, but I think that in the usual situation it is preferable to take advantage of the registrar's greater knowledge and experience in this area, even for the less complicated family tariff. Here, despite E.'s serious misbehaviour during the relationship and his failure to make any submissions on this application, I can see no hardship to L. in requiring her to establish her costs before the judicial official who is normally responsible for assessing them. If E. declines to participate in the registrar's hearing, she will no doubt succeed.

VI. COSTS OF THIS APPLICATION

- [54] I would say that neither party has achieved substantial success on this application and that they should each bear their own costs of it.
- [55] On the most important issue, although I have modified the property division order from trial to take into account L.'s likely contributions to family debts, thus potentially extinguishing E.'s share of the equity in the Cottonwood home if she makes sufficient debt payments, this modification was not the order that she sought.
- [56] Success on the remaining issues was divided, perhaps slightly in E.'s favour when one considers the potential value of the child care and nanny expenses for which L. sought his contribution. However E. declined to participate properly in the application, thus delaying its resolution, and it is certainly not appropriate to reward such conduct.

The Honourable Mr. Justice T.A. Schultes

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