
CANADA / JUDGMENT

McDaid v. Bak

2014 BCSC 2461

COURT

Supreme Court of British Columbia

DECIDED

5 December 2014

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2014 BCSC 2461 McDaid v. Bak

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McDaid v. Bak,

2014 BCSC 2461

Date: 20141205

Docket: E133506

Registry: Vancouver

Between:

Sinead Brigid McDaid also known as Sinead Brigid Bak

Claimant

And

Jason Michael Bak

Respondent

Before: Master Muir

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

P. Daltrop

Counsel for the Respondent:

M.R. Slay

Place and Date of Hearing:

Vancouver, B.C.

December 3, 2014

Place and Date of Judgment:

Vancouver, B.C.

December 5, 2014

- [1] THE COURT: This is an application by the claimant, Ms. McDaid, for sale of the former matrimonial home located on St. Georges Avenue in North Vancouver (the "former matrimonial home"); production of documents from the respondent, including financial documents and his 2013 income tax return; authority to apply for passports for the children; and interim child and spousal support.
- [2] The parties commenced residing in a marriage-like relationship in 2001. There is a dispute as to a period of separation, however, they were married on September 2, 2005 and separated in November 2011. There are two children, Eoin, born September 8, 2008; and Erin, born May 11, 2011. The parties are joint guardians and have joint custody of their two children.
- [3] Mr. Bak continues to reside in the former matrimonial home with his new partner. Ms. McDaid is now residing in Burnaby with her new partner, who has two children from a previous relationship.
- [4] Eoin attends Holy Trinity School in North Vancouver, which is close to the former matrimonial home, and Erin attends preschool three days a week I believe. Pursuant to his Form F8 financial statement sworn in January 2014, Mr. Bak's income is said to be \$270,000 per year. Ms. McDaid has no income.
- [5] The litigation history is somewhat complex. In September 2011 the claimant took the children to Ireland to visit her family. They were to return in January 2012. That did not happen and the respondent made an application pursuant to the Hague Convention seeking return of the children. That resulted in "Terms of Settlement" in the Court of Ireland.
- [6] The children and the claimant returned to Canada on June 13, 2012. The claimant says that she intends to make Canada her home but her status here is not resolved. She is presently on a tourist visa that expires on December 14, 2014. That visa precludes her from working or attending school. She says she is taking steps to resolve that situation and that her current partner is sponsoring her immigration to Canada. The status of that application is unclear.

- [7] The Terms of Settlement included provisions for the deposit of the children's passport, one with each of the party's counsel. Neither party was to remove the children from the jurisdiction without consent, although there were provisions allowing them to travel again to Ireland for Christmas. The respondent was to pay the claimant \$6,600 a month on a without-prejudice basis for child and spousal support. The respondent agreed to provide the claimant with a car and to pay the cost of that lease and to deposit \$15,000 into an escrow account to be accessed by the claimant in the event of default in payment of the specified support. The respondent was to support the claimant's application for permanent residence in Canada.
- [8] It is alleged that the respondent has not complied with a number of terms of that settlement. It is said, amongst other things, that he did not deposit the \$15,000 into escrow. He has not paid for a vehicle for the claimant for over a year and that he began to unilaterally deduct certain expenses from the agreed support amount.
- [9] As a result, an application for child and spousal support was brought in December 2013. That was adjourned several times. The parties appeared before Master Taylor on July 15, 2014, where a consent order was agreed to. The relevant terms for our purposes include: 1) that the respondent would continue to pay the \$6,600 a month on a without-prejudice basis; 2) that the respondent would have exclusive interim occupancy of the former matrimonial home, 3) no application for sale of the former matrimonial home could be brought by the claimant until after October 31, 2014, and 4) that the parties would seek to refinance the first mortgage on the property such that there would be a cash payment to each party of \$25,000.
- [10] That refinancing has not happened, allegedly because the bank demanded both parties provide their CRA Notices of Assessment for 2013. Mr. Bak still has not filed his income tax returns for 2012 and 2013. Although he says his accountant is working on them and he expects to file them this month.
- [11] Ms. McDaid is in Canada on a tourist visa, as I noted, and she is unemployed and has not filed income tax returns in Canada. Thus the refinancing, which was expected to provide additional income for the claimant to assist in, amongst other things, paying for the conduct of this action, has not occurred and may not occur.
- [12] I note too that the trial of this matter is scheduled to commence on February 15, 2015, for ten days.
- [13] The respondent is making two preliminary objections to this matter proceeding. First, he argues that the notice of application is deficient in not properly setting out the legal basis for the claims advanced. He references several decisions in support of that, including that of *Dupre v. Patterson*, 2013 BCSC 1561.

- [14] While I do not condone the provision of materials that do not comply with the requirements of the rules, I am of the view that in this instance, given the lengthy history of this matter and that the issues of support and sale of the former matrimonial home have both been before the court previously, that there was no lack of sufficient notice to the respondent of the basis for the claims. Indeed, counsel indicated as much and was prepared to and did advance argument on all points.
- [15] Second, the respondent argues that Rule 5-1(18) of the Supreme Court Family Rules, B.C. Reg. 169/2009 requires a party bringing an application to which a Form F8 financial statement is relevant and where the Form F8 is over 91 days old to provide an updated financial statement at least 28 days before the start of the hearing. The claimant's only financial statement was sworn December 9, 2013. Since then, her circumstances have changed in that she now resides with her partner in his home.
- [16] Counsel for the respondent argues that even absent the requirement in the rules, the lack of a current financial statement renders it impossible for me to make the assessment required under the Federal Child Support Guidelines, SOR/97-175 where the payer's income exceeds \$150,000 and in addition that I cannot assess the needs of Ms. McDaid for spousal support.
- [17] Counsel for the claimant argues that Rule 5-1(18) does not apply as this application was initially brought in December 2013 and has been adjourned many times since. In addition, he points to Rule 5-1(15) of the Supreme Court Family Rules , which provides that:
- (15) If information contained in a document filed and served under this rule is rendered inaccurate or incomplete by a material change in circumstances, the party who filed and served that document must, promptly after that material change, serve on all parties:
- (a) a written statement setting out the accurate and complete information; or
- (b) a revised Form F8 financial statement containing the accurate and complete information.
- [18] Counsel for the claimant submits that the requirement of Rule 5-1(15) was satisfied by Ms. McDaid's 8th affidavit sworn December 2, 2014, in which she states in response to the respondent's assertion that her financial circumstances have changed due to the change in residence as follows, in para. 14:

My personal expenses have not been reduced.

[19] And in para. 18:

I am paying for my share of our household expenses. My boyfriend is not supporting me or the children.

[20] I am satisfied that Ms. McDaid's evidence responds directly to the assertion of a change in circumstances. Although there has technically been a failure to comply with the Supreme Court Family Rules in failing to file an updated Form F8 financial statement prior to the hearing of this matter, I am satisfied in all of the circumstances that is a technicality. I am

conscious of the provisions of Rule 21-5 of the Supreme Court Family Rules that unless I order otherwise, a failure to comply with these rules must be treated as an irregularity. Thus, I conclude that these preliminary issues are not a bar to this application being dealt with on its merits.

[21] The first matter is the application for sale of the former matrimonial home. The application is brought pursuant to Rule 15-8(1) of the Supreme Court Family Rules , which provides:

If in a family law case it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court

[22] The claimant admits that the sale of the property is not necessary. She asserts, however, that it is expedient in all of the circumstances. The parties agreed on the general principles and both referred me to the decision of our Court of Appeal in *Reilly v. Reilly*, 99 D.L.R. (4th) 47 at 55. In that decision, the court discusses the concept of expediency as follows:

In *Bodo v. Bodo*, it was said any doubts about the justice of an order for sale on an interim application should be resolved in favour of the status quo.

With respect, this formulation may not provide the certainty it suggests. The status quo for one spouse may be the perpetuation of an injustice for another. In light of the infinite variety of circumstances arising out of human relationships, it is fruitless to attempt to catalogue in advance the factors to be taken into account on an application for an interim sale. At the risk of over- simplification, my own view is that what the rule requires, where necessity is not in issue, is that the proposed sale be advantageous to both parties. Advantageous is a primary dictionary meaning of expedient.

[23] Both parties also referred me to the reasons of Madam Justice Huddart in *Bodo v. Bodo*, 66 D.L.R. (4th) 700. Counsel for the respondent took me to the reasons of Master Joyce, as he then was, in *Head v. Head*, [1994] B.C.J. No. 1503 where he reviewed the reasons in *Bodo* and summarized the factors that should properly be considered to determine whether a sale is necessary or expedient. Counsel for the respondent addressed each of those considerations and argued they weighed in favour of not selling the property at this time.

[24] The respondent also referred me to the decision in *Pierce v. Pierce* (1995), 2 B.C.L.R. (3d) 31 (S.C.), where the court concluded that as the trial was scheduled for slightly less than two months from the hearing date, there was no compelling reason that the property should be ordered sold in the face of the claim of the petitioner to retain the home as part of the division of assets.

- [25] Similarly, here the respondent says that he wishes to keep the former matrimonial home and that he has the wherewithal to purchase the claimant's interest in that home when that is determined. He also argues that some or all of the equity in the former matrimonial home is an excluded asset as the down payment was made with funds from the sale of shares which he owned prior to the commencement of the relationship.
- [26] That is disputed, and the claimant says that this case is on all fours with Bodo. The claimant submits that the only possible result at trial here will be the sale of the former matrimonial home so that Ms. McDaid's claim can be paid.
- [27] While I am skeptical that Mr. Bak will be able to purchase the claimant's interest in the former matrimonial home, I cannot, on the evidence before me, conclude that a sale now is in both parties' best interests. Given the time of year, the proximity of Christmas and the trial, the claims advanced by Mr. Bak for exclusion, and Mr. Bak's desire to retain the former matrimonial home as a stable element for the children. I conclude that it would not be expeditious to order a sale at this time.
- [28] I will, however, adjourn this application. If for some reason the trial of this matter does not proceed in February, there is liberty to bring this application on again.
- [29] Turning then to documents. The claimant seeks financial records from the respondent. She deposes, and it is not contested, that he has not made any financial disclosure since the filing of his Form F8 financial statement in January 2014. This evidence is said to be material to the claimant's assertion that the respondent's expenses are overstated and that he expenses matters through the company that should be considered when considering the respondent's income at the trial of this matter.
- [30] The issues here are significant. In his Form F8 financial statement, the respondent claims annual expenses of \$341,107.08. It appears that does not include the \$6,600 a month paid to the claimant. In addition, on top of secured debt of \$2,187,915.77, the respondent claims unsecured debt of \$2,622,775.64.
- [31] The claimant seeks production of documents for any account for which the respondent has signing authority. I believe that is overly broad. I am satisfied that there is a foundation made here for production of documents, but the order is restricted to documents for the respondent's personal bank account. He is, therefore, ordered to produce, within 14 days, his bank statements and cancelled cheques for all his personal bank accounts for the last 12 months. Different considerations apply to credit cards. The respondent is to produce statements of both the corporate credit cards he uses for expenses and his personal credit cards for the last 12 months.
- [32] As to the respondent's 2013 income tax return, his evidence is that it has yet to be completed. In the circumstances, the respondent will produce, within 14 days, all backup documents that were provided to his accountant for compiling his 2013 tax return. He will provide a copy of his 2013 income tax return within 7 days of its completion.

- [33] Turning to the passport issue. The claimant is planning a trip with the children over the Spring Break. She intends to go to the United States with her partner, along with their respective children and her partner's mother. She does not seek authorization for that trip in this application, but does seek authorization to obtain new passports for the children as their old passports have expired.
- [34] The respondent objects. He points out that the claimant's immigration status is unresolved and that she had once before kept the children in Ireland, contrary to their agreement. He alleges she is a flight risk. The claimant points out that according to the terms of settlement, the parties agreed to her travelling again to Ireland with the children, so there cannot be a serious flight risk issue here.
- [35] Further, I am invited to direct customs and immigration to send the children's passports to counsel for the claimant and direct that he hold them pending agreement or further order. That appears to me to resolve the matter most expeditiously and the application is therefore granted, with the direction that customs and immigration are to send the children's passports to counsel for the claimant who is to hold them pending further agreement or order.
- [36] Turning to Interim child and spousal support. There is no question that the children and the claimant are entitled to interim support. Indeed, there is a without prejudice payment included in an order already. The respondent has the means to pay. The claimant has no income and cannot work in Canada - at least as things presently stand.
- [37] As to child support, the respondent argues that the amount of child support suggested by the Federal Child Support Guidelines should be departed from, given his income is in excess of \$150,000. In my view, there is no evidence that the guideline amount is excessive, nor is there any evidence that this would be a de facto wealth transfer or tantamount to additional spousal support. Considering the principles set out in *Roche v. Chen*, 2012 BCSC 1290, I find no basis on which to depart from the guideline amount for child support on this interim application. As noted in *Roche*, any unfairness can be resolved at trial when the evidence will be explored in a more fulsome manner.
- [38] Interim child support for the two children is therefore ordered payable by the respondent based on a guideline income of \$270,000 in the amount of \$3,616 a month commencing November 1, 2014. It is payable on the 1st of each month thereafter as long as the children remain children of the marriage or until further order or agreement.
- [39] As to spousal support, both counsel made submissions based on the Spousal Support Advisory Guidelines and the amount presently being paid under the Terms of Settlement and the order of Master Taylor. Based on a guideline income for the respondent of \$270,000 and zero for the claimant, the Spousal Support Advisory Guidelines provide for a low end support payment of \$4,686, a mid-range of \$6,230 and a high range of \$6,842. The claimant urged that she should have support in the mid-range of those calculations. The respondent urged the low end. The low end provides the parties each with 50 percent of the net

disposable income, the mid-range 44.1 percent for the respondent and 55.9 percent for the claimant.

[40] Looking at the expenses claimed by the claimant and the general financial circumstances of the respondent, including the debts he is servicing, I conclude that the low end of the scale is most appropriate for an interim award. Interim spousal support is therefore ordered payable by the respondent based on a guideline income of \$270,000 for the respondent and zero for the claimant. The amount is ordered at the low end of the Spousal Support Advisory Guidelines scale in the amount of \$4,686 a month commencing November 1, 2014, and payable on the 1st of each month thereafter until further order or agreement. The respondent will have credit for the amounts paid pursuant to the order of Master Taylor for the months of November and December 2014.

[41] I will hear you as to costs and as to any questions or anything that is unclear.

[42] MR. DALTROP: Your Honour, it seems to me success has been divided and that costs should be in the cause.

[43] MR. SLAY: I agree.

[44] THE COURT: All right. In the circumstances, costs will be in the cause.

___ "Master Muir" ___

Master Muir

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