

CANADA / JUDGMENT

McMillan v. McMillan

2023 BCCA 144

COURT

British Columbia Court of Appeal

DECIDED

17 March 2023

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2023 BCCA 144 McMillan v. McMillan COURT OF APPEAL FOR BRITISH COLUMBIA Citation: McMillan v. McMillan, 2023 BCCA 144 Date: 20230317 Docket: CA48817 Between: Semiha McMillan also known as Semiha Yilmaz Appellant (Claimant) And Colin John McMillan Respondent (Respondent) Before: The Honourable Mr. Justice Abrioux (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated December 8, 2022 (McMillan v. McMillan, 2022 BCSC 2254, Vancouver Docket E210069). Oral Reasons for Judgment Counsel for the Appellant: J.M.W. Cudmore A.L. Colpitts Counsel for the Respondent: L.A. Cruickshank Place and Date of Hearing: Vancouver, British Columbia March 14, 2023 Place and Date of Judgment: Vancouver, British Columbia March 17, 2023 Summary: The appellant applies for leave to appeal part of an interim spousal support order providing that the amount of spousal support payable to her pursuant to the Spousal Support Advisory Guidelines ("SSAG") shall be reduced by 50% of the market rent of the parties' Richmond property, until trial. She alleges the judge ordered a type of "occupation rent" or, alternatively, misapplied the "compelling financial circumstances" exception in the SSAG. Held: leave to appeal is granted. The appeal is of sufficient merit and significance to both the practice and the parties to meet the extremely high threshold for leave to appeal interim orders in a family law context. ABRIOUX J.A.: Nature of Application

[1] The claimant/appellant, Semiha McMillan, applies for leave to appeal an interim spousal support order of Justice Macintosh made on December 8, 2022. Subparagraph 2(e) of the order provides that the amount of spousal support payable pursuant to the Spousal Support Advisory Guidelines ("SSAG") by the respondent, Colin McMillan, be reduced by 50% of the market rent that could be received for the parties' property at 6131 Basset Road, Richmond, British Columbia (the "Richmond Property"), where the appellant is living.

Background

[2] The interim spousal support order forms part of a larger order dismissing the respondent's application for the sale of the Richmond Property pursuant to Rule 15-8 of the Supreme Court Family Rules, B.C. Reg. 169/2009. The appellant opposed the application for sale.

- [3] In addition to the order for sale, the respondent sought a reduction in the interim spousal support he pays to \$418 per month pursuant to s. 167 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Prior to the hearing before Macintosh J., the respondent informally amended his application to submit that, should the sale of the Richmond Property be denied, spousal support should be reduced from the requested \$418 to zero, until trial.
- [4] The parties' trial had been adjourned from its original date in November 2022 to April 2024.
- [5] The parties married in 2004, and separated in January 2021. They have two teenage children. They bought the Richmond Property in December 2020, with the intention of tearing down the existing house and building a new family home. In about June 2021, the appellant moved into the Richmond Property. There is no mortgage registered against title; the appellant is residing there "rent-free". The respondent now rents the upper floor of a house in Richmond.
- [6] In reasons indexed at 2022 BCSC 2254, Macintosh J. found it was not clear that the sale of the Richmond Property was either necessary or inevitable. While stating that he was sympathetic to the respondent given the length of time until trial, the judge noted that the sale was not advantageous to the appellant or the children, who were relatively settled there, and that doubts about whether a sale should be ordered before trial are to be resolved in favour of the status quo.
- [7] However, the judge acceded to the respondent's request for a reduction in spousal support, although not to the full extent requested in his amended application.
- [8] An October 21, 2021 consent order provided for interim spousal support of \$2,087 per month, which amount had been adjusted downward on October 11, 2022 to \$1,992. The judge noted that the higher amount was ordered at a time when the appellant was living in the Richmond Property but earning only nominal income, whereas she now earned \$70,000 annually and continued to live in the Richmond Property.
- [9] The judge observed at para. 20 that "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 [SSAG]". He ordered interim and without prejudice spousal support, from January 1, 2023 until trial, or further order, using the following inputs: · Shared parenting of the parties' children; · The respondent's income set at \$174,032; · The appellant's income set at \$70,000; · The children's section 7 expenses set at \$5,000; and · Mid-point in the SSAG range.
- [10] The judge at para. 21 then stated:
- [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. ...

- [11] This is reflected in subparagraph 2(e) of the December 8, 2022 order. Before me, it was clarified that only the reduction of support by 50% of market rent is challenged on appeal. Legal Framework for Leave to Appeal
- [12] The order in question is an order for interim relief under s. 167 of the FLA, which provides: 167 (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.
- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
- (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
- [13] This qualifies as a "limited appeal order" under Rule 11(c) of the Court of Appeal Rules, B.C. Reg. 120/2022, for which leave to appeal is required. While the general test for leave to appeal applies to interim support orders in the family law context, this Court's jurisdiction to vary such orders is extremely limited. It will only interfere in "exceptional circumstances" where there is "clear reason" to do so: *N. (T.) v. N. (J.C.)*, 2013 BCCA 432 at para. 10 (Chambers); *Hammond v. Hammond*, 2020 BCCA 314 at para. 57 (Chambers); *MacDonell v. MacDonell*, 2021 BCCA 471 at para. 19 (Chambers).
- [14] In *MacDonell*, Justice Harris summarized the unique principles in such a case:
- [18] The proposed appeal is of an interim order pending trial. It is a discretionary order, although, of course, discretion must be exercised on a principled basis. It is well recognised that interim orders in family matters work "rough justice" to create a workable temporary resolution of issues dividing parties until they can properly be resolved at trial on the basis of admissible evidence. As a result, this Court rarely entertains appeals from interim orders. The focus of the parties' efforts needs to be on getting to trial, not continuing their conflict in a different forum.
- [15] The overarching question is whether granting leave to appeal is in the interests of justice: *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers).
- [16] With these governing principles in mind, I will consider the criteria for leave to appeal as recently summarized in *Jiang v. Peoples Trust Company*, 2022 BCCA 40 at paras. 32-34 (Chambers):
- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
- (4) whether the appeal will unduly hinder the progress of the action. Positions of the Parties

- [17] The appellant asserts that the judge, purporting to apply the "compelling financial circumstances in the interim period" exception, effectively ordered a form of occupation rent. She argues he erred in doing so in that there was no ouster, and, in any event, occupation rent is only to be considered at a trial when the trial judge considers whether to unequally divide family property. Furthermore, it cannot be a factor in the consideration of interim spousal support. She says that the market rent of the Richmond Property is irrelevant to the required analysis mandated by s. 167 of the FLA, and that the judge failed to appropriately consider the proper factors.
- [18] Alternatively, she argues that if what occurred was an application of the compelling financial circumstances exception set out in c. 12.1 of the SSAG, then the judge erred in his analysis. She says that the judge was provided with no authorities which found that a spousal support recipient not having to pay rent or a mortgage could trigger this exception. She further submits that she was already living in the Richmond Property when the October 2021 consent order was made, and that the only change in circumstances since that time is the increase in her income, which can be addressed by a straightforward application of the SSAG.
- [19] Before me, the appellant articulated the legal question this way: in what circumstances is it appropriate, on an interim spousal support application, for the court to consider the "compelling financial circumstances" exception in the SSAG? She submits that there are no appellate authorities which consider this question, and the issue is of sufficient merit and significance to the practice to clear the high hurdle for the granting of leave to appeal.
- [20] Finally, the appellant submits that the order unfairly prejudiced her. According to an estimate obtained by the parties as to the market rental rate of the Richmond Property, she argues that the effect of subparagraph 2(e) of the order is to reduce the respondent's spousal support payments to zero until trial.
- [21] The respondent submits that the appellant does not challenge any of the judge's factual findings, to which a high degree of deference is owed. He also argues that the judge appropriately applied the exception. That is because housing costs are properly considered by the court on such an application, and that his high rent constitutes precisely the kind of "unmovable expense" in the interim period, prior to the division of property, contemplated by the SSAG as a rationale for the exception. He submits this Court should not interfere in the rough justice that the judge gave effect to.

Analysis

- [22] The SSAG provides in part: 5.3 Interim orders The Advisory Guidelines are intended to apply to interim orders as well as final orders. The interim support setting is an ideal situation for the use of guidelines. There is a need for a quick, easily calculated amount, knowing that more precise adjustments can be made at trial. Once an income can be established for each party it is possible under the formulas to generate ranges of monthly amounts with relative

ease. The Advisory Guidelines do recognize that the amount may need to be different during the interim period while parties are sorting out their financial situation immediately after separation. To accommodate these short-term concerns, the Advisory Guidelines recognize an exception for compelling financial circumstances in the interim period which is discussed in Chapter 12, dealing with exceptions. 5.4 Review and Variation The primary application of the Advisory Guidelines is to interim and initial determinations of spousal support at the point of separation or divorce, whether through negotiated agreements or court orders. The Advisory Guidelines also have a role to play in the determination of spousal support in the context of variation and review, but it is a somewhat more limited role [G]iven that the Advisory Guidelines are based on income sharing, they are well-suited to adjusting spousal support amounts to changing incomes over time. The Guidelines can thus be applied in a very straightforward way to increases in the recipient's income and decreases in the payor's income. However, in some cases, such as post-separation increases in the payor's income or reductions in the recipient's income, there are threshold issues of the relevance of the changed income to the spousal claim--issues essentially of "entitlement." These threshold issues must be dealt with first, to determine to what extent, if any, the income change is to be taken into account, before the Guidelines can be applied.

12. Exceptions Since the release of the Draft Proposal, one surprise has been the failure of lawyers and judges to use the listed "exceptions" to the formulas. In this final version, we have therefore assembled all the exceptions in one chapter, with more refinements and specifics about their potential use. We have also added some new exceptions, reflecting the feedback received since the Draft Proposal. For ease of reference, we will first list all the exceptions, before discussing each in turn:

- (1) Compelling financial circumstances in the interim period 12.1 Compelling Financial Circumstances in the Interim Period We have listed this exception first, as it is the first exception that most will encounter. There are some situations in the interim period where there may have to be an exception for compelling financial circumstances. When spouses separate, it is not always possible to adjust the household finances quickly. One of the spouses may have to bear large and often unmovable (at least in the short run) expenses, most likely for housing or debts. In most instances, the ranges generated by the formulas will cover these exceptional cases, but there may be some difficulties where marriages are shorter or incomes are lower or property has not yet been divided. Interim spousal support can be adjusted back to the formula amounts once a house has been sold or a spouse has moved or debts have been refinanced.

- [23] The SSAG have been endorsed by courts as a "useful tool" to guide the range and duration of awards for spousal support and have been deemed consistent with the law in British Columbia: *Chutter v. Chutter*, 2008 BCCA 507 at paras. 98, 100. Courts have gone so far as to say that an order of spousal support which falls substantially above or below the suggested range in the SSAG could give rise to an error in law, unless a reasonable explanation was provided for the discrepancy: *McEachern v. McEachern*, 2006 BCCA 508; *Redpath v.*

Redpath, 2006 BCCA 338.

- [24] Bearing in mind the extremely deferential standard of review for interim spousal support orders, this is one of the exceptional cases, in my view, in which leave to appeal should be granted. The question regarding the application of the "compelling financial circumstances" exception in the circumstances of this case, to justify a departure from the range suggested by the SSAG meets the merits and significance to the practice criteria, particularly when it is arguable, as alleged by the appellant, that a form of occupation rent was being ordered by the judge.
- [25] The significance to the parties also militates towards granting leave, considering the effect of the order on the actual amount of interim spousal support payable by the respondent within the context of a trial which is still over a year away.

Disposition

- [26] Accordingly, I grant the appellant's application for leave to appeal subparagraph 2(e) of the interim order regarding the reduction in spousal support by 50% of the market rent of the Richmond Property.
- [27] Costs will be in the cause. "The Honourable Mr. Justice Abrioux"

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Prepared on 24 October 2026 · Esheria