
CANADA / JUDGMENT

L.L.E. v. R.P.E.

2021 BCSC 2648

COURT

Supreme Court of British Columbia

DECIDED

24 November 2021

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2021 BCSC 2648 L.L.E. v. R.P.E.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.L.E. v. R.P.E.,

2021 BCSC 2648

Date: 20211124

Docket: E52165

Registry: Vernon

Between:

L.L.E.

Claimant

And

R.P.E.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 6 on June 20, 2022.

Before: The Honourable Mr. Justice Riley

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant appearing by teleconference:

C.R. Christiansen

Counsel for the Respondent appearing by teleconference:

K.B. Greenough

Place and Date of Hearing:

Vernon, B.C.

November 23, 2021

Place and Date of Judgment:

Vernon, B.C.

November 24, 2021

- [1] THE COURT: So this is a ruling on an application. This is an application by L.L.E. for various interim or interlocutory orders in a family law matter, including: (a) sale of the former family home; (b) interim distribution to cover arrears of support; (c) preparation of a s. 211 report by Dr. England; (d) financial disclosure with respect to R.P.E.'s company and with respect to R.P.E.'s personal finances; (e) amendment of the notice of family claim to include a claim for occupational rent; and (f) that R.P.E. pay all fees and charges with respect to a notice to mediate.
- [2] In his application response, R.P.E. indicates or indicated that he was agreeable to some of the orders sought by L.L.E. At the start of the hearing and during the hearing, the points in issue narrowed considerably. By the end of the hearing, the only matters in dispute between the parties were: (1) L.L.E.'s application for interim sale of the former family home; and (2) L.L.E.'s application for a direction that R.P.E. be required to pay for the upcoming mediation.

Facts

- [3] By way of background, in very skeletal terms, here is a summary of the relevant facts and procedural history:
- a) The parties were in a relationship for some 6.5 years from roughly 2012 until late 2018 or early 2019;
 - b) The parties have one child, H., whose date of birth is [redacted], and who is now five years old;
 - c) L.L.E. moved out of the former family home in May of 2019, at which time she moved into a basement apartment where she continues to reside to this date;
 - d) In the meantime, R.P.E. remained in the former family home and continues to reside there;
 - e) Since June of 2019, the parenting arrangement for H. has been on an alternating weekly schedule, three days, two days, and two days, and then into the next week in reverse.

- [4] With respect to their current circumstances and relative financial situations, here are the circumstances:
- a) L.L.E. is 44 years old and is an administrative assistant at a funeral home. In an interim decision on child and spousal support, Justice Betton determined L.L.E.'s guideline income to be \$23,744.
 - b) R.P.E. is 55 years old and is the owner-operator of a transport business through his company, [redacted]. In the interim decision on child and spousal support, Justice Betton determined that R.P.E.'s income was \$173,347 per year. R.P.E. questions the accuracy of that, but he has not taken any steps to vary or challenge it.
 - c) In his interim decision, Justice Betton ruled that R.P.E. was required to pay \$1,339 per month in child support and \$3,684 per month in spousal support.
 - d) L.L.E. deposes and R.P.E. does not dispute that he has failed to pay monthly support as provided for in Justice Betton's order, or at least the full amount of monthly support. L.L.E. has registered with Family Maintenance Enforcement Program ("FMEP") but, despite that, R.P.E. has now accumulated arrears of child and spousal support totalling some \$67,800 as of 12 October 2021.
- [5] With respect to the property that is the main focus of L.L.E.'s application, the former family residence, it is located on a 28-acre piece of property at [address redacted] (the "Property"), with a 3500-square-foot house that has a full basement, a 560-square-foot cabin, and a 2800-square-foot shop used in R.P.E.'s trucking business. The most recent property appraisal puts the value of the Property at \$1,450,000 and there is a \$550,000 mortgage registered against the property. Based on those figures, there is a total of just over \$900,000 in equity in the property.

Analysis

Issue 1: Interim Sale

- [6] Rule 15-8 of the Supreme Court Family Rules, B.C. Reg. 169/2009, deals with applications for interim sale of property. It provides that a court may make an order for sale when satisfied that it is "necessary or expedient" to do so. Although the case law sometimes uses the phrase "necessary and expedient", the rule itself states that an order for sale may be granted where it is determined to be necessary or expedient. In other words, these two terms are used disjunctively: see *R.R.S. v. B.R.M.S.*, 2021 BCSC 1330 [R.R.S.] at para. 21. Courts have said that where the proposed interim sale is not shown to be necessary, then it should be advantageous to both parties: see *A.B. v. C.D.*, 2015 BCSC 2134 [A.B.] at para. 63, and *Tomic v. Tough*, 2013 BCCA 355 [Tomic] at para. 26, citing *Reilly v. Reilly*, 1992 CanLII 742 (B.C. Court of Appeal) at para. 35. The burden is on the applicant to satisfy the court that interim sale is necessary or expedient: see *R.R.S.* at para. 22, citing *Kapoor v. Makkar*, 2020 BCCA 223 at para. 23. A number of factors may inform the court's consideration of whether a sale is

necessary or expedient. These include the needs of the children, the availability of alternative accommodation, emotional condition of the spouses, external economic factors, wasting of the asset, and the capacity of the parties to maintain the asset: see Tomic at para. 16, citing Bodo v. Bodo, 1990 CanLII 2291 (Supreme Court) at para. 23. Another question that may arise is whether the sale of the home is a practical inevitability or, as an alternative, whether one party may be able to retain it by buying out the other party's interest: see A.B. at para. 63.

- [7] Many, though not all, of the considerations I have just addressed arise in the case at bar. For the purposes of the analysis that follows, it is necessary to briefly review the position of each party in respect of property division.
- [8] L.L.E. has a strong case for exclusion of some \$25,000 which was used as a down payment for the Property. R.P.E. has a case, perhaps not quite as strong, but a case nonetheless for exclusion of at least portion of the some \$118,000 in net proceeds of sale of a former family residence which he owned prior to the relationship, but which the parties held onto for the first few years of their relationship. Finally, L.L.E. has a claim to at least some interest in R.P.E.'s business, namely the increase in value of the business over the course of the relationship, but of course the business pre-existed the relationship, so the business itself would be excluded property.
- [9] With these parameters in mind, without trying to do a nuanced assessment of the property division claims, it seems likely that R.P.E. would be required to pay somewhere between \$475,000 to \$600,000, to buy out L.L.E.'s interest in both the former family residence and R.P.E.'s trucking business. These are my figures and they are not intended to reflect anything other than a thumbnail sketch of the parameters of any property division based on the very limited information that has been made available to me at this hearing.
- [10] Against that backdrop, L.L.E. says sale of the property is a practical inevitability in order to effect an equal division of family property at trial. L.L.E. says that her share of the family property is conservatively worth some \$550,000, such that in order to buy her out, R.P.E. would have to obtain financing in the amount of \$1.1 million. L.L.E. says this is not realistic, considering that the property is only estimated to be worth some \$1.45 million, and also taking into account the state of R.P.E.'s finances, which he represents in his own evidence to be poor. If he cannot afford to make the monthly support payments under the current order, L.L.E. questions how he could qualify for such a hefty new mortgage.
- [11] For his part, R.P.E. says he needs to hold onto the property for use in his trucking business. As noted, it is an acreage property with a shop and office space for R.P.E.'s business. L.L.E. questions this, pointing out that access to the property was cut off for a period of time this summer and R.P.E. was able to carry on the business without disruption. However, R.P.E. responds, and I accept, that he was only displaced from the property for a brief period of time, and even this brief disruption was a logistical challenge for his business. He had to call in a number of favours, as he put it, to keep the business running during the time that he did

not have access to the Property.

- [12] R.P.E. also deposes in his affidavit that after conducting some inquiries, he has concluded that there is no viable alternative location for the operation of his business in the Vernon area. He says there are no suitable plots of land available for purchase, and he says that leasing space for the business would not be feasible because the monthly lease payments would be some four to \$5,000 per month which would significantly impair the company's cash flow.
- [13] I do not agree with counsel for L.L.E. that R.P.E. has given no evidence to support his position, but I do accept that R.P.E.'s evidence is far from overwhelming. He has not provided any objective evidence to support his assertion that there are no suitable properties available for purchase, or alternatively that the monthly lease cost would be \$4,000 to \$5,000.
- [14] However, I do accept that in logic, leasing space for his operations would affect the company's profitability. I note that R.P.E. has been running a successful trucking business for many years, and I accept his testimony or his affidavit, rather, that at least part of the reason for this is that he is able to keep his costs low. At the end of the day, I accept that R.P.E. has genuine concerns about the practicality and feasibility of finding an alternative property on which to operate his business although, as I say, his evidence in support of that concern is far from overwhelming.
- [15] I accept that it would constitute a significant prejudice and risk to R.P.E.'s business to require him to relocate if there are alternatives available. He should not have to do so if it can be avoided.
- [16] That brings me to R.P.E.'s evidence on the question of whether the sale of the Property is a practical inevitability. In his affidavit, R.P.E. attests to a belief that he was in a position, or sorry, he is in a position to obtain bank approval for a mortgage of up to \$1.3 million. I agree with the submission of counsel for L.L.E. that R.P.E.'s reference to what someone at the bank told him or may have told him about that is completely inadmissible hearsay. So what I am left with is R.P.E.'s assertion, unsupported by any independent evidence, that he could obtain financing in that amount.
- [17] I agree with L.L.E.'s counsel that it does not make a lot of economic sense to expect that a bank would advance a mortgage of 1.3 million on a property worth 1.45 million in total. Counsel also fairly points out that R.P.E.'s position is even further weakened by his own evidence indicating that his cash flow is not as high as might be suggested in Justice Betton's ruling, and that his monthly expenses exceed his monthly income.
- [18] R.P.E. is either unwilling or unable to meet his current monthly support obligation, and in that context there is good reason to question his unsubstantiated claim to be able to secure financing of up to 1.3 million on the Property. I have taken all of this into account.

- [19] On the other hand, I also take into account that R.P.E. has been running a successful and profitable business for many years, that he has substantial personal and corporate assets, and that, according to L.L.E.'s own calculations, it might only be necessary for R.P.E. to come up with financing in the amount of 1.1 million to put himself in a position to buy out L.L.E.'s interest in the family property.
- [20] Considering all of this, this case is close to the line, but at this point I have some uncertainty, one way or the other, on the question of whether or not R.P.E. could obtain the necessary financing to buy out L.L.E. It follows that I also have some uncertainty, one way or the other, about whether the sale of the Property is a practical inevitability in this case.
- [21] The burden, of course, ultimately is on L.L.E. as the applicant to make out a case for interim sale. However, what is most frustrating about this situation is that the party who is really best placed to answer the question with concrete information about financing is the respondent on the application, R.P.E. The situation is further complicated by the fact that R.P.E. is not presently in a situation to provide proper disclosure of his corporate financial statements, and this is due to his failure to put together the information and provide it to his accountant in a more timely way.
- [22] R.P.E. also suggested in his affidavit that there is a possibility of subdividing the Property, selling part of it to pay L.L.E.'s interest, and retaining the balance of the property for use in the trucking business. However, I agree that on the record before me, that possibility is too speculative to warrant serious consideration at this time. Subdivision is not a straightforward process and it is not entirely within the control of the property owner. R.P.E. has not set out a sufficiently concrete plan to warrant any serious consideration of this as a viable option for paying out L.L.E.'s interest.
- [23] There are a number of other factors to consider. As I have said, I accept that sale of the property would create risk, uncertainty, and potential prejudice to R.P.E.'s business. Up until now, the business has been profitable and successful, and one would hate to see the business go downhill because of an inability to relocate it. I also recognize that preserving the status quo, that is the situation where R.P.E. continues to live in the former family residence and has access to all of the associated capital, while L.L.E. has had to move into a basement apartment, paying \$1,600 per month in rent, is in some respects a perpetuation of an unfairness to L.L.E.
- [24] This situation is compounded by the fact that R.P.E. owes a substantial amount of arrears of support. L.L.E. says that if the property is sold, she would be at liberty to apply for payment of the outstanding arrears out of the net proceeds. I agree with L.L.E.'s counsel that this is logically possible, but I also agree with counsel for R.P.E. that this possibility, payment of arrears out of net proceeds from the sale of the Property, is a few steps away and by no means a certainty. One cannot lose sight of the fact that L.L.E. has enrolled in the FMEP program and the FMEP can be expected to take reasonable steps to collect the outstanding arrears.

- [25] I am troubled by the fact that R.P.E. owes such substantial arrears, and yet is coming to the court arguing against interim sale of the property. But I do not find that this is a basis, of itself, to order sale of the property, particularly where it could prejudice R.P.E.'s business which, of course, is a significant source of income for both of these parties, R.P.E. and L.L.E.
- [26] I also accept the submission of L.L.E.'s counsel that interim sale of the property would be mutually advantageous to each of the parties in at least one respect, in that it might make the property division claims easier to settle. However, again I have to balance this against the potential prejudice to R.P.E.'s business.
- [27] If the sale undermines the long-term profitability of R.P.E.'s business, it will impact not just on him, but also on L.L.E. and their child, in terms of the level of support that R.P.E. will be able to pay going forward. Having taken all of this into consideration, I am not convinced at this time that interim sale of the Property is necessary or expedient. I would not say that interim sale is mutually advantageous. With regard to necessity, certainly if R.P.E. was not in a position to buy out L.L.E., then the sale of the property would be a practical inevitability. It is possible that R.P.E. may be able to obtain the necessary financing to buy out L.L.E., but that possibility is somewhat speculative at this point in time.
- [28] In these circumstances, I am inclined to give R.P.E. a certain period of time to obtain more concrete evidence with respect to his ability to buy out L.L.E.'s interest in the form of a commitment letter from a reputable financial institution approving him for a mortgage in the amount of no less than \$1.1 million. Keeping in mind that R.P.E. is now awaiting the completion of corporate financial statements by his accountant, I would give R.P.E. until 28 January 2022 to provide opposing counsel with a commitment letter to that effect.
- [29] If R.P.E. is unable to do so within that timeframe, then I would give L.L.E. the right to renew her application for interim sale of the property before me. In order to make any subsequent or renewed application by L.L.E. more efficient, I can indicate that any such application could be scheduled before me for a period of 45 minutes at 9:00 a.m. or 9:15 a.m. on any day when I am available to hear it by phone or by MS Teams. I would further indicate that it should not be necessary for the parties to file an entirely new complete application record for any renewed application. Rather, the parties would be at liberty to file only a supplementary application record containing only updated information available since the date of the original hearing.

Issue 2: Directions with respect to Notice to Mediate

- [30] I am not going to review the history of this litigation in any detail. It is common ground that the parties have already had a mediation session before a qualified mediator, Ms. William, I believe, in the spring of 2021 which was not fruitful. There was also a previously scheduled trial date which was cancelled when R.P.E. changed counsel.

- [31] R.P.E. has now served L.L.E. with a notice to mediate dated 8 October 2021. Counsel for L.L.E. says the timing of the notice is conspicuous because it was served in anticipation of the current application at a time when L.L.E. had a number of outstanding and unresolved requests for financial disclosure. Counsel for L.L.E. referred me to s. 25 of the Notice to Mediate (Family) Regulations, B.C. Reg. 296/2007, which provides that the court can make directions with respect to the terms and conditions of the mediation. L.L.E. is seeking a term requiring R.P.E. to pay for this round of mediation because: (1) the parties have previously gone through one round of mediation with no success; (2) the timing of R.P.E.'s notice is suspect; and (3) L.L.E. cannot afford to pay for the mediation.
- [32] I do not have before me a sufficient evidentiary record on which to conclude that the notice to mediate was served for an improper purpose. The most compelling concern raised by L.L.E.'s counsel is the suggestion that she, L.L.E., does not have an ability to pay for mediation. Counsel conceded that once the property division claims are resolved, either by agreement or after trial, L.L.E. will be in a different financial position. It seems to me that the most appropriate order to make in these circumstances is an order that R.P.E. is required to pay for the mediation up front, without prejudice to the right of either party to argue for a different allocation of that cost at the end of the case.
- [33] That is the conclusion of my ruling on the two contentious issues.

Summary

- [34] Because there is an application with a number of different components to it, I will go through the points in L.L.E.'s notice of application, and here I can indicate, Madam Clerk, that I have typed these out, and so I can email them to you if you can send me an email that I can reply to, so that you will not be struggling to try and keep up with what I say here, and of course this is subject to what the parties might have to say about the terms that I have expressed:
- (1) With respect to Points 1 through 6 in the notice of application, these relate to L.L.E.'s request for an order for the sale of the former family residence. This aspect of L.L.E.'s application is dismissed with L.L.E. having leave to renew the application before Justice Riley if R.P.E. fails to obtain a commitment letter from a reputable financial institution confirming that he has approval for a mortgage of up to 1.1 million in respect of the Property by no later than 28 January 2022. If R.P.E. fails to obtain a commitment letter, L.L.E. may renew her application for sale of the former family residence, and the matter may be scheduled for hearing at 9:00 a.m. or 9:15 a.m. on any date when Justice Riley is available to hear it.
 - (2) With respect to point 7 in the notice of application, which has to do with L.L.E.'s request for an order for payment of arrears of support out of the proceeds of sale of the former family residence. That aspect of the application is adjourned generally.

- (3) Dealing with Point 8 in the notice of application, L.L.E.'s request for an order that the special and extraordinary expenses for the child, H., date of birth [redacted], specifically include amounts paid for after-school care as required for L.L.E. to maintain her employment, that aspect of the application is granted on the condition that R.P.E. is to be given receipts for the payment of his share of this expense.
- (4) With regard to points 9 through 11 in the notice of application, which is L.L.E.'s request for an order appointing Dr. Rebecca England to prepare a report or a report under s. 211 of the Family Law Act, S.B.C. 2011, c. 25, to assess the needs of the child, H., date of birth [redacted], that application is granted on the condition that L.L.E. will pay up front for the cost of the report, without prejudice to the right of either party to argue at trial for allocation or re-allocation of that cost.
- (5) Referring to point 12 of the notice of application, L.L.E.'s request for an order requiring R.P.E. to produce financial information or records of various kinds, that request is granted on the following terms:
- (a) With respect to the documents requested in subparagraphs 12(i) to (iii) of the notice of application, R.P.E. shall ensure that all of the necessary information is furnished to his accountant by no later than 1 December 2021, and further he shall provide the requested financial statements and ledgers to L.L.E. forthwith upon receipt of same from his accountant.
- (b) With respect to the documents and information requested at subparagraphs 12(iv) to (viii) of L.L.E.'s notice of application, R.P.E. shall provide that information to L.L.E. by no later than 21 December 2021, which is 28 days from today's date. So that is the information about R.P.E.'s personal finances and personal expenditures, and I see no reason why R.P.E. cannot be required to provide that information sooner than with respect to the information that has to go through the accountant.
- (6) Referring to point 13 of L.L.E.'s notice of application. L.L.E. is granted leave to amend her notice of family claim filed 30 April 2019 to include a claim for occupational rent, and R.P.E. is granted leave to file a counterclaim.
- (7) In relation to point 14 of L.L.E.'s notice of application, that aspect of the application is granted in part, in that R.P.E. is required to pay the fees and expenses in connection with the mediation per the notice to mediate dated 8 October 2021, without prejudice to the right of either party to argue at trial for allocation or re-allocation of that cost.
- [35] So that concludes my ruling. My sense is that success was divided and with respect to the question of costs, I would be inclined to indicate that costs of the application should be in the cause, subject to any submissions of either party if they wish to make them.

"Riley J."

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