

CANADA / JUDGMENT

M.N. v. C.G.F.**2020 BCSC 2072****COURT**

Supreme Court of British Columbia

DECIDED

7 February 2020

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2020 BCSC 2072 M.N. v. C.G.F. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: M.N. v. C.G.F., 2020 BCSC 2072 Date: 20200207 Docket: E162511 Registry: Vancouver Between: T.M.L.N. aka M.N. Claimant And C.G.F. Respondent Before: The Honourable Mr. Justice Basran Oral Ruling Re Applications for Final Orders and a Stay In Chambers Counsel for the Claimant: A.M. Ouellet Counsel for the Respondent: L. Spencer Place and Date of Hearing: Vancouver, B.C. January 17, 2020 Place and Date of Ruling: Vancouver, B.C. February 7, 2020

[1] THE COURT: This is an application by the claimant for:

- 1) A stay of execution of the October 15th, 2019 final order allocating the respondent's RRSP to him in the division of property so that the full amount that he has on deposit in his TD Canada Trust accounts will be restrained pending the outcome of an appeal involving these assets;
- 2) An order staying costs of the final order or alternatively, a determination that any costs ordered be payable after a decision is rendered on the appeal;
- 3) An order settling the terms of the final order; and
- 4) Costs of this application.

[2] The application also sought orders seeking a variation of the parenting schedule and counselling. However, I declined to hear submissions on these issues because it would not have been possible to complete this application in the allotted time. I have seized myself of any parenting applications that the parties make during the next six months.

[3] This matter arises from a family trial that took place over 12 days from January to March, 2019. The trial judgment was released on August 21, 2019, and after hearing further submissions, corrected reasons were issued on October 31, 2019, indexed as 2019 BCSC 1406. Final Order

[4] Turning first to the final order. I agree with the submission of the claimant that para. 7(c) should read as follows: The amounts payable by each party may be offset against each other resulting in a net payment of \$323 per month from the Claimant to the Respondent.

- [5] The end of para. 13 of the final order shall state that the "claimant shall thereafter retain her shares in (M.) Salon and (T.) Salon as her sole property".
- [6] Excluded property is the major point of distinction in the final order. Paragraph 15 will read as follows:
- 1) This court hereby orders and declares as follows:
 - i) The respondent has \$140,000 of excluded property which will be returned to him to the extent that this amount is available in assets in his name and control as of the date of trial; and ii) The claimant has \$45,600 of excluded property which will be returned to her to the extent that this amount is available in assets in her name and control as of the date of trial.
- [7] The order with respect to the Gravitas shares will be: The respondent will transfer 50 percent of the Gravitas shares (Private Corp.) en specie to the claimant.
- [8] The term of the order setting out that "Each party shall be solely responsible for and pay the debts in his or her own names as the Court finds that there is no family debt" shall be numbered in the final order.
- [9] The final order shall indicate that: "The value of the claimant's engagement ring is family property and will be divided equally between the parties."
- [10] The final sentence of the order setting out how the jewelry will be divided shall state: If the parties are unable to agree on the division of items and/or if there are items that neither of them want, the remaining items will be sold and the parties will equally share in the net proceeds.
- [11] Paragraph 19 in the respondent's draft of the final order shall not be part of the trial order.
- [12] The final order shall indicate that "Costs shall be determined by the court based upon the further submissions of the parties." Stay Application Relevant Legal Principles
- [13] If there is an appeal, the Court that made the final order may grant a stay and the trial judge who made that order should hear the stay application: s. 234 of the Family Law Act, S.B.C. 2011, c. 25 and Poulin v. Poulin, 2002 BCSC 1520 at paras. 5 and 11.
- [14] The following three-part test applies to stay applications in family law cases:
- 1) A preliminary assessment must be made on the merits of the case to ensure there is a serious question to be tried;
 - 2) It must be determined that the applicant will suffer irreparable harm if the application were refused; and
 - 3) An assessment must be done to determine which of the parties would suffer the greater harm from the granting or refusal of the remedy. This is the balance of convenience test. L.B. v. S.B., 2004 BCSC 1050 at para. 4.

- [15] The judgment appealed from must be presumed to be correct and a successful plaintiff should not be deprived of the fruits of their judgment unless the interests of justice require that they be withheld pending an appeal: *Gold v. Gold* (1992), 70 B.C.L.R. (2s) 216 (S.C.) at para. 13.
- [16] The standard is not high in determining if there is a serious issue to be tried. The applicant only needs to show that there is some merit to the appeal, that it is arguable and not frivolous: *Cariboo-Chilcotin Helicopters Ltd. v. Ashlaur Trading Inc.*, 2005 BCSC 248.
- [17] "'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined. The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be relevant consideration." *RJR-MacDonald Inc. v. Canada* (Attorney General), [1994] 1 S.C.R. 311 at para. 59 (internal citations omitted). Positions of the Parties Claimant's Position Serious Question to Be Tried
- [18] The claimant submits that she is entitled to further assets on the basis that the Court erred in its findings on excluded property by conflating pre-marital property with excluded property. It is her position that the parties' TD Cash and RRSP accounts must be divided according to their values as of the date of their separation. Doing so will result in the respondent owing the claimant at least \$75,000 to equalize the parties' RRSPs as of this date and he will owe a further amount of approximately \$8,500 to equalize their cash accounts. Irreparable Harm
- [19] Quoting from the claimant's notice of application, her submission on irreparable harm is: If the stay isn't granted, there's a risk that the Respondent will spend or otherwise dispose of these funds such that he may not be able to compensate the Claimant from same in the event the Court of Appeal agrees with her and decides that she's entitled to compensation.
- [20] I asked the parties to provide additional written submissions on the issue of irreparable harm as it applies to the facts of this case. The claimant submitted that the dissipation of an asset could constitute irreparable harm if its dissipation together with other financial considerations mean that it is unlikely the respondent will be able to pay a damage award. The claimant was unable to point to a specific case authority on the dissipation of assets but by analogy and inference from other cases, she submits that the irreparable harm test is met if there is a real risk of an empty judgment based on an assessment of the assets and liabilities of the parties. Balance of Convenience

- [21] The claimant points out that the TD RRSP and Cash accounts are the very assets that are the subject of the appeal and they are the respondent's only significant assets. Furthermore, counsel for the respondent has confirmed that he expects that his client will use these assets to pay his \$85,000 legal bill if they become available. On this basis, the claimant submits that the balance of convenience favours the claimant because she will suffer the greater harm if the stay is not granted. Respondent's Position Serious Question to Be Tried
- [22] The respondent denies that there is a serious question to be tried because he asserts that the trial decision is correct and that the claimant is merely rearguing the issue of the division of the parties' assets. Irreparable Harm
- [23] The respondent submits that the claimant's speculation that the respondent will be unable to pay a damage award falls short of establishing irreparable harm and that there is no evidence to support the allegation that he will be unable to pay such an award. He argues that the respondent has sufficient income to pay an award of damages ordered by the Court of Appeal. Balance of Convenience
- [24] The respondent believes that the balance of convenience favours him because he is entitled to the fruits of his judgment.

Analysis

Serious Question to Be Tried

- [25] In my view, the claimant's appeal is not frivolous or undertaken for some secondary purpose. I am satisfied that there is an arguable issue that has some merit with respect to the parties' excluded property. I note that the standard is not high in determining if there is a serious question to be tried. On this basis, I am satisfied that this element of the test has been met. Irreparable Harm
- [26] I note that the respondent's income is approximately \$100,000 per year. Although he has debts of approximately \$80,000, I am satisfied that with this income, he will be able to pay the amount required if the claimant's appeal is successful.
- [27] The facts of this case are clearly distinguishable from those in *Zhao v. Fang*, 2019 BCSC 2023, a case that both the claimant and respondent referred to in their written submissions on irreparable harm. In that case, Mr. Zhao was not working and had no income or assets in Canada. Furthermore, he had not voluntarily complied with any of his financial obligations to Ms. Fang and their children. On this basis, Justice Blok was satisfied that there was a real risk that any gains achieved by Ms. Fang would not be recoverable.

- [28] In this case, Mr. Foster has a long and consistent employment history, he earns a good income of \$100,000 per year, and he has contributed to the care of his children by paying considerable child support to the claimant dating back to their date of separation. Unlike Mr. Zhao, for the most part, the respondent has voluntarily complied with his financial obligations to his children.
- [29] I agree with the respondent's submission that the mere speculation that the respondent may not be able to compensate the claimant falls short of the evidence required to establish that there is a real risk that he will not pay a damage award. He is not insolvent or impecunious and he earns a good income. Furthermore, the respondent's past conduct suggests that he will comply with Court ordered financial obligations. Balance of Convenience
- [30] In considering which of the parties will suffer greater harm from the granting or refusal of the stay, I am mindful that the respondent conceded that he intends to dissipate the TD RRSP and Cash accounts in order to pay his legal bill. These are the very assets that are in issue on the appeal. Nevertheless, I must assume that the trial decision is correct and in my view, after a long and hard fought trial, I am satisfied that the respondent is entitled to the fruits of his judgment. I reach this conclusion primarily because I believe that with his income, he will be able to pay an award in the event that the claimant is successful on appeal. The balance of convenience in this matter therefore favours the respondent.

Conclusion

- [31] Having applied the relevant three-part test, I have concluded that there is a reasonable question to be tried. However, the claimant will not suffer irreparable harm if the stay is denied, and the balance of convenience favours the respondent. Therefore, the application for a stay of execution in respect of the respondent's TD Canada Trust RRSP and cash accounts is denied.
- [32] The terms of the final order shall reflect the findings described earlier in this ruling. Costs
- [33] Based on the forgoing reasons, the respondent is entitled to his costs of the trial as ordered in my earlier ruling on costs. These costs are not stayed nor will they be deferred to when a decision is rendered on the appeal. However, the costs of this application will follow the outcome of the appeal. "Basran, J"

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