

CANADA / JUDGMENT

M. M. E. v. S. B. T.

2024 BCSC 1567

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1567 M. M. E. v. S. B. T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M. M. E. v. S. B. T. ,

2024 BCSC 1567

Date: 20240710

Docket: 244694

Registry: Victoria

Between:

M. M. E.

Claimant

And:

S. B. T. and T. B. E. Ltd.

Respondents

Before: The Honourable Justice Wolfe

Oral Reasons for Judgment

Counsel for the Claimant:

D. Harry

Counsel for the Respondents:

M. Norton

Place and Date of Hearing:

Victoria, B.C.

July 4, 2024

Place and Date of Judgment:

Victoria, B.C.

July 10, 2024

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- [1] These reasons have been edited for publication. To protect the privacy and well-being of the children, I have initialized the names of the parties in the style of cause and have used initials for the parties and anonymized certain personal or identifying details in this judgment.
- [2] THE COURT: These are my oral reasons for judgment in relation to an interim application in a family law matter. They were prepared on an expedited timeline to ensure the parties would have an answer to the question about living arrangements posed by the respondent's application. In the event a transcript is ordered, I reserve the right to edit for clarity, grammar and references, but the substance and outcome of my decision will not change.
- [3] I was also advised this morning by counsel for Ms. E. that if the Court finds continued cohabitation to be a practical impossibility, then Ms. E. will consent to the proposal that Mr. T. pay funds towards her accommodation. As I had already prepared these reasons for judgment based on the positions taken at the hearing, I will provide them in full.

Overview

- [4] The respondent, Mr. T., applies, under s. 90 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], for an order of exclusive occupancy of the family residence located in North Saanich, British Columbia (the "Family Residence"). Recognizing the financial and personal circumstances of the claimant, Ms. E., if granted occupancy, Mr. T. also seeks an order under which he proposes to provide what are essentially bridging funds to Ms. E., to assist her in renting alternative accommodations between the date of any interim order and the trial in this matter. The trial is currently set for five days, beginning November 3, 2025.
- [5] Mr. T. says Ms. E.'s behaviour at the Family Residence-, particularly since March 2024, has been disruptive and destructive, demonstrating a lack of any appreciation for boundaries or the impacts of her behaviour. Of particular concern, Ms. E.'s behaviour has negatively affected Mr. T.'s two teenaged children, who live with him almost full-time from at least May to August because of their competitive swimming schedules. The impacts on the children have been both physical (for example, sleep disturbances) and in terms of their emotional well-being and comfort in their own home.
- [6] Ms. E. opposes the application, primarily on the basis she maintains continued cohabitation is not a "practical impossibility". She suggests any concerns about conduct are more appropriately addressed through conduct orders, with liberty to the parties to return to Court on an expedited basis in the event of a breach. If continued cohabitation is not possible, at the hearing, Ms. E. took the position she was the preferred occupant including because of her health issues and Mr. T.'s significantly greater financial resources. She now consents.
- [7] For the reasons that follow, I am satisfied Mr. T.'s application should be granted, such that he and his children have exclusive occupancy of the

Family Residence. To mitigate the impact of that conclusion on Ms. E., I am also satisfied I should order Mr. T. to make an interim payment to Ms. E. to assist her with alternate accommodations pending trial.

Factual background

- [8] The parties provided relatively detailed affidavit evidence on this application, including their respective characterizations of certain events. Although there are some disputes between the parties, many of them are not material to the issues I must determine. The summary that follows is necessarily high-level, focusing on the key points that are relevant to the present application, but I have reviewed and considered all materials.
- [9] The parties entered into a relationship around December 1, 2019 and separated on September 4, 2023. There is a dispute about how and when Ms. E. came to live with Mr. T., but it is common ground that at a certain point, she moved into the main portion of the Family Residence with him.

- [10] Mr. T. owned the Family Residence before the parties' relationship began. The Family Residence has a main portion, as well as a self-contained suite on the same level. There is also a yard with some gardens.
- [11] The parties have no children together. As stated above, Mr. T. has two teenage children from a previous relationship. Mr. T. and the children's mother share parenting, and the children split their time between the two households. However, the children are competitive swimmers, and during the swim season from at least May to August, they reside primarily with Mr. T. as he takes them to swim practice four days a week at 5:45 a.m.
- [12] Ms. E. has a teenage daughter from a previous relationship. She lived with the parties for a period of time, occupying what had formerly been the office in the main portion of the Family Residence. When the parties separated, Ms. E. and her daughter moved into the suite. In or around March 2024, Ms. E.'s daughter moved out and now lives elsewhere. Around the same time, Ms. E. became involved in a new relationship and her current partner is often at the suite.
- [13] Mr. T. was previously employed as a hotel manager for a business owned by his parents, earning an above-market salary of \$130,000 a year. The business was sold in early May 2024 and Mr. T. is not being kept on by the new owner. In his May affidavit, he deposes he expected to be looking for new work through summer 2024; no updated information about employment was provided before the hearing. Mr. T. is not certain what he will do next or what his future income level will be. Mr. T. has significant assets totalling \$2.8 million, including a strata property at Mt. Washington in addition to the Family Residence, multiple vehicles and a large RRSP, as well as some savings. Most of these assets are claimed to be excluded property. Mr. T. also has almost \$400,000 of secured debt in financing for the Family Residence and monthly expenses of almost \$14,000, including about \$4,500 per month in costs associated with the Family Residence.
- [14] Ms. E. is not currently employed. At one point, she worked for the business owned by Mr. T.'s parents, and has also worked in a number of other capacities. She applied for disability benefits but was denied; she advises the appeal process is not complete. She receives a rental subsidy of \$421 per month, and since February 2024, Mr. T. has provided Ms. E. with voluntary payments of \$2,000 per month. She has no significant assets and has a negative net worth. It is not disputed that Ms. E. suffers from a number of health challenges, including but not limited to chronic pain, anxiety and panic attacks and other mental health conditions. She says her health conditions impair her daily functioning. She has provided doctor's letters that indicated in July 2023 she would not be able to work. A subsequent letter from June 2024 indicates she has made progress but opines that progress may be undermined by a requirement to move.

- [15] Mr. T.'s evidence identified a series of concerns with Ms. E.'s behaviour which he characterizes as having escalated in number and nature. In his view, they make continued cohabitation impossible. While this is not an exhaustive summary, the most significant concerns include the following:
- a) Excessively loud music: Mr. T. says Ms. E. will play her music at very loud levels in the suite, making it impossible to enjoy the main portion of the Family Residence. Mr. T. provided an audio recording at the hearing, which I reviewed. While it was not possible, as Ms. E.'s counsel argued, to determine exact noise levels, the level of the music that could be heard in the main portion of the Family Residence was clearly very loud and I find would objectively be disruptive.
 - b) Entering the main portion of the Family Residence: Mr. T. has installed security cameras in the yard and main portion of the Family Residence. Ms. E. has been caught on video camera in the main portion of the Family Residence when Mr. T. and the children are not there. In one still taken from the security camera on April 8, 2024, Ms. E. can be seen going through Mr. T.'s fridge. This occurred after Mr. T.'s counsel had written to Ms. E.'s counsel specifically requesting that Ms. E. cease her disruptive behaviour, which included entering the main portion of the Family Residence.
 - c) Destruction of certain property: Mr. T. says Ms. E. has destroyed property, such as a garden pot, digging through a planter and leaving a trail of dirt through the backyard to the suite door; pulling drawers out of the bathroom and then leaving them empty at the back door; and turning down or otherwise moving security cameras he has installed;
 - d) Loudly engaging in sexual relations, including through the night: Mr. T. says Ms. E. engages in sexual relations with her new partner in the suite in ways that create significant noise, and that this continues through the night in a way that disrupts the children's ability to sleep. This is even more concerning given their four days per week of early morning swim practices.
- [16] For the most part, Ms. E. does not deny the behaviour complained of, but characterizes either the behaviour, or its import, differently. For example, she asserts that while she does play music in her suite, it is not that loud. She admits that she has entered the main portion of the Family Residence, but says it has only been a couple of occasions. She also says she is not precluded from doing so in the absence of an order for exclusive possession.
- [17] Ms. E. admits she broke a garden pot and rummaged through a planter. However, she says the pot had been a gift to her and she dropped it by accident and she went through the planter looking for bulbs she had planted that had apparently been removed. She says she removed the drawers because it was easier to transport her things to the suite that way. She agrees that she turned the security cameras but says they were violating her privacy and making her feel awkward. I note that Ms. E. is claiming she has a right to privacy and to be comfortable while in Mr. T. and the children's main portion of the Family Residence, but she does not recognize any right they might have to privacy from her in their own living areas.

- [18] With respect to the loud noise from Ms. E.'s sexual relations with her new partner, Ms. E. admits they have sex, including through the night, but denies that it continues up to midnight. She says she has attempted to be respectful, but the walls are quite thin and therefore the children would have heard similar sounds of sexual relations when she and Mr. T. were together. There is no recognition of the impact on the children of hearing this particular type of noise from their father's former partner in their own home.
- [19] Mr. T. says the lack of recognition of the impacts and the failure to apologize or provide any assurances that the behaviour will not be repeated makes the conduct that much more egregious. While Ms. E.'s counsel suggested affidavits are not the appropriate places to make apologies or provide assurances, there are certainly examples in the caselaw, including recently in *Corness v. Sola*, 2024 BCSC 519, where a party took accountability for their behaviour and offered both an apology and an assurance against the conduct being repeated, and the Court considered that relevant to the practical impossibility analysis (at para. 68).

Issues

- [20] Mr. T.'s application raises two primary issues:
- a) Should Mr. T. be granted an order of exclusive occupancy?
 - b) If yes, should Mr. T. be ordered to pay Ms. E. funds on an interim basis to support alternate accommodations pending trial?
- [21] Each primary issue includes sub-issues which are addressed in my analysis below. The parties also made brief submissions respecting costs.

Issue 1: Order for exclusive occupancy

- [22] Section 90 of the FLA grants the Court discretion to make temporary orders respecting a "family residence". Section 90(1) defines a "family residence" as a residence that is "(a) owned or leased by one spouse or both, and (b) the ordinary place of residence of the spouses." Section 90(2)(a) permits a court to make an order granting a spouse exclusive occupation of a family residence for a specific period of time.
- [23] In her application response, Ms. E. took the position that an order under s. 90 is not available in this case because the suite is completely self-contained and is therefore more akin to a separate apartment than part of a larger "family residence". The argument was not pursued in any detail at the hearing, nor is it consistent with Ms. E.'s assertion that she is not precluded from entering the main portion of the Family Residence absent an order for exclusive occupancy. Counsel for Ms. E. properly recognized the argument was a stretch. Counsel for Mr. T. asserted there are numerous cases where this Court considered applications for exclusive occupancy in relation to a family residence where the existence of a form of suite or separate living space did not render s. 90 inapplicable.

- [24] A quick review of the jurisprudence confirms this to be the case: see, for example, *L.L.M v. D.G.M.*, 2021 BCSC 1889 (basement suite with shared laundry); *Priebe v. Baker*, 2022 BCSC 306 (large lower floor with shared kitchen); *Dickenson v. Dickenson*, 2023 BCSC 1447 (two suites, although not completely self-contained), also referring to *Kotlyakov v. Kotlyakov*, unreported (May 29, 2020), Chilliwack Registry E-17135 (B.C.S.C.) (basement suite with separate entrance, but no kitchen). While there are instances of this Court refusing a s. 90 application on grounds that the property was a vacation home or an investment property, and not the "ordinary residence" (see for example, *Armitage v. Armitage*, 2022 BCSC 1108 and *N.S.S. v. B.K.S.*, 2023 BCSC 1117), I was not pointed to any authority where this Court has refused to consider a s. 90 application on the basis Ms. E. advanced. I reject her argument in this regard.
- [25] Where, as here, the property in question falls within the definition of family residence, the legal test is well-settled. The applicant bears the burden to satisfy the Court that: a) continued cohabitation is a practical impossibility; and b) on a balance of convenience, the applicant is the preferred occupant of the family residence: *Bateman v. Bateman*, 2013 BCSC 2026 at para. 44; *Evans v. Mahtoy*, 2015 BCSC 2141 at para. 28.
- [26] The jurisprudence confirms that a "practical impossibility" requires something that "makes the situation intolerable or unacceptable in an objective sense": *N.S.S.* at para. 19, citing *Glowacki v. Nesbeth*, 2021 BCSC 535 at para. 71. The threshold is a high one; incompatibility, minor annoyances and even acrimonious living circumstances may not be sufficient: *Corness* at para. 44.
- [27] The question of who is the preferred occupant is also an objective test, and requires a court to consider factors such as: any acquiescence or delay; the conduct of the parties; the economic position of the parties; alternate living accommodations available to either party; and any other relevant circumstances such as health: *Sun v. Cook*, 2007 BCSC 2045 at para. 16. This second balance of convenience stage requires the Court to examine the situations of both parties and weigh the relative disadvantages to each party if the application is granted or not granted: *Evans*, at para. 30.

Is continued cohabitation a practical impossibility?

- [28] Mr. T. accepts there is a high threshold for establishing practical impossibility, but says the circumstances of this case meet the test, particularly when the objective impacts on his children are considered. Ms. E. maintains the circumstances here do not rise to the level of practical impossibility as demonstrated by the fact the parties have both lived at the Family Residence for more than ten months now. She also says the interests of Mr. T.'s children cannot be considered because they are not "children of the marriage" involved in this litigation.
- [29] I do not accept Ms. E.'s argument that I cannot consider the interests of Mr. T.'s children. The Court can consider the interests of children who normally live in the family residence even if they are not the children of both parties. In *Priebe*, the Court considered evidence that the

claimant's children from a previous marriage were suffering from stress and depression that was exacerbated by the continued cohabitation of the parties. Under the practical impossibility analysis, the Court considered evidence that the respondent (and her new partner) entered the claimant's portion of the house and were caught on security camera searching the claimant's bedroom when the claimant was not home. The Court found the impacts of such behaviour on the claimant's children very relevant considerations, calling the entry into the claimant's bedroom "an intolerable breach of the claimant's privacy" (at para. 76) and concluding it was clear the behaviour was negatively impacting the claimant's children (para. 77).

- [30] Similarly, in *Armitage*, although the Court ultimately determined the home in question was a vacation home and not a "family residence", the Court did consider the interests of the children of one party in conducting the analysis.
- [31] In my view, there is sufficient evidence before me on which to conclude that Ms. E.'s conduct - particularly conduct like playing excessively loud and disruptive music, engaging in loud sexual intercourse at times when the children and arguably Mr. T. need to be sleeping to be prepared for swim practices, and entering the main portion of the Family Residence after having been asked, through counsel, to desist - is objectively having a significant negative impact on Mr. T.'s children and Mr. T. I am also entitled to consider Mr. T.'s evidence about the effects of the increasing conflict on his children (*Dennis v. Regehr*, 1996 CanLII 2392 at para. 45). This includes the younger child's increasing discomfort at being in the Family Residence and reluctance to invite friends over due to Ms. E.'s conduct. I note as well that a Court will not lightly disrupt the continued occupation of the residence of dependent children and their custodial parent: *Longo v. Longo*, 2013 BCSC 1578.
- [32] Further, I reject Ms. E.'s submission to the effect that family violence is now a pre-condition to a s. 90 order. I accept that in a number of cases there were allegations of family violence and the Court still did not find continued cohabitation to be a practical impossibility. However, many of those cases, including *Corness*, did not involve children and concerned properties that were larger or better lent themselves to sufficient separation. In *Evans*, Justice Sharma quoted at some length from Master Baker's decision in *JRE v. 07----8 B.C. Ltd.*, 2013 BCSC 2038, about whether the FLA's focus on family violence altered the "significance and weight of any violence the court finds has occurred" (at para. 28). In *JRE*, Master Baker is clear that "the FLA does not directly link ss. 90 and 226 with family violence" but concludes that "if one found facts falling within the FLA's definition of violence the court would be obliged to factor that into any application for exclusive occupancy" (at para. 10). In other words, family violence is not a precondition, but if present, the FLA now requires it to be given greater weight and significance on a s. 90 application. This was confirmed recently in *Dickenson*, where at paragraph 25, Associate Judge Robertson held "[i]t is not, however, necessary to make a finding of family violence to find that continued cohabitation is a practical impossibility."

- [33] Ms. E.'s counsel suggested the preferable course of action is for the Court to impose conduct orders to correct any concerning behaviour and to provide greater clarity around boundaries. She suggests such orders could be combined with an order permitting a further application to the Court on an expedited timeframe in the event of a breach. She asserts this would be more in keeping with the objective of the Supreme Court Family Rules to ensure claims are adjudicated on their merits. The conduct order approach would essentially give Ms. E. a chance to correct her behaviour before what her counsel called "the nuclear option" is exercised. Ms. E.'s application response outlines proposed conduct orders, and at the hearing, her counsel suggested a further conduct order prohibiting her from having any third parties to the Family Residence, with the exception of her daughter.
- [34] I have three concerns with the suggestion that conduct orders are appropriate. First, it will put Mr. T.'s children in a position where it is entirely possible, and potentially even likely given the history, that they will be subjected to additional disruptive behaviour by Ms. E., including for any period of time it may take to bring a further application to the Court. This does not adequately address the objective harm they are experiencing. Second, Ms. E. has already had more than 10 months to demonstrate she can cohabit at the Family Residence and her behaviour, which has escalated in nature since March 2024, has not borne out an ability to do so. This is exacerbated by her lack of recognition of the impacts of her behaviour and the absence of any assurance that her conduct will not be repeated. Third, Ms. E. has already been warned that her behaviour was inappropriate through correspondence between counsel. There have been previous attempts to deal with the matter in a less aggressive manner, and they have not proven successful. In the circumstances, I do not consider it appropriate to provide Ms. E. a further chance.
- [35] In all of the circumstances, and with particular regard to the objectively negative impacts on Mr. T.'s children, I conclude that the parties continuing to live together in the Family Residence is a practical impossibility.

Is Mr. T. the preferred occupant?

- [36] In determining who is the preferred occupant, the Court will consider acquiescence or delay, the conduct of the parties, their economic positions, potential alternative living accommodations and other relevant circumstances such as health. The conduct of the parties has been addressed above in relation to practical impossibility, so I will not repeat it here. I will briefly address the remaining factors in turn.
- [37] Ms. E. submits there has been both acquiescence and delay in bringing this application, given that the parties have lived together for over 10 months post-separation. I note the application was filed at the end of May, but could not be heard due to counsel and court schedules, until early July. I also note that the most significant concerns about Ms. E.'s behaviour began to surface in March 2024 after her daughter moved out. There were then informal attempts to address the matters in early April which were not successful. I do not consider the subsequent delay of less than two months to constitute disentitling delay or

acquiescence in this case.

- [38] With respect to the parties' economic positions, there is no dispute Mr. T. has significantly greater financial resources. Ms. E. is not currently employed and it is not known when she may be able to work again. She says she has no ability to afford alternative accommodation as the housing subsidy she receives, even when coupled with the support voluntarily provided by Mr. T., is insufficient. I accept this may be true. But these facts cut both ways. Ms. E. does not currently contribute to the expenses for the property, which amount to about \$4,500 per month (according to Mr. T.'s Form F8 Financial Statement). There is no evidence to support that Ms. E. could maintain the Family Residence pending trial. Since the Family Residence is subject to disputed family property claims, it is important that it be maintained for the next 16 months. If it is allowed to waste, that would negatively impact Ms. E.'s claims at trial. It would not be appropriate to both grant Ms. E. exclusive occupancy of the Family Residence and yet require Mr. T. to fund both new accommodation and the costs of the Family Residence while he is not living there, especially when he is not currently employed.
- [39] I also note that under s. 85 of the FLA, property acquired by one spouse before the relationship began is presumptively not family property. There is no question the Family Residence was acquired before the relationship began. Accordingly, it seems likely that Ms. E.'s claim will primarily be for a portion of the increase in the value of the Family Residence during the relationship. While I obviously am not pre-determining matters, there was no suggestion in the materials or at the hearing that there is a scenario under which Ms. E. would be given title to the Family Residence at trial. As was the case in *Priebe*, the reality appears to be that she will have to leave at some point - it is just a matter of when.
- [40] Ms. E. appears to recognize this. As Mr. T. identified, in her affidavit, Ms. E. says that she wants the matter to be resolved so that she can move out, but she cannot do that until the property division has been settled. This statement suggests Ms. E. recognizes she will have to leave, but also supports the idea that the obstacles to her leaving now are either money or a desire to preserve her interests in the family law litigation. Section 90(3)(b) of the FLA expressly provides that an order for exclusive occupancy does not grant a spouse a proprietary interest in the family residence. Accordingly, Ms. E. does not need to remain in the Family Residence to preserve her claims in this matter.
- [41] With respect to money, Mr. T. says it is inconsistent for Ms. E. to take the position that her financial ability to move out is contingent on the claims being settled while at the same time refusing to accept or consent to an interim advance of funds that would enable her to afford new accommodations. She asserts she will be rendered homeless if forced to leave due to financial circumstances, but is unwilling to accept assistance with respect to those financial circumstances. Again, as in *Priebe*, Ms. E.'s position amounts to a desire to have her cake and eat it too, by remaining in the Family Residence for free pending the conclusion of the litigation despite there being financial options available to her.

- [42] With respect to the potential for alternative accommodations, Ms. E. says Mr. T. has alternative accommodations available in the form of the Mt. Washington condo, whereas she has nowhere else to go. There is no evidence Ms. E. has looked for alternative accommodations. There is evidence that she previously stayed with her mother and sister on Vancouver Island; she offers no explanation for why she is unable to do so again, but rather makes a bald assertion that she does not have anywhere else to live.
- [43] I accept there is no evidence that Mr. T. has looked into alternative accommodation, but I also accept that, given his parenting responsibilities, he would need to find alternative accommodation not just for himself but for his two children, who have particular needs for school / extra-curriculars. In this regard, I note it would not be practical, for example, for Mr. T. to move himself and the children to Mt. Washington. As well, any move for Mr. T. may also require the involvement of the children's other parent in advance. None of the information about these potential complications is before the Court. I am not willing to assume there would be agreement to Mr. T. moving with the children, which could impact negatively on Mr. T.'s parenting of his children.
- [44] Lastly, with respect to Ms. E.'s health concerns, she has provided some evidence but it is difficult to give it significant weight. She has not provided an expert report, but rather two doctor's letters, one of which pre-dates the separation. I appreciate counsel's submissions that it can be challenging to obtain adequate medical evidence on a short turn-around. However, the letters do not indicate the doctor was aware they would be provided to the Court. They do not contain an acknowledgment of the duty of an expert witness. They do not explain what the doctor was told about a possible requirement for Ms. E. to move (i.e. whether it would be required immediately, or whether some time would be provided; whether financial or other assistance would be provided for the move and new accommodations, etc.). The reality is that relocations are stressful for everyone. There is at least some evidence on which I can be satisfied that having to move would likely be more stressful for Ms. E. than for many other people. I am not able to quantify that, but I accept this factor weighs against an order for exclusive occupancy.
- [45] Taking all of the above factors and evidence into account, I find that the balance of convenience weighs in favour of Mr. T. as the preferred occupant.
- [46] It follows that I grant Mr. T.'s application for exclusive occupancy of the Family Residence and I will require Ms. E. to vacate by midnight on August 10, 2024. I will also make a number of orders providing direction about the move-out, which I will detail below.

Issue 2: Order for interim payment of funds

Is there authority to order payment of funds?

- [47] Without specifying the basis on which the order was sought, Mr. T.'s notice of application proposes orders that he pay funds to Ms. E. to assist with moving costs and accommodation pending trial, as an interim advance on the division of family assets. Ms. E. opposes those

orders, including on the basis that the Court does not have authority to grant them under s. 89 of the FLA. Ms. E. argues s. 89 only permits an interim distribution of funds if necessary for one of the three purposes expressly listed in that provision, and funding accommodation is not one of them.

- [48] In response to Ms. E.'s position, Mr. T. advances a somewhat creative argument for authority under s. 89. In essence, he argues that because Ms. E. says she will be homeless and unable to pursue her family law claims if forced to leave the family residence, an order to pay interim funds for her alternate housing supports her ability to continue with the family law proceedings. Thus, the proposed interim order would indirectly be funding or at least facilitating the litigation. I will deal with the question of authority first.
- [49] The jurisprudence confirms s. 89 of the FLA is a unique provision with very specific objectives. Section 89 orders are often characterized as "extraordinary" in that they permit a distribution of family property before final resolution of property claims. Such orders are designed to "level the litigation playing field" by assisting economically disadvantaged spouses to access justice or otherwise balance their participation in matrimonial proceedings: see, for example, *Etemadi v. Maali*, 2022 BCCA 298 at para. 44, per Butler JA (dissenting but not on this point). However, the language of the provision is specific. Before the Court can make an order under s. 89, the Court must be satisfied the order is sought in relation to family property, it would not be harmful to the interests of a spouse and it is necessary to fund one of the three listed purposes: family dispute resolution, all or part of a family law proceeding or obtaining information for such matters. To the extent an order goes beyond what is "necessary" for those purposes, the Court commits an error in principle: *Bartch v. Bartch*, 2018 BCCA 271 at para. 75.
- [50] The purposes for which a s. 89 order can be made are explicitly tied to funding litigation or similar proceedings. No provision is made for other non-litigation related expenses a family law litigant may face and the Court lacks jurisdiction to make an order that does not come within the strict wording of s. 89: *K.S.P. v. J.T.P.*, 2022 BCSC 1017 at paras. 9-12. Accordingly, I agree with counsel for Ms. E. that I lack jurisdiction to make the requested orders under s. 89 of the FLA.
- [51] However, that does not end the inquiry. In the context of other applications for orders of exclusive occupancy, courts have ordered the party staying in the family residence to pay the other party for relocation and rental costs. Some of these orders were made by consent.
- [52] In *Dickenson v. Dickenson*, 2023 BCSC 1447, the claimant had left the former family home but sought to return and oust the respondent through an order for exclusive occupancy. In opposing the order, the respondent offered to pay the claimant \$20,000 to assist with his moving and living costs. Associate Judge Robertson denied the request for exclusive occupancy but ordered the respondent to pay the \$20,000 as offered. While that order was ultimately made by consent, the Court found the offer to pay tipped the balance of convenience in the respondent's favour as the preferred occupant.

- [53] Similarly, in *L.L.M. v. D.G.M.*, 2021 BCSC 1889, aff'd 2021 BCCA 471, the claimant was granted exclusive possession of the family residence where both parties had remained living. While not sought on the application, the claimant agreed on a without prejudice basis to a release of \$50,000 to each party from funds that had previously been restrained in the proceedings. Justice Baker also made that order by consent.
- [54] I appreciate Ms. E. did not originally consent to an order for payment. While she has since advised she will consent, such orders have been made in the absence of consent. In *Priebe v. Baker*, 2022 BCSC 306, the claimant offered to pay the respondent \$60,000 on a without prejudice basis to assist her in relocating. Master Muir (as he then was) granted the claimant's application for exclusive occupancy on condition that he make the without prejudice payment to the respondent as offered. In my view, there are several possible sources of authority under which an order could be made without consent.
- [55] First, under s. 227(c) of the FLA, the Court may make an order requiring a party "to do or not do anything, as the court considers appropriate, in relation to" a purpose set out in s. 222. One of the purposes for which a Court may make an order is "to facilitate arrangements pending final determination of a family law dispute" (s. 222(d)). Sections 222 and 227 of the FLA have been interpreted as giving the Court a "broad discretion to craft appropriate conduct orders": *A.B. v. C.D.*, 2020 BCCA 11 at para. 189. Further, the power to "facilitate arrangements" suggests the court has power to "reach into issues incidental to the litigation": *A.B.* at para. 186.
- [56] More specifically, under s. 226(a) of the FLA, the Court may make an order to "require a party to make payments respecting rent, mortgage, specified utilities, taxes, insurance and other expenses related to a residence" (emphasis added). The wording indicates the payment can be required in respect of any residence. It is clear the Court has jurisdiction to make a conduct order that would require payment by one party to another to facilitate housing arrangements pending trial. Second, if the application is heard before a superior court justice, the Court has inherent jurisdiction to make an order as a corollary to another order being made, where the Court considers it necessary and in the interests of justice.
- [57] Regardless of which source is relied on, it is clear I have authority to make an order requiring Mr. T. to pay Ms. E. for rent and other expenses associated with alternate accommodations. I also now have Ms. E.'s consent to such an order being made.

Should an order for payment be made?

- [58] Turning to the merits, Mr. T.'s notice of application suggested the payment of funds be made in increments on completion of certain steps: \$5,000 to be paid immediately, \$3,000 to be paid within 48 hours of Ms. E. vacating the suite, and a final \$2,000 to be paid within two weeks of Ms. E. having vacated as long as the suite is undamaged and left in a reasonable condition. The proposed terms also included requirements to remove certain personal property from the office of the Family Residence and not to remove anything other than Ms. E.'s personal property without written permission. The proposed non-monetary terms

appear to be an attempt to ensure expectations around a move-out are clear and to deter any destructive behaviour.

- [59] In his reply affidavit, and during submissions, Mr. T. modified his proposal. He is now willing to provide \$1,500 per month, or more if the Court considers reasonable, to assist Ms. E. with rent and other living expenses in the period leading up to trial. Mr. T. says he has no desire to see Ms. E. rendered homeless in the intervening period, nor does he wish her living situation to prevent her from being able to pursue her family law claims. Finally, Mr. T. says any such advance should properly be considered by the Court in the final division of assets and debts in this matter.
- [60] Despite saying she cannot afford to live elsewhere, Ms. E. originally opposed any interim distribution of funds. At the hearing, she said she should not be forced to accept an advanced distribution of what she might ultimately be entitled to receive from her claim. She is also concerned that, since the trial is still more than a year away, if she accepts the advanced payments, when coupled with other funds she has already received and will continue to receive, the combination of advanced payments may exhaust what she is found entitled to at trial. Her counsel properly conceded at the hearing, however, that the evidence before me on this application does not permit me to determine if that is a realistic risk. At this point, the concern about exhausting her potential entitlement is speculative.
- [61] Ms. E.'s position on the application as a whole was difficult to reconcile. Due to her acknowledged financial circumstances, it amounts to an argument that, in order to preserve her potential future entitlement in this litigation, she should be permitted to live in the family residence, basically free of housing expenses, for the next 15 or 16 months, while Mr. T. pays the mortgage and other costs for the family residence as a whole. While the advantages to Ms. E. from such an arrangement are clear, I was not pointed to any authority to suggest the law requires me to relieve Ms. E. of responsibility for present living expenses in order to best preserve her potential future entitlement. Nor was I directed to authority that suggests Ms. E.'s desire to maximize her potential future entitlement precludes me from making an order I consider appropriate to mitigate the obvious impact of granting Mr. T. exclusive occupancy.
- [62] Ms. E.'s counsel referred to *Chutter v. Chutter*, 2008 BCCA 507, for the proposition that a spouse should not have to encroach upon their capital to maintain a standard of living comparable to that which they enjoyed during the marriage. Mr. T.'s counsel argued the Court of Appeal made those comments in relation to an order for spousal support and the lower court's failure to adequately address the different heads under which spousal support compensation can be ordered. I agree that *Chutter* does not assist Ms. E..
- [63] Even if Ms. E. had not consented, in my view, taking into account all of the circumstances, it would still have been appropriate to make an order requiring Mr. T. to pay funds to Ms. E. to assist her with rental and other housing costs. I exercise my discretion to do so under s. 226(a) of the FLA, or alternatively under my inherent jurisdiction.

[64] Ms. E. originally expressed some concern that the revised proposal of \$1,500 per month would be insufficient to cover rent, given the current housing market and increases in rent costs in the last few years. However, Ms. E. already receives a rental subsidy of \$421 per month, and Mr. T. has been voluntarily paying her \$2,000 per month as a form of support. From those sources, even if the voluntary payments are adjusted, I am satisfied Ms. E. will be able to afford rent and other living costs pending trial if she acts responsibly. Accordingly, I order Mr. T. to pay Ms. E. a sum of \$1,500 per month for the period of August 2024 up to and including November 2025, when the trial will take place, for a total of \$24,000. That order will go by consent. I order Mr. T. to provide the funds as follows:

- a) \$5,000 to be paid to Ms. E. by Friday, July 12, 2024;
- b) \$5,000 to be paid to Ms. E. within 48 hours of her vacating the suite (leaving it in reasonable condition) and removing all of her personal property, which must occur no later than midnight on August 10, 2024; and
- c) \$14,000 to be paid to Ms. E. by August 31, 2024.

[65] I do not consider it appropriate to make an order on this interim application deeming the payment of these funds to be interim advances on the division of family assets. It will be clear from the order that Mr. T. has been required to make these payments to Ms. E. as part of these family law proceedings, and nothing in this order precludes Mr. T. from arguing at trial that these payments should properly be considered by the trial judge in making any order for division of family property. However, I was only provided with the notice of family claim for purposes of this application and it is apparent from that pleading that there are a significant number of property-related issues, including a claim by Ms. E. for occupational rent. In my view, it is more appropriate to leave it to the trial judge to make the final determinations respecting the division of family property, including how these interim payments should be treated.

Summary of Orders

[66] In conclusion, I make the following orders under the FLA:

- a) Mr. T.'s application for exclusive occupancy of the Family Residence is granted;
- b) Ms. E. will vacate the Family Residence by no later than midnight on August 10, 2024, which includes removal of all of her personal property in the suite, from the office in the main portion of the Family Residence and from the yard;
- c) Ms. E. will not to remove any furniture or other items that are not her personal property without Mr. T.'s written agreement;
- d) Ms. E. will leave the suite clean and in reasonable condition;

- e) By consent, Mr. T. is to pay Ms. E. a total of \$24,000 for rent and other housing-related costs for her alternate accommodations for the period of August 2024 up to and including November 2025, on the following schedule:
- i. \$5,000 to be paid to Ms. E. by Friday, July 12, 2024;
- ii. \$5,000 to be paid to Ms. E. within 48 hours of her vacating the suite (leaving it in reasonable condition) and removing all of her personal property; and
- iii. \$14,000 to be paid to Ms. E. by August 31, 2024.

[67] I was not asked to make any interim conduct orders to govern the parties' behaviour until Ms. E. vacates the suite. It is my hope that this decision serves as sufficient guidance for the short period of time before her move-out must be completed, such that the parties will be able to govern themselves respectfully.

Costs

[68] As Mr. T.'s application has been substantially successful, he would usually be entitled to costs of this application. At the hearing, Ms. E. submitted costs should not be payable to Mr. T. because the two-hour time estimate on the notice of application was wholly inaccurate. Mr. T. noted the hearing was set for two hours by consent and it was not until Ms. E. filed her application response on the same day the application record was due that the concern about timing came to light.

[69] In those circumstances, and given that the Court also briefly interrupted the hearing to address another matter in chambers, I do not agree that the time estimate was wildly inaccurate or that Mr. T. is the only one who bears responsibility. I therefore order that Mr. T. will have his costs of this application in any event of the cause. However, given Ms. E.'s financial circumstances, costs of this application will be payable at the conclusion of the family law proceeding as a whole.

"K. Wolfe J."

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