

CANADA / JUDGMENT

L.K.S. v. S.D.B.

2020 BCSC 1364

COURT

Supreme Court of British Columbia

DECIDED

18 September 2020

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2020 BCSC 1364 L.K.S. v. S.D.B. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: L.K.S. v. S.D.B., 2020 BCSC 1364 Date: 20200918 Docket: E19195 Registry: Duncan Between: L.K.S. Claimant And S.D.B. Respondent Before: The Honourable Mr. Justice Punnett Reasons for Judgment Counsel for the Claimant: B. Read-Greenan Counsel for the Respondent: P.D. Blair Place and Date Notice of Application Filed: Duncan, B.C. July 24, 2020 Date Written Submissions Received: September 3, 2020 Place and Date of Judgment: Victoria, B.C. September 18, 2020

- [1] The claimant in this family proceeding seeks an interim distribution of family property to fund dispute resolution pursuant to s. 89(a) of the Family Law Act (FLA) and costs.

Background

- [2] The parties resided together in a marriage-like relationship from on or about December 1, 2014 and separated February 4, 2019.
- [3] The claimant deposes she initially worked part time before she "succumbed to physical constraints rendering [her] disabled from ongoing engagement in the work force". The claimant's financial statement sworn December 5, 2019 indicates she commenced receiving Disability Assistance under the Employment and Assistance for Persons with Disabilities Act of \$1,185.42 per month on December 1, 2018, and is now receiving \$1,235.42 per month.
- [4] The respondent's financial statement sworn December 2, 2019 shows he is employed with income of \$42,850.60 plus pension income from a Canadian Armed Forces Pension of \$20,565.56, for a total of \$63,396.16 per annum.
- [5] The claimant's assets in December 2019 amounted to \$24,500, of which \$21,000 consisted of \$3,000 in savings and \$18,000 in a TFSA. However, she deposed she was using her savings to meet her monthly expenses and estimated her savings of \$3,000 would be depleted by the end of 2019. She seeks \$40,000 from the respondent under s. 89(a) of the FLA.

- [6] The respondent's assets in December 2019 consisted of the former family home, valued at \$420,000 and encumbered by \$107,115.84 in debt. It also shows he held liquid assets of \$51,426.76. He deposes his TFSA composes \$43,280.63 of those assets and was acquired before the parties' relationship and are excluded property, as is over \$100,000 of the former family home's equity as it was purchased with funds received in a settlement with his former spouse.
- [7] The respondent has paid no spousal support since the parties separated. Position of the Claimant
- [8] The claimant claims for spousal support and an interest in the former matrimonial home. She does not depose that she contributed to the purchase, either through a down payment or mortgage payments. She states she "performed orthodox housekeeping and other domestic duties for the Respondent."
- [9] She submits she cannot afford to advance her claim as she lacks funds to do so and the respondent will not be economically disadvantaged by the order she seeks. She further submits her counsel estimates a further \$40,000 is required, over and above the \$14,000 she has paid to date, to bring her claim to resolution.
- [10] The claimant argues she has a demonstrated need for a distribution of funds, lives on an income below the poverty line, has been economically disadvantaged by the separation and, without funds, cannot pursue her claims. Implicit in her application is the respondent can advance the funds without prejudicing his interests. In addition, she alleges the respondent has not been responsive to resolution of her claim, thereby increasing her legal expenses. Position of the Respondent
- [11] The respondent notes that determination of family property is in issue. He claims his pre-existing pension, the former matrimonial home, his TFSA and his RRSP all involve excluded property. He submits he will be prejudiced by the order sought arguing the claimant's interest in the family property may prove to be less than the amount she seeks on this application. He argues that more than one issue must be assessed (including the determination of and value of family property and what, if any, interest the claimant has in such property) in order to determine the issue of the interim distribution sought. In addition, given all family law issues are outstanding, that the claimant has failed to comply with Covid-19 Notice #14 as she failed to provide in her application the full scope of the outstanding issues.
- [12] The respondent further argues the claimant has funds available to her, the evidence of the claimant is insufficient as it does not demonstrate that an interim distribution will not jeopardize his position at trial and that the onus to do so is on the claimant. Nor does the claimant's material detail the legal fees required or why she cannot meet such expenses. Law

- [13] Section 89 of the FLA permits orders for interim distribution of property: 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.
- [14] The claimant relies on *Zhang v. Fan*, 2018 BCSC 2162, and *Negus v. Yehia*, 2015 BCSC 857. In *Zhang*, Affleck J. wrote: 26 In *McKenny v. McKenny*, 2015 BCSC 1345, Fitch J. (now J.A.) wrote at paras. 56 and 57:
- [56] With respect to the claim for an interim distribution of family property, the authority for such an order may be found in s. 89 of the FLA. This section provides that a court may make an order for an interim distribution of family property if satisfied that it would not be harmful to the interests of the spouse and is necessary to provide money to fund family dispute resolution, all or part of a proceeding under the Act, or to obtain information or evidence in support of a family dispute, resolution or application to a court.
- [57] The claimant correctly notes that the order sought by the respondent is extraordinary in nature and must be assessed carefully. The test governing interim distribution of family property has two components:
- 1) The applicant must show an advance is required to mount a challenge to the other spouse's position at trial; and
 - 2) The applicant must show that the advance or payment on an interim distribution basis will not jeopardize the other spouse's position at trial. 27 In *Drinkall v. Drinkall*, 2016 BCSC 373, Master McDiarmid held that the onus is on the applicant to satisfy the court that an interim distribution will not jeopardize the other party's position at trial.
- [15] He also found parties can be directed to secure borrowing against family property with the costs of borrowing to be shared.
- [16] In *Negus* the claimant sought the advance of funds. In making the order, MacIntosh J. noted: 8 The words in s. 89, "not be harmful to the interests of a spouse", have to be reasonably interpreted in accordance with the Supreme Court of Canada's instruction on statutory interpretation found in cases such as *Bell ExpressVu*, 2002 SCC 42. The fact that it may be commercially inconvenient or awkward for Mr. Yehia to generate these funds does not mean that it is harmful to his interests within the meaning of the section. I do not see credible evidence to support a finding of harm here, within the meaning of s. 89, as I understand the section and its purpose.

- [17] Other decisions have also considered s. 89. In *Sigurdson v. Sigurdson*, 2016 BCSC 1141, Master MacNaughton (as she then was) had more evidence before her than is the case here. Following Drinkall, she was not satisfied it would not be harmful to the respondent's interests to order an advance (para. 42).
- [18] In *L.L.J. v. E.J.*, 2013 BCSC 1233, Master Keighley stated at para. 46: The material relied upon by the father in support of his application contains nothing in the way of detail concerning his anticipated expenditures for legal fees or satisfactory evidence as to why he is unable to meet these expenses from his earnings or funds available from other sources. He says: ... "I have no funds and no credit with which to fund dispute resolution or this litigation or continue to be represented by counsel." That is not sufficient. His application for an interim distribution is dismissed but may be revisited if supported by satisfactory evidence.
- [19] In *I.F. v. R.J.R.*, 2015 BCSC 793, Balance J. stated:
- [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.
- [194] In cases where the applicant may be precluded from entitlement to the family property based on a pre-existing agreement, the notion of being harmful to the other spouse's interests could also take the form of the court permitting a distribution so as to enable the funding of an unmeritorious claim. A reasonable way to attenuate that manifestation of harm is to require the applicant to show there is a reasonable prospect of success of impeaching the subject agreement.
- [200] In closing, I would observe that the claimant did not provide a budget of her anticipated legal expenses or a timeline within which she expected they would be incurred. I would endorse the tendering of such evidence in support of an application under s. 89 as the preferable approach. It does not follow, however, that the absence of such evidence will render the application fatal, as urged by the respondent. Where, as here, it is abundantly clear that the litigation and business valuation issues are complex, expert opinion evidence is likely required and the history of the court proceedings already predicts a protracted and costly battle, the court may have sufficient information before it to approve a distribution.
- Discussion

- [20] There is minimal evidence before the court. Given the conclusion I have reached I need not address the alleged non-compliance with Covid 19 Notice #14. Regarding the former matrimonial home, it was purchased during their relationship in May 2017. There is no evidence of the purchase price. There is equity of \$312,884.16. The claimant's financial statement does not list the home as an asset while that of the respondent does. It therefore appears the home is not registered in their joint names. Nor, as noted, does the claimant allege any direct contributions to its purchase, mortgage or maintenance.
- [21] The claimant deposes in her July 2020 affidavit that her second financial statement filed in December 2019 confirms her current "straightened financial circumstances". Hence, for the purpose of this application, she has liquid assets of \$3,000 in a chequing/savings account and \$18,000 in a TFSA. She notes a Line of Credit debt of \$5,000.
- [22] The claimant alleges the respondent is seeking to "starve [her] into submission". However, the evidence does not establish he is doing so.
- [23] The claimant has not established that at this time "an advance is required to mount a challenge" to the respondent's position, nor has she shown "that the advance or payment on an interim distribution basis will not jeopardize the other spouse's position."
- [24] In addition, the material does not show the basis for the requested sum of \$40,000 except that it is counsel's estimate of the sum required to resolve the family law dispute. The material also fails to provide sufficient information regarding the claim for spousal support, the issues of what is family property, what is excluded property and details of the claimant's contribution and the financial arrangements during the relationship. On the material filed, the amount of her entitlement is unclear as insufficient evidence prevents any meaningful analysis.
- [25] The application is dismissed with costs in the cause, but may be revisited if supported by satisfactory evidence. "The Honourable Mr. Justice Punnett"

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