

CANADA / JUDGMENT

McMillan v. McMillan

2022 BCSC 2254

COURT

Supreme Court of British Columbia

DECIDED

8 December 2022

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2022 BCSC 2254 McMillan v. McMillan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McMillan v. McMillan,

2022 BCSC 2254

Date: 20221208

Docket: E210069

Registry: Vancouver

Between:

Semiha McMillan also known as Semiha Yilmaz

Claimant

And

Colin John McMillan

Respondent

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

D.J. Miller

Counsel for the Respondent:

L.A. Cruickshank

Place and Date of Hearing:

Vancouver, B.C.

December 5, 2022

Place and Date of Judgment:

Vancouver, B.C.

December 8, 2022

[1] THE COURT: The respondent husband applies for an order before trial to sell a residential property in Richmond, B.C. (the "Richmond property") where the claimant wife is living. The claimant opposes the sale. The respondent also seeks a reduction in the spousal support he pays and other relief, which I will address later in these reasons.

Background

- [2] The parties married in 2004. They separated in January 2021. They have a boy, 17, and a girl, 14. Today, the claimant is 44, and the respondent is 60. The trial of this proceeding was to begin on November 21, 2022. Now it is adjourned and is likely to be heard starting April 8, 2024. The respondent filed the application for the sale of the Richmond property in May 2021, and it was first set to be heard in June of that year.
- [3] The relative brevity of this interim ruling in a sense does not do justice to the thorough submissions of both parties when this application was argued, but it is the case that achieving only rough justice is the inevitable result of these pre-trial rulings, given that the hearings are brief, the parties have not been cross-examined in court, and relatively few witnesses have given evidence.

Sale of the Richmond Property

- [4] Turning more directly to the sale of the Richmond property. The particulars of the sale orders that the respondent seeks are found at paragraphs 1 through 4 in Part 1 of his notice of application filed September 8, 2022. The primary request is a sale order under Rule 15-8(1) of the Supreme Court Family Rules.
- [5] The claimant moved into the Richmond property in about June 2021. She and the respondent had lived with the children in a house in Tsawwassen which they sold in 2020. They bought the Richmond property at the time of the sale of the Tsawwassen property with a view to tearing down the house on the Richmond property and building a new family home.

- [6] In the meantime, that is, after selling the Tsawwassen house and buying the Richmond property, the family moved to rented accommodation in Delta. That is where they were living when they separated in January of 2021, and the respondent moved out. He now rents the upper floor of a house in Richmond. The claimant lives at the Richmond property rent-free, and there is no mortgage against the title of that property.
- [7] The parties purchased the Richmond property in December of 2020 for \$1.3 million. An appraisal from this fall values it at \$1,570,000, which is down \$80,000 from its value last summer. The appraiser in his report spoke of a falling market at present. Beyond that, no expert evidence was led on the expected market value at the time of trial, now to be in April of 2024, and even if such evidence had been introduced, how can one reliably know either way what the market value will be by that time?
- [8] There are several factual issues in dispute regarding whether the claimant will be able to afford to buy out the respondent's interest in the Richmond property and keep it for herself, as she hopes to do, and regarding how the proceeds from any sale of the Richmond property would be properly divided between the parties. The respondent submits the claimant will never be able to afford to buy him out. The claimant responds that she has \$300,000 from her mother, and bank financing of \$350,000 and other financial sources.
- [9] The respondent replies that the evidence of the claimant's mother's commitment is weak, consisting of a handwritten note from the mother attached to the claimant's affidavit, and that the letter from the bank to the claimant does not amount to a firm commitment to contribute financing. Those questions cannot be resolved on this application. They would need to be resolved in a trial.
- [10] As for which party would be entitled to what portion of the money from selling the Richmond property, there are several factual disputes, and they too would only be resolved at trial. They include the enforceability of a marriage agreement whereby the respondent alleges \$500,000 given by his parents and used by the couple is to be fully credited to him. Another dispute is to do with the respondent having allegedly lost hundreds of thousands of dollars in "day trading" for which the claimant seeks to hold him liable. Again, those and other sizable claims and counterclaims would need to be resolved at trial.

The Law

- [11] Both parties cited *Kapoor v. Makkar*, 2020 BCCA 132. From para. 46 in *Kapoor*, the following guidance is found: if the sale is not necessary, the expedient criterion in the family rule means that a sale should be advantageous to both parties. To the same effect: see *Tomic v. Tough*, 2013 BCCA 355 at para. 26.

- [12] Another factor from Kapoor is whether the sale is inevitable, as the respondent contends it is in this case, or is not inevitable, as the claimant submits. A trial can answer that question. If a sale is not inevitable, that obviously weighs in favour of retaining the property at the interim stage.
- [13] Another important consideration, still from Kapoor in para. 46, is whether a sale would effectively eliminate accommodation for a spouse and children, or whether alternative accommodation is available. As noted before, the claimant is now able to live at the Richmond property with neither party having to pay rent for it to anyone else, or to pay down a mortgage. She is there full-time, and the two children are there at least half the time.
- [14] The property is near where both children attend school. The claimant's work is also in Richmond, where she is a paralegal in a law firm in private practice. Kapoor at para. 46 adopted this court's statement in *A.B. v. C.D.*, 2015 BCSC 2134, that any doubts about whether an order for sale should be made before trial should be resolved in favour of the status quo. Kapoor at para. 22 tells us that the onus in a sale application rests with the party seeking to change the status quo.
- [15] I have sympathy for the respondent in seeking an order to sell the Richmond property when it is kept in mind that by the time now set for trial, the sale application will be nearly three years old, but I am bound by the facts and by the law referred to above. It is not clear that the sale is necessary and inevitable, and the respondent carries the onus on the application. Unfortunately, only a trial will settle the question of necessity.
- [16] The sale is not advantageous to the claimant. Nor is it for the children, who are relatively settled there at present. A sale would mean the parties and, therefore indirectly, the children, would have to incur rental costs for the claimant to a third party, which at present are unnecessary. Doubts about whether a sale should be made are to be resolved in favour of the status quo. Clearly, the evidence raises legitimate doubts. I therefore dismiss the application for the sale of the Richmond property.

Spousal Support

- [17] Turning to spousal support. Paragraph 5 in the respondent's September 8, 2022 notice of application reads as follows:

Pursuant to section 167 of the Family Law Act, and on an interim without-prejudice basis, based on the Respondent's Guidelines income of \$174,032 and the Claimant's Guidelines income of \$70,000, that the Consent Order pronounced on October 21, 2021, be varied to direct the Respondent to pay \$418 in spousal support to the Claimant commencing on October 1, 2022, and on the first of each month thereafter until further court order or the written agreement of the parties.

- [18] Spousal support in the October 21, 2021 order was \$2,087, at a time when the claimant was earning only nominal income and was living rent-free in the Richmond property. She now earns \$70,000 annually and is still living rent-free in the Richmond property.
- [19] From the record as I have reviewed it, on October 11, 2022, the parties adjusted spousal support downward slightly to \$1,992, without prejudice to the present application. At the hearing before me, or shortly before the hearing, the respondent amended his spousal support application informally to say that if the sale of the Richmond property was to be denied, spousal support should be reduced from the requested \$418 per month to zero pending trial. The claimant opposed the amendment but said the respondent's arguments could be heard with the lateness of the amendment being a factor against the amendment succeeding.
- [20] With regard to spousal support, this case raises the "compelling financial circumstances" exception for adjusting spousal support on an interim basis as referred to in c. 12.1 of the Federal Spousal Support Guidelines [Guidelines]. Accordingly, the order I am making is that interim spousal support from January 1, 2023 until trial, or further order, will be made on a without-prejudice basis using the following inputs:
- (1) shared parenting;
 - (2) mid-point in the Guidelines range; and
 - (3) with the respondent's income of \$174,032 and the claimant's income of \$70,000.
- [21] From the figure resulting from that calculation, the spousal support payment to the claimant will be reduced by 50% of the market rent rate for the Richmond property in its current condition. That is the rough justice that will be employed. Counsel between them will determine the market rent rate for the Richmond property, failing which they can appear before me by telephone at 9:00 a.m. any morning I am sitting, and the registry can be advised accordingly.

Other Requested Orders

- [22] Turning to the other requested orders: Order no. 6, concerning the amount of child support, was not argued before me, by agreement. Order no. 7, regarding s. 7 expenses, is granted as requested at 31% for the claimant and 69% for the respondent. Order no. 8, by consent, is modified so that the claimant will answer only questions 362 and 368 from the December 3, 2021 examination for discovery. Regarding order 9, the trial is now adjourned by consent to April 8, 2024. Order no. 10, for the enforcement of parenting time, is adjourned generally by consent. Order no. 11, addressing costs, can be addressed in a two-page letter from each side with any relevant case law, the letters to be exchanged on a common date that the parties agree on.

[23] CNSL L. CRUICKSHANK: Thank you, Justice. I just have one clarification, if I may. In terms of both parties' calculation inputs for the spousal support, they both included \$5,000 of special expenses for the children. I just would seek that that be a term of the order in terms of the inputs, as it was in both parties' submissions.

[24] CNSL D. MILLER: I do not object.

[25] THE COURT: Very well. The \$5,000 will be included accordingly.

"Macintosh J."

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