
CANADA / JUDGMENT

MacFarlane v. Ponds

2019 BCSC 544

COURT

Supreme Court of British Columbia

DECIDED

10 April 2019

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2019 BCSC 544 MacFarlane v. Ponds

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

MacFarlane v. Ponds,

2019 BCSC 544

Date: 20190410

Docket: E182240

Registry: Vancouver

Between:

Janet MacFarlane

Claimant

And

Gary Neal Ponds

Respondent

Corrected Judgment: The text of the judgment was corrected

at paragraphs 2, 4, 60-64 on April 25, 2018

Before: Master Elwood

Reasons for Judgment

Counsel for the Claimant:

P. Mennie

Counsel for the Respondent:

G. Sherman

Place and Date of Hearing:

Vancouver, B.C.

March 26, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 10, 2019

INTRODUCTION

- [1] The claimant, Janet MacFarlane, applies pursuant to s. 89 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") for an interim distribution of \$50,000 from the family property at issue in these family law proceedings to fund her legal expenses for the upcoming trial.
- [2] The respondent, Gary Neal Ponds, opposes an order for an interim distribution of family property in the amount of \$50,000. In his application response, Mr. Ponds stated that he would consent to a limited distribution of \$10,000. Following a review of his investment portfolio with his financial adviser, however, Mr. Ponds learned that a non-registered investment account in his name has a cash component of \$29,000. He now proposes that Ms. MacFarlane could receive one-half of that amount, or \$14,500.

BACKGROUND

- [3] Ms. MacFarlane and Mr. Ponds met in June of 2010. After a period of time, they began to date. In early 2011, Ms. MacFarlane moved into an apartment that Mr. Ponds had leased temporarily following the end of a previous relationship. In July 2011, the parties moved into a house that they leased together. Ms. MacFarlane moved out in July 2018.
- [4] The nature of this relationship and how it may have evolved over time will be in issue at the trial. Specifically, the trial judge will be asked to determine whether it was "marriage-like" for the purposes of Ms. MacFarlane's entitlement as a "spouse" under the family property and spousal support provisions of the FLA, and if so, for what period of time.
- [5] Ms. MacFarlane deposes that, throughout the relationship, she and Mr. Ponds shared a bed, were monogamous and lived together "in a traditional manner". Mr. MacFarlane, on the other hand, deposes that the relationship was "of the moment", the parties never planned a future together and the romantic nature of their relationship was short-lived, after which the co-habitation was one of convenience.

- [6] Mr. Ponds discloses current assets of approximately \$1,000,000, consisting almost entirely of financial holdings in RRSP, TFSA and non-registered investment accounts. Mr. Ponds entered the relationship with between \$350,000 and \$400,000 in financial assets, which he will argue must be excluded from any family property that may be divided under Part 6 of the FLA. Also, Mr. Ponds will argue that the trial judge should order a less than equal distribution of the family property to Ms. MacFarlane, based on the factors set out in s. 95 of the FLA.
- [7] Mr. Ponds is an American citizen with a successful background in civil engineering, construction contracting and law. His employment in British Columbia recently came to an end, and he is the process of moving to Michigan where he has secured new employment. His reported income for 2017 was just under \$290,000. He is currently earning \$180,000 USD, or approximately \$240,000 CDN, per year.
- [8] Ms. MacFarlane was unemployed when she met Mr. Ponds. For much of the relationship, Ms. MacFarlane did not work outside the home. She began her current job in 2017, earning approximately \$40,000 in 2018. She entered and left the relationship with minimal assets.
- [9] Pursuant to an order that was made by consent at a judicial case conference on November 1, 2018, Mr. Ponds paid spousal support to Ms. MacFarlane on an interim, without prejudice, basis in the amount of \$2,000 per month, for six months ending April 1, 2018. That order gave either party liberty to apply after the expiry of its finite period regarding entitlement, quantum and duration of any further support.
- [10] The trial is set for May 6, 2019, for seven days.

INTERIM DISTRIBUTION OF PROPERTY - SECTION 89 OF THE FLA

- [11] Section 89 of the FLA provides that:

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

- [12] An interim distribution of family property under s. 89 may be justified when it is necessary to permit the parties to advance their respective cases on a relatively level playing field: *M.A.L. v. N.A.L.*, 2014 BCSC 203.

- [13] In general terms, the applicant must demonstrate that (a) an advance is necessary to challenge the other's position at trial, and (b) the advance will not jeopardize the other party's claim: *Mckenny v. Mckenny*, 2015 BCSC 1345, at para. 57.
- [14] In *I.F. v. R.J.R.*, 2015 BCSC 793, Madam Justice Ballance explained the purpose of s. 89 in terms of promoting access to justice with an eye to the overall objectives of the FLA, as follows:
- [192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the FLA.
- [15] The balancing consideration in s. 89, of whether the interim distribution would be "harmful to the interests of a spouse", is broader in scope than simply the ability of the responding spouse to mount a defence to the family law claim. As Madam Justice Ballance explained in *I.F.*:
- [193] Determination of the presence of harm requires the court to reasonably anticipate and then assess the consequences that may flow from the interim order being sought. That approach, in turn, invites a highly individualized component to the inquiry. For example, would the distribution being sought in the particular case require a sale of property or of the encumbering of assets; what income tax ramifications might be triggered and what other transactional costs would arise? The concept of harm under s. 89 would also encompass economic implications such as whether the distribution would adversely impact the other spouse's lifestyle or effectively undermine or prejudice his or her argument for reapportionment.
- [16] In *I.F.*, the respondent's position in the underlying litigation was that a marriage agreement precluded the claimant from entitlement to family property under the FLA, which is somewhat analogous to Mr. Ponds' position in this case that his relationship with Ms. MacFarlane was not marriage-like. In these circumstances, Madam Justice Ballance held, the interests of the responding spouse may be harmed if the court required funding of an unmeritorious claim. A reasonable way to "attenuate that manifestation of harm" is to require the applicant to show there is a reasonable prospect of success on the threshold issue of entitlement: *I.F.*, at para. 194.
- [17] A further factor that must be considered is whether the applicant will be able to repay the amount distributed in the event the family law claim is dismissed. This is not to say the court should be satisfied the applicant can repay the advance immediately. Requiring an ability to repay the advance immediately would effectively put s. 89 beyond the reach of most spouses in need of its assistance. An interim distribution will only result in the kind of "enduring" harm that s. 89 guards against if the applicant cannot repay the advance even over a

reasonable period of time: I.F., at para. 196-197.

- [18] Accordingly, there are three factors I must consider on this application: (a) Is an advance of \$50,000 necessary for Ms. MacFarlane to advance her claim at trial? (b) Is there a reasonable prospect Ms. MacFarlane will establish a marriage-like relationship and an entitlement to at least \$50,000 of family property? (c) Will an advance of \$50,000 harm the financial interests of Mr. Ponds within the meaning of that concept under s. 89?
- [19] These factors must be accessed carefully, recognizing that an interim distribution of family property is an extraordinary remedy: Mckenny, at para. 57.

A. Is an advance of \$50,000 necessary?

- [20] In order to demonstrate necessity, the applicant should provide the court with a budget of the anticipated litigation expenses and evidence as to why he or she is unable to meet those expenses from other resources: L.L.J. v. E.J., 2013 BCSC 1233; Longeau v. Wolfe, 2016 BCSC 835; Chung v. Harrison, 2018 BCSC 1258.
- [21] Ms. MacFarlane gives evidence in her affidavit of an estimate provided to her by her legal counsel of approximately \$50,000 for a seven-day trial, based on 100 hours for senior counsel at a hourly rate of \$450 and 20 hours by an associate at an hourly rate of \$250.
- [22] Mr. Ponds argues that this budget is too "vague" to justify an advance under s. 89 of the FLA. While the budget provided to Ms. MacFarlane is lacking in specifics, it is sufficient in my view to allow an assessment of her reasonable requirements at this late stage of the proceedings.
- [23] A rough estimate might be inadequate if an advance was sought earlier in the proceedings, at which time the court might require a more detailed breakdown of the anticipated expenses and a timeline for when those expenses would be incurred. However, on the eve of trial, when the parties have exchanged trial briefs and the issues are well-known, such detail is, in my view, unnecessary.
- [24] I have reviewed the trial briefs. I consider the estimate provided by Ms. MacFarlane's counsel reasonable having regard to the agreed trial length, the lists of witnesses to be examined or cross-examined and the issues to be tried. In fact, I anticipate that the full cost to Ms. MacFarlane of the trial may well exceed \$50,000.
- [25] Mr. Ponds further submits that s. 89 is not intended to provide full funding for a trial up front, but rather only what is necessary to mount a case. While Ms. MacFarlane deposes that her counsel has a policy of requiring a sufficient retainer to start a trial, Mr. Ponds argues that she ought to explore alternate arrangements, such as deferring some of the billings to the conclusion of the trial in the expectation she will receive a share of Mr. Ponds' financial assets.

- [26] I do not accept the notion that s. 89 is based on a minimum level of legal funding, or that to qualify for an advance an applicant must find counsel who is willing to conduct the trial at reduced rates or deferred billing. These qualifications would run counter to the purpose of leveling the playing field with a better-resourced spouse who is able to retain counsel of his or her choice.
- [27] Ms. MacFarlane deposes that her counsel of choice, who has prepared the case to date and incurred approximately \$15,500 of unbilled time on her file, requires a retainer of \$50,000 to start the trial. I am not in a position to reject that evidence.
- [28] In her Form F8 financial statement, Ms. MacFarlane discloses net assets of approximately \$10,000. In her affidavit, she explains that the only assets of any value, an old car, a piano and some furniture, are very difficult to sell. She also denies Mr. Ponds' allegation that her father gives her money, beyond ordinary gifts. She deposes that her father is retired and living on a pension. I do not think it is necessary for her to go further to establish that she is unable to fund the retainer her counsel requires from other sources.
- [29] In short, I am satisfied that an advance of \$50,000 is necessary for Ms. MacFarlane to advance her claim at trial.

B. Is there a reasonable prospect of success?

- [30] Ms. MacFarlane can only succeed in this action if she establishes that she was a "spouse" as that term is defined in s. 3(1) of the FLA:

A person is a spouse for the purposes of this Act if the person has lived with another person in a marriage-like relationship, and (i) has done so for a continuous period of at least 2 years

- [31] In *Austin v. Goerz*, 2007 BCCA 586, while rejecting a "checklist approach", the Court of Appeal said that cases like *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) provide helpful indicators of the sorts of behaviour that society associates with a marital relationship. In *Molodowich*, the Court listed shared shelter, sexual and personal behaviour, services, social activities, economic support and children as the characteristics generally associated with marriage. To this, the Court of Appeal added in *Austin* that "the presence or absence of any particular factor cannot be determinative of whether a relationship is marriage-like" (para. 58).
- [32] In *Weber v. Leclerc*, 2015 BCCA 492, Groberman J.A. affirmed that there is no checklist of characteristics that will be found in all marriages, and concluded:
- [23] The parties' intentions - particularly the expectation that the relationship will be of lengthy, indeterminate duration - may be of importance in determining whether a relationship is "marriage-like". While the court will consider the evidence expressly describing the parties' intentions during the relationship, it will also test that evidence by considering whether the objective evidence is consonant with those intentions.

- [24] The question of whether a relationship is "marriage-like" will also typically depend on more than just their intentions. Objective evidence of the parties' lifestyle and interactions will also provide direct guidance on the question of whether the relationship was "marriage-like".
- [33] More recently, in *H.S.S. v. S.H.D.*, 2016 BCSC 1300, at paragraph 49, Dardi J. accepted the following factors as informing the analysis of whether the parties were living as spouses:
- Whether the parties vacationed together;
 - Presence or absence of marital relations;
 - How the parties conducted their financial affairs, including any financial planning they undertook as a couple and how they filed their tax returns. Notably, the authorities establish that financial dependence is no longer considered an essential element of a marital relationship;
 - Estate planning;
 - Making shared plans for the future;
 - Participation in joint social activities and the manner in which the spouses presented themselves to others.
- [34] Mr. Justice Milman reviewed these and other authorities in *A.J.E. v. T.B.W.*, 2017 BCSC 1657, and concluded:
- [17] [I]t is apparent that the determination of whether the parties were living in a marriage-like relationship is a fact-specific inquiry that must be made on a comprehensive basis, having regard to all of the evidence. While I may consider the various indicia listed in authorities, they are not to be treated as a checklist and no single factor should be treated as being decisive.
- [35] It would not be appropriate for me on this application to engage in a comprehensive analysis of the evidence. The trial judge will decide whether the relationship was marriage-like, and if so, for how long, based on a full record and after having heard from all of the witnesses. My task is only to decide whether there a reasonable prospect Ms. MacFarlane will establish a marriage-like relationship and an entitlement to at least \$50,000 of family property.
- [36] In this regard, there is some common ground in the affidavit materials. In July 2011, the parties made a commitment to live together, found mutually agreeable accommodations and jointly entered into a lease agreement. Their relationship when they moved in together was undeniably intimate and romantic, although these aspects may have waned in 2014 and possibly even ended in 2015. Mr. Ponds provided financial support and coverage from his health benefits to Ms. MacFarlane while she looked for employment. Mr. Ponds and Ms. MacFarlane referred to one another, socialized and vacationed as a couple, although their time together may have tailed off in 2015.

- [37] In my view, the parties contributed to making a home and a life together in a manner that seems more marriage-like than one would expect of a couple living together for convenience only.
- [38] On the other hand, Mr. Ponds deposes, and Ms. MacFarlane does not deny, they did not plan an indefinite future together. Mr. Ponds and Ms. MacFarlane kept their finances separate. There is no evidence they discussed their financial holdings or retirement planning. There were no joint accounts. They did not purchase assets of any value together.
- [39] Ms. MacFarlane may face some challenges at trial on the key question of whether the couple saw their relationship as one of indeterminate, lengthy duration; however, I am satisfied for the purposes of this application that there is a reasonable prospect she will establish that she lived with Mr. Ponds in a marriage-like relationship for at least two years, and accordingly, the right to be treated as a spouse under the FLA.
- [40] Ms. MacFarlane's share of the family property may be limited by the length of the marriage-like relationship that is found by the trial judge and any factors that may militate towards an unequal division of that property; however, I am also satisfied that there is a reasonable prospect she will establish a claim to at least \$50,000.

C. Would an advance harm the financial interests of Mr. Ponds?

- [41] Mr. Ponds asserts that, with the exception of the cash in his non-registered investment account, an advance would require him to liquidate invested funds, which will trigger capital gains taxes if the funds are obtained from his non-registered accounts and deferred income taxes if they are withdrawn from the RRSPs.
- [42] As stated, Mr. Ponds has proposed that Ms. MacFarlane could receive half of the \$29,000 cash in his non-registered investment account, leaving the other half for Mr. Ponds to fund his own case.
- [43] Ms. MacFarlane argues that there are a number of sources available to the Mr. Ponds from which to fund the full \$50,000 advance sought on this application. These include a TFSA with a balance of approximately \$75,000, bank accounts with a combined balance of approximately \$14,000, monthly income of approximately \$20,000 before taxes and a substantial investment portfolio against which Mr. Ponds could borrow even if he chose for tax reasons not to sell any holdings at this time.
- [44] In response to the suggestion he could draw on the TFSA account without adverse tax costs, Mr. Ponds filed an affidavit attaching information that U.S. citizens are taxable on income earned in a TFSA.
- [45] Mr. Ponds further argues that no court has ordered a spouse to take on new debt to fund an advance under s. 89 of the FLA. He relies on the following passage from Madam Justice Ballance's reasons for judgment in I.F.:

- [199] I am satisfied that a \$50,000 interim distribution from family property can be made without negatively impacting the respondent's standard of living, compromising his asset base or triggering adverse income tax costs and without harming his financial interests in the overall picture. (emphasis added)
- [46] In my view, this passage must be considered in the context of the immediately preceding paragraph in which Her Ladyship found that "the concept of being harmful to the financial interests of the spouse in terms of the recipient spouse's capacity to repay, must mean harm of an enduring nature" (emphasis added). The same can be said, in my view, of other asserted manifestations of harm.
- [47] An advance under s. 89 should not be denied, in my view, when it would trigger any tax or other transaction cost to the payor spouse. Restricting s. 89 in this way could limit its application to spouses with large amounts of cash on hand or very high disposable incomes.
- [48] The level and nature of the harm that will defeat an application under s. 89 should be understood, in my view, in light of its remedial purpose. This suggests to me that a spouse who argues that an advance would be harmful to his or her financial interests should provide evidence on which to quantify the harm relative to the benefit of an advance.
- [49] In this case, Mr. Ponds has only asserted in his own affidavit that liquidating his investments will trigger adverse tax consequences here or in the United States. He has not provided evidence from his financial advisor or an accountant that raising the additional \$31,000 to fund an advance of \$50,000 would actually trigger tax costs, and if so, when or in what amount.
- [50] Borrowing against family property appears to have been one of the options available to the payor spouse in I.F. (see para. 195) and McKenney (see para. 59-61).
- [51] The evidence in this case does not establish that an interim distribution of \$50,000 will jeopardize Mr. Ponds' position at trial or harm his financial interests such that the application should be denied. Whether it is funded by selective selling or by a line of credit, the proposed advance represents just 5% of Mr. Ponds' current assets. Mr. Ponds is financially sophisticated. I am satisfied that he will be able to work with his financial advisors to raise the necessary funds while minimizing the tax and interest costs, if any.
- [52] I am also satisfied that an advance to Ms. MacFarlane of \$50,000 will not jeopardize Mr. Ponds' ability to pay his own lawyer. Mr. Ponds must have planned for his legal costs in the upcoming trial without relying exclusively on the cash component of his non-registered investment account, of which he was only recently made aware.

- [53] Any financial costs to Mr. Ponds associated with the advance to Ms. MacFarlane may be brought to the attention of the trial judge. If Ms. MacFarlane is successful in establishing an entitlement to a share of Mr. Ponds' investment portfolio, the trial judge may factor those costs in the final award. If Ms. MacFarlane is unsuccessful, the trial judge may order her to repay those costs.
- [54] Ms. MacFarlane's ability to repay the advance and any associated costs if required has caused me some concern. Ms. MacFarlane's current income is modest. Her employment history does not suggest her means to repay Mr. Ponds will increase significantly in the near future. Nonetheless, Ms. MacFarlane deposes that she could repay the interim distribution over a reasonable period of time. At 51 years of age, she is relatively young and not under any disability of which I was made aware that would prevent her from working long enough to pay off a debt of this amount.
- [55] All things considered, I am satisfied that Ms. MacFarlane has sufficient ability to repay Mr. Ponds over time should she be required to do so by the trial judge.
- [56] In short, I am satisfied for the purposes of s. 89 that an interim distribution of \$50,000 will not harm the financial interests of Mr. Ponds.

CONCLUSION AND ORDER

[57] For these reasons, I make the following orders:

- a) There will be an interim distribution of family property to Ms. MacFarlane in the amount of \$50,000;
- b) Ms. MacFarlane will pay these funds to her legal counsel in trust to be used solely for the purposes enumerated in s. 89 of the FLA;
- c) Ms. MacFarlane will irrevocably instruct her counsel to repay any amount remaining of these funds at the conclusion of this matter to Mr. Ponds; and
- d) Costs of this application are costs in the cause.

[58] The parties have also agreed to an order by consent that the respondent will make an additional interim, without prejudice payment of spousal support of \$2,000 on May 1, 2019, and the existing order under s. 91 of the FLA will be extended until final judgment in this matter.

"Master Elwood"

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