

CANADA / JUDGMENT

Larkin v. MacInnes

2023 BCSC 174

COURT

Supreme Court of British Columbia

DECIDED

25 January 2023

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2023 BCSC 174 Larkin v. MacInnes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Larkin v. MacInnes,

2023 BCSC 174

Date: 20230125

Docket: E220548

Registry: Vancouver

Between:

Kathleen Celeste Larkin also known as Kathleen Celeste MacInnes

Claimant

And

Peter Malcolm MacInnes

Respondent

Before: The Honourable Madam Justice J. Hughes

Oral Reasons for Judgment

Counsel for the Claimant:

S. Pollard

Counsel for the Respondent:

A. Simoes

T. Affoo

Place and Date of Hearing:

Vancouver, B.C.

January 11, 2023

Place and Date of Judgment:

Vancouver, B.C.

January 25, 2023

Overview

- [1] This is a summary trial brought in the context of a family claim in which the parties seek a divorce pursuant to s. 12 of the Divorce Act, R.S.C. 1985, c. 3, and a determination of the respondent's entitlement to spousal support pursuant to s. 15.2 of the Divorce Act.
- [2] More specifically as to spousal support, the respondent seeks an order that the claimant pay spousal support from the date of separation on both a compensatory and needs basis, for an indefinite period, at the high range of the Spousal Support Advisory Guidelines ("SSAG"). The respondent also seeks to impute income to the claimant of at least approximately \$300,000, and an order that spousal support be reviewed on an annual basis.
- [3] The claimant agrees that the respondent is entitled to spousal support on a needs basis for an indefinite period, but says that it should be payable at the low range of the SSAG. The claimant says her annual income for spousal support purposes should be \$210,000, and does not agree to review on an annual basis.

Suitability for Summary Trial

Legal Principles

- [4] The parties have each brought summary trial applications under Rule 11-3 of the Supreme Court Family Rules, BC Reg 169/2009. Rule 11-3(15)(a) requires the Court to consider whether a matter is suitable for determination by summary trial, providing as follows:
 - (15) On the hearing of a summary trial application, the court may
 - (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- [Emphasis added.]

- [5] A critical issue facing the court on a summary trial application is whether it can find the facts necessary to decide the disputed issues: 0878754 B.C. Ltd. v. Nishin Kanko Investments Ltd., 2016 BCSC 2094 at para. 45 [Nishin]. Consent of the parties to try a case by summary trial is an important consideration, but is not determinative. It is for the court--not the parties--to decide whether the case is suitable for summary trial. As Justice Goepel noted in Main Acquisitions Consultants Inc. v. Yuen, 2022 BCCA 249 [Main Acquisitions], interpreting the equivalent provision of the Supreme Court Civil Rules, B.C. Reg. 168/2009, the court acts as a gatekeeper and should not grant judgment if it cannot find the necessary facts or it would be unjust to do so:
- [89] The Rule makes the judge a gatekeeper. It is a crucial role. Notwithstanding the wishes or indeed often the vociferous submissions of counsel, judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so. As noted by Justice Southin in her typically forthright language in Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited, 2002 BCCA 138 [Bacchus]:
- [28] . . . the judge before whom a proceeding of this kind comes must not think of himself or herself as a puppet in the hands of the litigants.
- [6] A summary trial, though conducted on affidavit evidence, is still a trial and the parties are expected to "put their best foot forward" in terms of proving their claim or defence: Nishin at para. 46.
- [7] An application for summary trial seeks a final order and as such, pursuant to Rules 10-4(12) and (13), an affiant may only state what they would be permitted to state in evidence at a trial:

Limitation on contents of affidavit

- (12) Subject to subrule (13), an affidavit must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at a trial.

Exception

- (13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if
- (a) the source of the information and belief is given, and
 - (b) the affidavit is made
 - (i) in respect of an application that does not seek a final order or a change in, or suspension or termination of, a final order, or
 - (ii) by leave of the court under Rule 10-3(4)(e) or 14-7(71)(a).

[Emphasis added.]

- [8] Moreover, the fact that exhibits are attached to an affidavit does not make them admissible evidence on a summary trial: Main Acquisitions at paras. 94-97. This is particularly the case with respect to documents that are relied on for the truth of their contents, or that purport to provide evidence in nature of expert opinion. With respect to expert opinion evidence, it can be tendered by way of expert report in support of a summary trial under Rule 11-3(5)(e), provided that, unless the court otherwise orders, the report complies with the requirements of Rule 13-6(1).

Analysis

- [9] I have reviewed the evidence filed by the parties in support of this summary trial and concluded that this matter is not suitable for determination under Rule 11-3. More specifically, I am unable to grant judgment--and in doing so make the final orders the parties seek--on the basis of an evidentiary record that does not comply with Rules 10-4(12) and (13), is incomplete in material respects, contains conflicts that cannot be fairly resolved with reference to documentary or other evidence before me, and does not permit me to find the facts necessary to grant judgment.
- [10] As a preliminary point, in multiple instances, the affidavit material put before the Court on these applications did not comply with Rules 10-4(12) and (13), but was relied on for the truth of the contents contained therein. By consequence, the Court was left with an insufficient evidentiary record upon which to find the facts necessary to grant the spousal support order sought.
- [11] In particular, the respondent simply appended documents to his affidavit without any apparent consideration of the admissibility or use to which those documents could properly be put on a summary trial, i.e. whether they were admissible for the truth of their contents in the form tendered.
- [12] By way of but one example, the respondent appended a printout from the website, www.islandhealth.ca/careers, containing the BC Registered Nurse Wage Scale for 2021 along with various other unidentified pages containing what appear to be wage grids from a collective agreement. He relied on this information for the truth of the wage information contained therein in support of his claim for compensatory support, namely to prove that had he not given up his career as a registered nurse during the parties' marriage, he would presently be working in a more senior and financially lucrative role.
- [13] The claimant objected to the admissibility of these documents for the truth of their contents on the basis that they constituted hearsay and were not tendered in a manner that satisfied the business records exception thereto. The respondent was unable to articulate a substantive response to the claimant's objection and conceded that this was not the best evidence available. However, the respondent maintained that it ought to nonetheless be admitted for the truth because in the context of a summary trial, litigants are trying to save money and thus need to "find ways to get evidence before the Court that doesn't cost a lot of

money". I do not accept this submission. The fact that this matter is proceeding by way of summary trial does not mean that the parties are at liberty to dispense with the rules of evidence or the applicable provisions of the Supreme Court Family Rules in the name of cost or expediency: *Arbutus Investment Management Ltd. v. Russell*, 2022 BCSC 72 at para. 48, *aff'd* 2023 BCCA 9.

- [14] The same issue arises with respect to the blood test results that the respondent attached to his affidavit. He conceded that that evidence did not in fact assist him in establishing that he suffers from Type 2 Diabetes or that this condition in turn causes neuropathy in his feet, which renders him unable to work as a paramedic or registered nurse. This leaves the record devoid of any admissible evidence on a point that is material to his claim for support on either a compensatory or needs basis. I accept that parties can testify to their respective medical conditions. However, where the impact of those conditions on their future earning capacity is disputed and final orders are sought, something more than unexplained laboratory test results and bare assertions from the parties themselves is required to enable the Court to find the facts necessary to grant judgment on a summary trial.

Conflict in the evidence re respondent's cessation of work

- [15] This matter is also, in my view, not suitable for determination by way of summary trial on account of conflicts in the evidence on a material point which turns entirely on a credibility assessment. In particular, the parties' evidence is diametrically opposed on the issue of why the respondent quit working as a registered nurse during their marriage, and what assurance--if any--was made to him in that regard by the claimant.
- [16] The claimant says that in 2009, the parties discussed the respondent reducing his working hours--he was at the time working part time on a multi-week rotation--to be more available to transport the children to their activities. She says that she "never agreed to be the sole financial provider for our family for the duration of my working life and the marriage". The respondent's evidence is to the opposite effect. He says he left his nursing career because his area of practice was going to start accepting "superbug" patients, and they did not want to risk exposing the claimant to infection given her medical history. By consequence, the respondent says the claimant "asked me to leave my employment and assured me that I would not have to work again in our marriage. My role would be to support her and our children". He goes on to say that he relied on the claimant's promises to that effect and would not have quit working otherwise.
- [17] The conflict in the parties' evidence on this point is material to determining the strength of the respondent's claim for compensatory support, and in turn the range at which support should be assessed. This conflict cannot be resolved by reference to other evidence--documentary or otherwise--before me. It would require me to make findings of credibility based solely on the parties' respective affidavits. Indeed, the respondent admitted that credibility is a significant issue on this point, but suggested that the Court could simply prefer one affidavit over the other. This is not a permissible approach. As the Court of

Appeal stated in *Cory v. Cory*, 2016 BCCA 409:

- [10] On this appeal, the respondents argue that the matter was suitable for determination under Rule 9-7 on the basis that the judge was able to make the necessary findings of fact. On my reading of his reasons, however, I do not believe that the judge made any findings on the disputed evidence. Indeed, I do not see how the judge could have properly resolved the conflicts on a summary trial application when there was no documentary evidence, evidence of independent witnesses or undisputed evidence that undermined the affidavit evidence of one of the parties on critical issues, or some other basis for preferring one affidavit over another. As stated in the seminal decision of *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 1989 CanLII 229 (BCCA), 36 B.C.L.R. (2d) 202 at 219, 36 C.P.C. (2d) 199 at 216 (C.A.), a summary trial judge should not simply choose between one affidavit and another.

[Emphasis added]

Deficiencies in the factual record

- [18] While the claimant agrees that the respondent is entitled to indefinite spousal support on a needs basis, this does not assist in rendering the matter suitable because the respondent also seeks compensatory support and the parties disagree on the range at which support should be paid.
- [19] The appropriate range under the SSAG is at least partially dependent on the strength of the respondent's claim for compensatory spousal support. The lack of admissible evidence as to the impact of the respondent's diabetes on his ability to work as a paramedic or registered nurse renders me unable to find the facts necessary to determine the appropriate range of support on either basis. This is because where proven, limitations on income or earning capacity may result in an award at the higher end of the range in terms of both amount and duration even for non-compensatory support. In the same manner, while I accept that it is uncontested that the claimant's own medical issues have affected her earning capacity, and may well continue to do so, there is a lack of any independent evidence--e.g. clinical records or evidence from her medical practitioners--as to the likely impact of her condition on her ability to practice law in the future.
- [20] The circumstances of the parties' adult son and whether he will shortly become a child of the marriage again, provide a further example of factual deficiencies in the record that render this matter unsuitable for determination by summary trial. Their son is 21 years old and until recently, had been living in Saskatchewan and playing hockey with the Western Hockey League ("WHL"). He was recently released from the WHL, and the parties expect that he will now pursue post-secondary education, likely commencing in September 2023.
- [21] Counsel for the claimant made submissions that their son will likely attend school in Vancouver or Saskatchewan and that she expects to be solely responsible for supporting him. However, the record is devoid of evidence confirming that their son will in fact be

starting post-secondary education in the coming months and, if he does, where he will be studying and what his living situation will be. The lack of evidence on this point negatively impacts the Court's ability to determine which formula--with child or without child--should be used under the SSAG. As noted in the SSAG, the dividing line between the two formulae is whether there are any children of the marriage, and thus concurrent child support obligations at the time spousal support is determined.

- [22] I cannot, on a summary trial application such as this, simply rely on counsel's submissions as a substitute for a proper evidentiary record. Nor is it sufficient, in my view, to make a final order based on an evidentiary record that the parties acknowledge does not represent the current state of affairs and is expected to change in the near future in a way that may well materially affect the calculation of spousal support under the SSAG.

Difficulties in imputing income to the Claimant

- [23] The parties have significantly different positions on their respective past and future incomes for the purpose of determining spousal support. This is particularly the case for the claimant as payor spouse, where the difference is approximately \$100,000.
- [24] The respondent submits that the claimant's 2022 income is likely to exceed \$300,000. However, he also says there is presently no means to actually determine her 2022 income because of insufficient disclosure of financial statements for her law corporation. The claimant advises that she has not produced financial statements for her law corporation for the 2022 fiscal year because they are not yet available. She has, however, provided her billings for that year and estimates that she will take approximately \$210,000 in income from the law corporation.
- [25] The issue of incomplete financial disclosure appears to have only been raised by the respondent on the eve of the hearing. The respondent says the solution to the deficiencies in the financial disclosure is to impute income to the claimant of an amount based on her 2022 billings alone, then order of the annual production of financial information and review by the court. I disagree. Imputing income for self-employed individuals is a complex and factually intensive exercise that is not amenable to determination based on incomplete financial disclosure or assumptions. Furthermore, as the Supreme Court of Canada noted in *Leskun v. Leskun*, 2006 SCC 25 at para. 39, trial courts should resist making orders subject to review under s. 15.2 of the Divorce Act; and rather, insofar as possible, should resolve the controversies before them and make an order which is permanent, subject only to change on proof of change of circumstances.

[26] I conclude that I am not able to find the facts necessary to determine what income ought to be attributed to the claimant from her law corporation for the 2022 fiscal year or that, given her recent health issues, past years' income will be representative of her future earning capacity. It is not, in my view, appropriate to make final orders based on incomplete financial disclosure and "expected" income, particularly where the parties' positions differ by approximately \$100,000.

Conclusion on Suitability

[27] Considered as a whole, the record put before the Court on this summary trial does not enable me to find the facts necessary to determine the respondent's entitlement to spousal support or attribute income to the claimant for that purpose. While I am sympathetic to and appreciate the parties' need for closure and their interests in securing judgment in a manner as expeditious and inexpensive as possible, I am not satisfied that I can find the facts to make the final orders they seek or that it would be just to do so.

[28] To be clear, I do not accept counsel for the respondent's submission that because this is a summary trial, some lesser evidentiary standard ought to apply. As this Court has made clear, a summary trial is nonetheless a trial; the parties need to treat it as such and must put their best foot forward: *Arbutus Investment Management Ltd.* at para. 48. In the result, I conclude that the deficiencies and conflicts in the evidentiary record before me render this matter unsuitable for determination by summary trial.

Divorce

[29] I have considered whether I can nonetheless grant the parties the divorce sought, which is proceeding by consent. I am advised that the parties reached agreement on division of property. However, I am also advised that the necessary transfers and documentation, particularly with respect to division of TFSAs and RRSPs have not been completed. For tax purposes, I understand that RRSPs need to be rolled over while the parties remain spouses, such that the granting of an order for divorce may affect their ability to effect a spousal rollover as intended.

[30] In the circumstances, I decline to grant an order for divorce at this time. The parties are at liberty to reapply for a divorce in chambers or by desk order once the outstanding issues as to division of property have been resolved.

Conclusion

[31] Both parties' applications for summary trial are dismissed. Each party is to bear their own costs.

"Hughes J."

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