
CANADA / JUDGMENT

M.N. v. C.G.F.

2019 BCSC 2113

COURT

Supreme Court of British Columbia

DECIDED

15 October 2019

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2019 BCSC 2113 M.N. v. C.G.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.N. v. C.G.F.,

2019 BCSC 2113

Date: 20191015

Docket: E162511

Registry: Vancouver

Between:

T.M.L.N. aka M.N.

Claimant

And

C.G.F.

Respondent

Before: The Honourable Mr. Justice Basran

Supplementary Reasons to M.N. v. C.G.F., 2019 BCSC 1406

Oral Reasons for Judgment - Supplementary

In Chambers

Counsel for the Claimant:

A. Ouellet

Counsel for the Respondent:

L. Spencer

Place and Date of Hearing:

Vancouver, B.C.

September 17 and 20, 2019

Place and Date of Judgment:

Vancouver, B.C.

October 15, 2019

INTRODUCTION

- [1] THE COURT: This is an application for clarification of a trial decision with respect to excluded property and the division of the parties' assets.
- [2] In the trial decision, dated August 21, 2019, referenced at 2019 BCSC 1406, I found that the claimant and respondent were entitled to exclusions of \$45,500 and \$75,800 respectively. The parties agreed that I made a mistake in respect of the respondent's exclusion. The claimant's position is that, at most, the respondent's exclusion should have been \$139,600. The respondent believes that his exclusion should have been between \$144,000 and \$163,000.
- [3] For the reasons that follow, and based on the evidence at trial, I have concluded that the respondent's exclusion should have been \$140,000. There will be no change to the division of assets stemming from this correction.

THE CLAIMANT'S POSITION

- [4] The claimant believes that as a matter of fairness, the asset division between the parties should be adjusted to ensure that she receives the full benefit of her \$45,500 exclusion because this amount was managed by the respondent. I note that the claimant consented to the respondent's management of this amount and there was no evidence to suggest that he mismanaged or in any way misappropriated these funds. The evidence was that he managed these funds in conjunction with his own accounts.
- [5] The claimant asserts that it would be unfair for the respondent to receive the alleged "full value" of his exclusion while she is left with a shortfall. However, the claimant admits that I made a mistake in finding that the respondent's exclusion was \$75,800. Both parties agree that it should have been much higher. Accordingly, the respondent will not receive an amount close to the corrected value from his exclusion.

- [6] The claimant submits that any gain in the respondent's accounts from the date of cohabitation to the date of the triggering event, which is the date of separation, is family property. She alleges that the respondent withdrew \$50,000 from his accounts shortly before the commencement of the trial and used these funds for his own purposes.
- [7] The claimant points out that the parties came into the relationship with equal net worths so it would be unfair for the respondent to leave the marriage with a higher net worth than the claimant. I note that five years have passed since the date of separation and each party has managed their own finances during this period.
- [8] The respondent submits that the claimant is seeking far more than a mere clarification, she is seeking to reopen her case and make further submissions. He believes that the Court should simply clarify paras. 95-97 of the reasons for judgment regarding the amount of the respondent's excluded property. Regardless of the amount of this exclusion, he points out that the respondent only has approximately \$64,000 remaining in the relevant accounts, so he will not receive the full value of his exclusion regardless of the value at which it is assessed.

RELEVANT LEGAL PRINCIPLES

- [9] Turning now to the relevant legal principles. The discretion to reopen a trial should be exercised with restraint and the interests of justice and finality loom large on this type of application: *Hellberg v. Netherclift*, 2017 BCCA 363 at para. 67:
- [67] A trial judge exercises a broad discretion in determining whether the interests of justice require an order reopening the trial. At the same time, the discretion is not unfettered and must be exercised judicially: *Hansra v. Hansra*, 2017 BCCA 199 at paras. 44, 52-59. Generally, the discretion to reopen should be exercised with restraint. Parties must not be permitted to use the rule as a means of re-arguing or re-casting their cases. The interests of justice in finality loom large on an application of this kind.
- [10] Excluded property is valued at the time of cohabitation: s. 85(1)(a) of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Therefore, the value of the exclusion does not vary based on subsequent events.
- [11] There may be an unequal division of family property if it would be significantly unfair to divide it equally: s. 95(1) of the FLA.
- [12] The Court may consider if a spouse acted in bad faith: s. 95(2)(g) of the FLA.
- [13] The Court may also consider any other factor that may lead to significant unfairness: s. 95(2)(I) of the FLA.

- [14] For the purposes of this case, the Court must not order a division of excluded property unless it would be significantly unfair not to divide it on consideration of the duration of the relationship and a spouse's direct contribution to the preservation, maintenance, improvement, operation, or management of excluded property: s. 96(b) of the FLA.

DISCUSSION

- [15] In my view, the claimant is attempting to reopen and reargue her case. The relief she is seeking, a different reapportionment of the assets, is far more than a mere clarification of the reasons for judgment.
- [16] Although I misstated the amount of the respondent's exclusion, this does not create an opening for the claimant to argue that she should be made whole in respect of the amount of her exclusion. My finding on the amount of the respondent's exclusion is in no way connected to the amount of the claimant's exclusion; nor does the amount of the respondent's exclusion change my findings on the division of assets.
- [17] In the interests of exercising restraint and justice, I decline to reopen the trial to further consider the issue of the division of assets.
- [18] The claimant asserts that as a matter of fairness I should equalize the outcome of the two parties' exclusions. Even if I were to permit a reopening of the trial to consider the merits of this position, counsel for the claimant did not adduce the necessary evidence at trial or point to any relevant authority to support her position.
- [19] Section 95 of the FLA deals with the unequal division of family property, not excluded property. Even if this provision were to apply, the claimant would have been required to lead specific evidence at trial of the significant unfairness that justifies an unequal division of property. She failed to do so. The respondent was not cross-examined during the trial on the withdrawal of \$50,000 from his accounts.
- [20] There is no basis for the application of either ss. 95 or 96 of the FLA to divide the excluded property in a manner different from what I described in the reasons for judgment because there was no evidence that the division of assets was based on the bad faith conduct of the respondent; nor was it significantly unfair.
- [21] Neither party is receiving the full value of their exclusion because their assets have dissipated. It is no answer for the claimant to allege that the respondent should pay for the dissipation of her assets because he managed her funds. She freely consented to this arrangement and is bound by the consequences of it. There is no basis for the proposition that the parties should each be left with similar net worths post-trial, particularly given that each of them has been managing their own finances for the past five years since they separated.

- [222] In my view, it is not appropriate to reopen the issue of the division of assets and I decline to do so. An application for clarification of the reasons for judgment cannot be used to reopen and reargue an issue that has been decided. I did not fundamentally misapprehend the evidence in respect of the division of assets. I merely misstated the amount of the respondent's excluded property.
- [231] Having considered the relevant evidence and the submissions of the parties, I conclude the respondent's excluded property should have been \$140,000 not \$75,800.
- [241] The reasons for judgment are clarified to confirm that the amount of the respondent's exclusion is \$140,000. No further changes or clarifications to those reasons is warranted.
- [251] THE COURT: Are there any submissions on costs?
- [261] MR. SPENCER: I was hoping that what we could do is deal with this issue of costs for this part of the trial with all of the submissions with respect to costs. There were offers that were exchanged. And we spoke last time we were before Your Lordship of the opportunity for my client to have two weeks to make written submissions on costs, my friend to have a week to reply, and then I have a further week if I wanted some sur reply to that. But this should be subsumed, this clarification, in my submission, in the whole issue with respect to costs.
- [271] MS. OUELLET: That's fine. I'm still not understanding the reasons though. So, what I need to understand for the record is what did you intend to do with her exclusion? So, if you ordered that she had an exclusion of \$45,000, where - where is that exclusion? I don't -- I don't understand the decision.
- [281] THE COURT: Well, I have given you my reasons, Ms. Ouellet.
- [291] MS. OUELLET: Okay.
- [301] THE COURT: And her exclusion is the amount that I determined it was in the reasons for judgment. There is a clarification now in respect of the respondent's exclusion.
- [311] MS. OUELLET: Right.
- [321] THE COURT: And what happens in respect of whether she gets paid on that exclusion is subject to whether or not there are sufficient assets left to be divided in that regard. And the fact that there are not is a function, as I just stated in my reasons, of the fact that the assets have dissipated over this period of time. So there is nothing in this clarification to suggest that she is going to be made whole in respect of her exclusion, but that is the amount that she would have been entitled to as an exclusion based on the evidence that was led at trial.
- [331] MS. OUELLET: Okay.

- [34] MR. SPENCER: But formally -- I haven't been in this situation terribly often, My Lord. So, formally will there be -- is it a corrigendum? Will there be new reasons that just simply say paragraph 95 doesn't say 75,800 anymore and it now says 144? Or should just -- counsel just draft the order with -
- [35] THE COURT: Draft the order.
- [36] MR. SPENCER: -- with 144.
- [37] THE COURT: Just draft the order with that correction.
- [38] MR. SPENCER: Is it 144 or 140? I'm sorry, My Lord.
- [39] THE COURT: One-four-zero.
- [40] MR. SPENCER: One-four-zero. Thank you.
- [41] MS. OUELLET: So, I guess I -- sorry, I just need to be clear. You're saying she had the \$45,000 excluded property at the end of - at the beginning of the marriage, but she does not get excluded property of 45,000. Is that the order?
- [42] THE COURT: That's correct.
- [43] MS. OUELLET: Okay.
- [44] THE COURT: Anything further at this time?
- [45] MR. SPENCER: No. Thank you. So, is it two weeks then for written submissions on costs overall for the respondent?
- [46] THE COURT: Yes. You may - I think we dealt with this last time, as you stated, and as long as the parties are on the same page with this, two weeks from today's date. You have another week then, Ms. Ouelett, to reply if there's any further submissions to make, and you can include whatever submissions you want to make in respect of this further clarification of the reasons.
- [47] MR. SPENCER: Thank you.
- [48] MS. OUELLET: Thank you.

"Basran J."

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