
CANADA / JUDGMENT

M.E.C. v. D.E.J.

2007 BCSC 526

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 526 M.E.C. v. D.E.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.E.C. v. D.E.J.,

2007 BCSC 526

Date: 20070420

Docket: 64178

Registry: Kelowna

Between:

M.E.C.

Plaintiff

And

D.E.J.

Defendant

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiff:

W.C. Shields

Appearing on his own behalf:

D.E.J.

Date and Place of Hearing:

April 10, 2007

Kelowna, B.C.

Introduction

- [1] The applicant plaintiff is seeking variation of interim spousal and child support. She alleges that the defendant's circumstances have changed as a result of his having received a significant sum of money after selling a business. She also seeks a variety of orders, all of which amount to her receiving a share of the value of the alleged family assets in advance of judicial determination that they are family assets and before those assets have been the subject of apportionment. Finally, the plaintiff seeks orders requiring the defendant to give discovery of a number of documents relating to corporations in which the defendant has an interest as a shareholder.
- [2] The defendant takes the position that the plaintiff's evidence is uniformly misleading. He argues that the plaintiff has engineered circumstances so as to place him in severe economic straights. The defendant also says that because the plaintiff previously disobeyed a restraining order concerning assets, she should not be allowed the relief she currently seeks.

The Facts

- [3] These parties' history up to October 2006 was fully canvassed by Barrow J. in *M.E.C. v. D.E.J.*, 2006 BCSC 1802. He recounted that history in the context of the parties' cross-applications for spousal support and custody of their two children. No purpose would be served by repeating that history here. Suffice it to say that the parties' children are 6 and 8 years old. The plaintiff did not have a significant outside-the-home work history prior to the couple's separation in November 2005. She currently works as an administrative assistant and earns approximately \$28,000 per year. The defendant is 48 years old. He has been a successful businessman, and he holds several university degrees. For reasons that the defendant did not adequately explain to Barrow J., he was, in October 2006, unemployed.
- [4] Barrow J. determined that the defendant should be working and that he should be making on the order of \$75,000 per year. Barrow J. ordered that the defendant pay child support on that imputed income. The basic child support order was for \$1,120 per month. In addition, the defendant was ordered to pay \$420 per month pursuant to s. 7 of the Guidelines as his share of the children's daycare expenses. The defendant was also ordered to pay \$500 per month spousal support to the plaintiff.
- [5] Barrow J. specifically noted that earlier in 2006, the plaintiff breached a mutual restraining order relating to assets affected by the family litigation. This is the breach about which the defendant bitterly complains. The plaintiff refinanced the matrimonial home for \$250,000.

She used some of the proceeds of the refinancing to pay living expense debts, and she retained \$50,000 in a Guaranteed Investment Certificate. The evidence on the application before Barrow J. did not disclose the amount of the original debt on the matrimonial home, but in the course of the present application, it came to light that the original mortgage debt was approximately \$100,000. Earlier in October, the plaintiff received permission from the court to access \$10,000 from the GIC.

- [6] After considering the parties' evidence on the issue, Barrow J. varied the restraining order so as to authorize the plaintiff to make use of the funds in the GIC to pay spousal and child support. He did that because there was a possibility that the defendant would not pay that support voluntarily. Barrow J. also authorized the defendant to have \$5,000 from the GIC for his short-term living expenses. At the end of the day, then, \$35,000 remained in the GIC.
- [7] Several significant events have occurred since the making of the October 2006 interim order. The first, and perhaps least helpful event, was the postponement of the trial. That trial was to start on December 4, 2006. Unfortunately the combination of the inadequate state of the defendant's disclosure and his losing legal representation resulted in the trial's adjournment. The trial is now set for August 20, 2007.
- [8] The second significant event to occur after Barrow J.'s order was the defendant's sale of his one-half interest in a hotel property located in Ontario. The plaintiff was aware of this sale and she was, apparently, in favour of it. She asserts that the hotel was a family asset and that the proceeds of sale must be treated accordingly. The defendant says that the hotel was not a family asset, and he should be allowed to deal with the proceeds as he sees fit.
- [9] The defendant received \$750,000 for the sale of his interest in the hotel. As the sale was closing, the plaintiff wanted to secure the funds while they were in Ontario, but for reasons that are not entirely clear to me, the counsel she retained in Ontario was either not able or not willing to take steps to ensure that the whole sale proceeds were held in trust. What did happen was that \$385,000 was paid to the defendant - he received that sum in late 2006 or early 2007. The remainder of the sale proceeds, some \$365,000, remains in the defendant's Ontario lawyer's trust account. That lawyer is a Mr. Lawrence Phillips of Thunder Bay, Ontario. The exact trust terms relating to those funds were not fully described to me. The parties agree, however, that Mr. Phillips is not to disburse the funds until the parties' family litigation is resolved.
- [10] According to the defendant's evidence, he has only \$84,200 left from the \$385,000 he received from the hotel sale. He says that he has paid about \$275,000 to persons to whom he owed money, that he has given his lawyers about \$23,000, that he has paid \$1,900 on a credit card debt, and that he has spent about \$1,400 on the parties' children. The defendant maintains that he needs the remaining funds to live on. He notes that he has not filed income tax returns since 1997. He expects to have significant tax liabilities from that failure. One would expect that he may also have a tax liability for the capital gain that he realized on the sale of his interest in the hotel.

- [11] The third significant event to occur since the interim support orders were made in October 2006 is that the parties' matrimonial home has been sold. The sale is expected to close on April 30, 2007. The sale price is \$700,000. It remains to be seen whether the plaintiff will be required to account for all or a portion of the \$250,000 refinancing she did in early 2006, but it is certain that the \$250,000 will be paid to the bank out of the sale proceeds. The net proceeds are expected to amount to approximately \$400,000.
- [12] The plaintiff has been drawing on the GIC for support payments since October 2006. There is still about \$6,000 remaining in it. The plaintiff anticipates that she will incur a number of moving costs when she leaves the matrimonial home. She wishes to purchase another residence and has her eye on one that will cost \$367,000. The plaintiff says that in order to get an affordable mortgage, she will need to make a down payment of \$130,000. The plaintiff also says that she expects to have to pay an expert \$10,000 to \$15,000 to evaluate the interest that the defendant has in each of three separate corporations. The plaintiff argues that she needs to have access to the funds deriving from the defendant's hotel sale in order to meet these various expenses.

Discussion

- [13] The defendant maintains that, in her effort to obtain what she wants, the plaintiff has lied or misrepresented numerous facts. The defendant urges me to disregard the plaintiff's affidavit evidence. I am not prepared to accept or reject either party's evidence at this stage of the proceeding - an assessment of credibility is best and most properly done at trial.
- [14] The defendant also repeatedly refers to the plaintiff's breach of the restraining order when she refinanced the matrimonial home. He urges me to conclude that the plaintiff cannot be trusted to be forthright because she has a history of ignoring court orders.
- [15] The consequence, if any, to the plaintiff for breaching the restraining order will be meted out by the trial judge. In the interim, I am satisfied with Barrow J.'s management of that issue: he noted that the refinancing was apparently contrary to the restraining order, but he acknowledged the necessity of allowing the plaintiff to access at least \$45,000 from that refinancing. That necessity arose out of the defendant's failure to comply with the court's order that he should pay child and spousal support. Therefore, rather than forgive the breach, Barrow J. simply dealt with it in a pragmatic way. I agree with that approach, and for that reason, my decision in this application will not turn on the refinancing issue. That issue will be for the trial judge to decide.
- [16] That said, I do think that the defendant is entitled to an accounting from the plaintiff of her use of the approximately \$100,000 difference between the \$250,000 she gleaned from the refinancing and the combination of the approximately \$100,000 pre-existing mortgage and the \$50,000 GIC. The plaintiff must provide that accounting to the defendant, accompanied by copies of all documents relating to her use of the \$100,000 within 14 days of the release of these Reasons.

- [17] The plaintiff has moved at Items 1 and 2 of her motion to vary the spousal and child support payments. Frankly, I do not perceive that the parties' circumstances have significantly changed since the support orders were made in October 2006. The defendant's business interest in the Ontario hotel has simply been converted from a shareholding to cash. His ability to earn income has not changed, and it was on that basis that the support orders were made. The plaintiff's circumstances may change after the matrimonial home is sold, but her evidence did not address those potential changes in any detail. There was certainly not enough information contained in the plaintiff's materials to conclude that her need for spousal support has or will change so much as to necessitate a variation of the spousal support order. In any event, the trial date is reasonably close, and there is little utility to be had in fine-tuning support at this stage of the litigation. Items 1 and 2 of the plaintiff's notice of motion are therefore dismissed.
- [18] At Item 3 of her notice of motion, the plaintiff seeks an order that the defendant post further security for his obligation to pay support. There is \$6,000 remaining in the GIC. That sum is sufficient to meet the defendant's support obligations for the next three months. It takes the plaintiff through to the end of July 2007. The trial is set for August 20, 2007. If the plaintiff feels it necessary to further encroach on the parties' capital for support prior to the trial, she might consider making an application then when the need is extant. At present it is not. Item 3 of the plaintiff's notice of motion is therefore dismissed.
- [19] Item 4 of the notice of motion seeks an order that the defendant pay the \$385,000 he received from the hotel sale into court or into a lawyer's trust account. The defendant does not have the full \$385,000 any longer. His use of those funds may be the subject of sanction at trial, but at this point, it would be fruitless for the court to order the defendant to pay into trust a sum of money that he does not possess. Item 4 of the notice of motion is dismissed.
- [20] Item 5 of the notice of motion requests an order that Mr. Phillips transfer the \$365,000 that he holds in trust to the plaintiff's lawyer's trust account, to be held there pending resolution of the parties' family litigation. The evidence in this application was not adequate to satisfy me that I have a complete understanding of the trust conditions binding Mr. Phillips' use of those funds. It is possible that he holds those funds on trust conditions that benefit the defendant and one or more other parties. An order requiring Mr. Phillips to transfer the money to B.C. might impair the other party's interests. Certainly no application for this sort of relief ought to have been brought to court without first giving Mr. Phillips notice. The plaintiff appears to have made no effort to alert Mr. Phillips.
- [21] However, if there are no other calls on the money in Mr. Phillips' trust account, then there is no good reason that the money should stay in Ontario, and no reason that it should not be transferred here.
- [22] In order to stay clear of impinging on possible third-party interests, I will make an order that within seven days of the release of these Reasons, the defendant shall give Mr. Phillips his irrevocable written instruction to transfer the \$365,000, plus any interest it has earned, to

the plaintiff's solicitor in trust. The defendant will immediately supply a copy of that instruction to the plaintiff's solicitor. In the event that Mr. Phillips is capable of complying with the defendant's instruction, the plaintiff's counsel will deposit those funds into an interest bearing trust account and will not disburse or otherwise deal with those funds, except upon written authority by both parties or upon further order of this court.

- [23] The plaintiff's notice of motion at Items 6, 7 and 8 seek orders that she receive a total of \$320,000 from the \$385,000 and the \$365,000 funds. She asserts that she needs \$20,000 to retain experts for trial; \$25,000 for moving expenses, child care, and debts and liabilities; and \$275,000 for a down payment on a residence for her and the children. The plaintiff's claims for these funds cannot be allowed. That is because the proceeds from the hotel sale are not necessarily a family asset. It would be entirely inappropriate for the plaintiff to receive, in advance of trial, one half of the value of an asset whose character in the litigation is hotly contested and is not yet determined. Those items of relief are dismissed.
- [24] Nevertheless, it is apparent that the plaintiff will require some money to establish a new residence for herself and the parties' children. The approximately \$400,000 net proceeds from the expected sale of the parties' house will, I am quite sure, be a family asset. The plaintiff is likely to be entitled to one half of that net equity. Against that entitlement, she may have to make good to the defendant one half of the \$100,000 she spent from her refinancing arrangement. It is likely, therefore, that no matter what else is decided in this case, the plaintiff will come out with at least \$150,000 from the net proceeds of the sale of the matrimonial home. I can see no good reason why she and the children should be discommoded by delaying her access to those funds in order to secure their living arrangements. Therefore, I order that the plaintiff may access up to \$130,000 from the net proceeds of the house sale, and that the plaintiff may use that fund for no purpose other than to make a down payment on the purchase of another residential property. Further, the plaintiff may access up to \$20,000 from the net proceeds of the house sale for no purpose other than to pay the expense of cleaning the former matrimonial house prior to the possession date and of moving the household contents to the replacement property. The plaintiff must maintain an accounting of her use of that portion of the \$130,000 and the \$20,000 funds, and she must produce that accounting to the defendant upon demand.
- [25] I note that in the course of argument the defendant complained that it would be unfair for the plaintiff to have money to buy another residence when he had no money and could not buy a house. To that I reply that the defendant did not make an application to access any part of the net proceeds of the sale of the matrimonial home. The defendant cannot credibly complain about not getting something he never asked for.
- [26] Item 9 seeks an order that the defendant deposit \$50,000 from the \$385,000 fund as security for his ongoing support obligations. The answer to that request is found in the discussion of Item 3.

- [27] I also note that in October 2006, the plaintiff had \$35,000 available to her to pay spousal and child support. The court authorized her to make use of that fund to pay support. The total support amounted to \$2,020 per month. If the plaintiff has only \$6,000 remaining in the GIC now, then she must have withdrawn \$29,000. If the withdrawals started in October 2006 and included April 2007 for a total of seven months, then, since the interim support order was made, the plaintiff has taken an average of \$4,140 per month out of the GIC. If my arithmetic is correct, rather than only \$6,000, there ought to be about \$20,000 left in the GIC. The plaintiff appears to have drawn down the GIC at a faster rate than she was authorized to do.
- [28] Item 9 is dismissed.
- [29] The plaintiff's Item 10 asks for an order that the defendant provide an accounting of his use of the \$385,000 fund since he received it. The defendant's April 2, 2007 affidavit provides that accounting at para. 19 and Exhibit "G". The defendant has, of course, an ongoing obligation to give the plaintiff disclosure of any and all documents relating to the defendant's use of that fund. Accordingly, the defendant shall make discovery to the plaintiff of all documents concerned with his use of that fund.
- [30] At Item 11, the plaintiff asks the court to sanction the defendant for his use of that portion of the \$385,000 that he has dispersed since receiving it. That determination is, in my view, better left to the trial judge who will have the advantage of assessing the character and quality of these parties in person. The trial judge will also be able to assess whether any of the debts the defendant says he paid were actual debts and whether they should be included in determining the net value of any family assets.
- [31] I will, however, order that the defendant be restrained from making use of the remainder of the \$385,000 currently in his possession or control for any purpose other than meeting his necessities of life between now and the trial. Necessities of life mean nothing more than modest and reasonable expenses for accommodation, food, transportation and personal care totalling no more than \$2,000 per month, plus, of course, payment of the defendant's \$2,020 spousal and child support obligation.
- [32] Item 12 of the notice of motion seeks an order that the defendant produce his 2002 to 2006 income tax returns. The defendant admits that he has not filed income tax returns for some time and says that it will be some time yet before he can get an accountant to prepare them for him. In my opinion, it is simply not reasonable for the defendant to fail to comply with his duty to file income tax returns and then to use that failure as an excuse to delay discovery of income information to the plaintiff. I am concerned, however, that an order compelling the defendant to file his past-due returns may increase his jeopardy of prosecution by the taxation authorities. I will decline to order that he file those returns. I will, however, order that the defendant prepare and deliver to the plaintiff working copy returns that, to the best of his knowledge and in accordance with accounting advice, could be filed as his actual returns for the years 1997 - 2006 inclusive. I further order that the defendant prepare those returns and deliver them to the plaintiff within four weeks of the

release of these Reasons. I authorize the defendant to make use of no more than \$15,000 from the \$385,000 fund remaining in his possession to pay for professional advice and assistance in preparing those returns. I further order that the defendant give discovery to the plaintiff of any and all documents relating to the preparation of those returns, together with copies of any invoices or billings he may receive from his tax preparation advisor.

- [33] At Item 13 of the notice of motion, the plaintiff seeks an order that the defendant provide various financial documents relating to three corporations in which the defendant is a shareholder. The defendant maintains that there is little point in producing that information because two of the corporations are defunct and the third is not a family asset because he owned shares in it long before the parties married. I cannot say whether the defendant's assertions are true - that will be for the trial judge to decide. I can say that there is no question but that the plaintiff is entitled to discovery of such information as the defendant may be entitled to obtain from these corporations. That information may be relevant to whether the defendant's shares are or are not family assets and if they are, how much they are worth. The defendant must, therefore, make discovery of any and all documents in his possession relating to those companies. The defendant shall give discovery within seven days of the release of these Reasons. The defendant must certify under oath or affirmation that he has, in fact, given complete discovery of all documents in his possession.
- [34] That said, I anticipate that the defendant will not diligently pursue discovery of the documents the plaintiff seeks if those documents are in the control of third parties. I will, therefore, order that the defendant must execute authorizations to release to the plaintiff the information and documents he is entitled to receive or inspect by virtue of his shareholding in each of the companies known as Knights of the Round Table Inc., FWS Community Partners Inc., and 3139394 Manitoba Ltd. The defendant must disclose to the plaintiff the parties or persons who possess or control the documents contemplated by those releases. It will be for the plaintiff or her counsel to draft those releases so as to capture the relevant documents. Within seven days of the release of these Reasons, the defendant will provide the plaintiff with a detailed and complete list of those parties and persons who control or possess the relevant documents relating to the three companies. The defendant will execute and return the releases to the plaintiff within three days of receiving them. The plaintiff will immediately provide the defendant with copies of any documents received by use of those releases. The cost, if any, of obtaining those documents will be in the plaintiff's account. Those costs may or may not be the subject of argument at the conclusion of the trial.

Costs

- [35] Finally, the plaintiff seeks the costs of this application. The support orders will not be varied, and the plaintiff will not achieve early distribution of the value of the disputed family assets. The plaintiff has, in my view, substantially failed to achieve the result she sought. The defendant successfully resisted the majority of the relief claimed, and he is entitled to his costs in the cause.

"P. Rogers, J."

The Honourable Mr. Justice P. Rogers

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