
CANADA / JUDGMENT

Murtack v. Murtack

2019 BCSC 487

COURT

Supreme Court of British Columbia

DECIDED

2 April 2019

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2019 BCSC 487 Murtack v. Murtack

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Murtack v. Murtack,

2019 BCSC 487

Date: 20190402

Docket: E182222

Registry: Vancouver

Between:

Sheri Judy Doris Murtack

Claimant

And

Myles Montgomery Murtack

Respondent

Before: Master Muir

Reasons for Judgment

Counsel for the Claimant:

B.J. Ingram

Counsel for the Respondent:

J.M. Lalonde

Place and Date of Hearing:

Vancouver, B.C.

March 7, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 2, 2019

introduction

[1] This is an application by the claimant for the following orders:

- a) An interim distribution of family property under s. 89 of the Family Law Act., S.B.C. 2011, c. 25 [FLA];
- b) Interim child support for the children of the marriage who reside with her pursuant to the Divorce Act, R.S.C. 1985, c. 3;
- c) Interim spousal support in the form of a lump sum plus nominal monthly support pursuant to the Divorce Act; and,
- d) Costs.

Background

[2] The parties were married on August 22, 2011, after some period of co-habitation, and separated in the spring of 2018. The claimant says the date of separation was April 1, 2018.

[3] The parties have the following children:

- a) Kaiya-rai Sarmenta, born September 11, 1999 ("Kaiya-rai");
- b) Mason Myles Murtack, born July 22, 2002 ("Mason");
- c) Paris Anne Murtack, born March 15, 2004 ("Paris");
- d) Ava Mylee Sandra Murtack, born January 3, 2008 ("Ava"); and
- e) Beckett Michael Anderson Murtack, born January 3, 2008 ("Beckett").

[4] Although Kaiya-rai is the respondent's stepdaughter, the respondent has, at all relevant times, been in a parental relationship with her.

[5] The claimant resides in Naples, Florida, initially with the five children. She now has only Paris and Ava in her full-time care.

- [6] The respondent resides in Cranbrook, BC, and has had Mason in his full-time care since September 2016 and Beckett in his full-time care since September 2018. Kaiya-rai is attending university in Florida on a full-time basis.
- [7] Trial in this matter is set to commence for ten days in January 2020.
- [8] On November 28, 2018, a Judicial Case Conference order provided, inter alia, for the respondent to provide child support to the claimant of \$4,000 per month on an interim, "without prejudice" basis. Leave was granted for the claimant to bring an application for child and spousal support and for an advance.
- [9] On February 11, 2019, Master Cameron granted an order (the "Cameron Order"), inter alia, for the retainer of a business valuator and appraiser at the expense of the respondent at the first instance, such costs to subsequently be shared equally between the parties, subject to agreement or further order. In addition, Master Cameron granted an asset restraining order against the respondent, excepting customary living expenses, expenses in the ordinary course of business and professional fees.
- [10] The respondent has been a successful businessman and the parties have direct and indirect interests in several companies. The claimant says that this allowed the parties to have the large family they both wanted and allowed her to stay home with the children full-time.
- [11] In 2012, the parties decided to move to Florida, where the respondent operated a renovation company. Around June 2014, the respondent decided to move permanently back to Cranbrook. The claimant decided that she wanted to stay in Florida.
- [12] The respondent indicates that this caused a severe strain on their relationship and his initial position was that the parties separated in September 2015. Upon reflection, he now agrees that they finally separated in the spring of 2018.

Financial Positions

- [13] A chart of the corporate holdings of the parties was provided to me at the hearing. It indicates that the respondent is a 100% shareholder in a company called M.D. Mineralsearch Inc. ("Mineralsearch"). The respondent deposed that he has operated this company since the early 1980s, and that it did not increase in value greatly during the parties' relationship.
- [14] The respondent says he has taken no dividends from Mineralsearch for about five years.
- [15] The parties each own 50% of M & S Murtack Holdings Ltd. ("M & S"). This is a holding company used to channel dividends to the parties.
- [16] According to the chart provided to me, M & S owns 37.5% of the shares of Woodlake Lands Inc. ("Woodlake"), which in turn holds 100% of the shares of Double M Construction Ltd. ("Double M").

- [17] That ownership is somewhat unclear, as the respondent deposes that the shares of Woodlake are owned by a family trust, which was created in 2014 for tax purposes. The parties are said to be the sole beneficiaries of that trust.
- [18] The respondent also deposes that the claimant recently had an opportunity to sell "her" shares in Woodlake for \$2,400,000. However, when I asked counsel how the claimant could sell shares that were owned by a trust, he could not tell me. I note that the financial statements of M & S indicate that it owns 37.5% of Woodlake.
- [19] There is considerable disparity in the parties' evidence about the value of the family assets.
- [20] In her Form F8 Financial Statement, the claimant estimates the parties' assets to have a value in excess of \$26 million, including the corporate interests.
- [21] In his Form F8 Financial Statement, the respondent did not value the corporate interests and estimated the other financial assets to be worth just over \$3.2 million (I note an error in the respondent's Form F8 Financial Statement, where the assets are shown totalled at \$2.2 million). These assets include at least four parcels of real property that are not shown as encumbered on his Form F8 Financial Statement.
- [22] The respondent operates a buffalo farm on one of these properties. In his affidavit, he deposes that there is a \$400,000 mortgage on title to one of the parcels incorporated into the buffalo farm.
- [23] The claimant also lists in excess of 30 vehicles, including planes, a boat, dirt bikes, skidoos, seadoos, a dune buggy, three jeeps, and a motorhome, which she values at \$731,500 in her Form F8 Financial Statement. The respondent lists a truck, unspecified children's motorcycles, and quads with a total value of \$55,000 in his Form F8 Financial Statement.
- [24] It is entirely possible that there is some other explanation for the discrepancy between the parties regarding the vehicles, but from the respondent's evidence about one of the jeeps being owned by Mineralsearch, I conclude that some of these vehicles that are likely used for family purposes have been purchased through one or more of the parties' corporations.
- [25] The respondent says he has 'traditionally' deposited half of the M & S dividends to the claimant's account in payments of \$10,000 per month, rather than the typical periodic dividend payments of \$37,500 roughly quarterly, so that she would not spend all the money at once, alleging she is bad with finances.
- [26] He deposes that from January to November 2017, excluding September and October, deposits of \$10,000 per month were made to the claimant's bank account.

- [27] After November 2017, there was a one-year hiatus due to a sale of Double M shares. According to the respondent, he gifted all of his shares in Double M to the claimant in 2009. She then transferred those shares to Woodlake in late 2017 and received \$676,010, which was split between the parties. As a result of the impact of this, no dividends of M & S were paid from November 2017 until September 2018, when the respondent says that he deposited dividends of \$48,750 into the claimant's account.
- [28] The claimant acknowledges that payment, and notes that she also received a dividend payment of \$18,750 in January 2019 and \$4,000 per month in child support, which commenced in December 2018.
- [29] The respondent says that the claimant is now receiving child support in accordance with the Judicial Case Conference order, likely in excess of the table amounts, and that she also receives exactly the same income as he does, being the roughly quarterly dividends from M & S. Further, his evidence is that these dividends are likely to increase in the future.
- [30] The claimant says that these funds were provided at the whim of the respondent and were always insufficient for the needs of her and the children, as she was responsible for the private school payments for the five children (initially), medical insurance, and other expenses.
- [31] The claimant says that she obtained her real estate licence and worked part-time as a realtor under the respondent's visa in the United States, earning about \$20,000 over an 18-month period. The claimant says that when the respondent's visa expired in the spring of 2018, however, she could no longer work under that visa and has not been able to work since.
- [32] The claimant says that in the fall of 2017, she had to take \$50,000 out of her Registered Retirement Savings Plans in order to make ends meet.

The parties' positions

Lump sum and retroactive spousal support

- [33] The claimant deposes that the expenses for her and the children in her care amount to \$12,650 per month, which includes schooling expenses of \$1,667 per month for the two daughters.
- [34] As noted, she received nothing from the respondent or the companies from the date of separation until September 2018.
- [35] The claimant says that the respondent is controlling and that she has no access to money from the various corporate holdings without him giving it to her. She argues that spousal support is necessary in the circumstances. She submitted that interim support should be awarded on a lump sum basis.

- [36] As an alternative to ordering spousal support, counsel submitted that I should order the respondent to continue to have M & S dividend payments paid to the claimant.
- [37] The claimant says that she hounded the respondent for support before and after separation and finally resorted to filing the notice of family claim. She submits a retroactive award is appropriate in the circumstances.
- [38] The respondent says that no spousal support is warranted as the parties are receiving equal amounts from M & S. The respondent resists a retroactive support order and says that the notice of family claim was the first indication that he had that the claimant was seeking support.
- [39] As to the rationale for a lump sum award, the claimant's evidence is that she and the two girls are presently in the US on a ten year B1/B2 Investor Visa, which permits them to live but not work in Florida while the claimant is investigating business ventures.
- [40] The claimant says that she has a plan to purchase a cleaning company in Florida. Although no detailed financial plan was provided, the claimant says this will require about \$100,000 US to acquire and operate for the first year. She says that this must be done before May 9, 2019 so that she will qualify for an E2 Visa on her own, failing which she and the two girls will have to leave the US.
- [41] Although the Florida home is not encumbered, the claimant says she is unable to obtain the necessary funds by mortgaging the home because of her lack of credit and work history in Florida. The financial assets in the claimant's control are \$264,000 in Registered Retirement Savings Plans, and \$96,000 CDN and \$9,100 US in chequing accounts.
- [42] The claimant says she needs retroactive spousal support and a lump sum payment of future spousal support to allow her to make the necessary investment to maintain her visa in the US.

Child support

- [43] The claimant's position is that I should impute an income of \$300,000 to the respondent and confirm the interim, "without prejudice" child support award of \$4,000 per month, retroactive to the date of separation.
- [44] Although the respondent argued that the claimant had an obligation to pay child support to him for the two boys, there was no such application before me. The argument was advanced more for the general proposition that the claimant did not require anything additional in the way of support given his consent to paying the \$4,000 per month child support and the corporate dividends she receives.
- [45] I gathered from the submissions of counsel for the respondent that the respondent was content paying the \$4,000 per month child support in accordance with the consent order.

Interim distribution

- [46] As to the interim distribution being sought by the claimant, she provides an estimate of legal fees through the ten-day trial of this matter in the amount of \$285,000.
- [47] The claimant argues that she cannot afford the same access to counsel that the respondent enjoys. She points out that he has de facto control over virtually all of the alleged family assets, which he can use to fund the lawsuit, as the Cameron Order allows him to use family assets to pay for professional fees.
- [48] The respondent objects to an interim distribution as he says he has personally guaranteed "several large commercial loans" and needs to maintain a good credit rating and, hence, cannot apply for other loans. He says to do so could negatively impact the businesses he operates. I note that the respondent did not provide any particulars regarding these financial circumstances.
- [49] In addition, the respondent notes that he is required by the Cameron Order to pay up front for the business valuations and appraisals and submits that the claimant has no need of an interim distribution.

Analysis and conclusions

Spousal support

- [50] In *Robles v. Kuhn*, 2009 BCSC 1163, Master Keighley summarized the considerations that must be taken into account on an application for interim spousal support at para. 12 as follows:
- [12] On interim support applications, the application of these provisions must be qualified by certain established considerations:
1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: *Gibb v. Gibb*, [2005] B.C.J. No. 2730 (S.C.);
 2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: *Grossi v. Grossi*, [1993] B.C.J. No. 878 (S.C.);
 3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances, which is better left to trial. The court achieves rough justice at best: *Randhawa v. Randhawa*, [1999] B.C.J. No. 3299; *Newson v. Newson*, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);
 4. The courts should not unduly emphasise any one of the statutory considerations above others;

5. On interim applications the need to achieve economic self-sufficiency is often of less significance;
 6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: *Ladd v. Ladd*, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.);
 7. Interim support should only be ordered where it can be said a *prima facie* case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, [2005] B.C.J. No. 2966, 2005 BCSC 1786 (S.C.);
 8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support: *L.G.B.*
- [51] As to lump sum support, Master Keighley addressed this issue in *Ferchert v. Ferchert*, 2007 BCSC 873, at para. 18:
- [18] Lump sum interim spousal support awards are quite rare, but have been awarded to allow payment of specific, necessary and significant disbursements such as: property and income taxes, tuition fees and accounting fees.
- [52] Although the claimant gives a ballpark estimate that she requires \$100,000 to purchase a cleaning company to allow her to maintain a visa in the US, there is no breakdown of this amount. There is no supporting material showing the feasibility of this purchase or the likelihood that it will result in her obtaining the visa she needs. Nor is there any convincing evidence that this is the only means available to her of maintaining her residency in the US. I note that she does have some means of her own, and if the purchase of this company is worthwhile, I expect that she does have the ability to achieve it without a lump sum award.
- [53] As to spousal support, I cannot find any basis for an award of interim spousal support so long as the claimant is receiving dividends from M & S of at least \$10,000 per month. With that and the \$4,000 child support per month being paid, the claimant's declared expenses are more than covered.
- [54] Thus, the application for interim, lump sum spousal support is denied. Should the claimant not receive dividends from M & S of at least \$10,000 per month on a regular monthly basis, there is liberty to apply. Of course, there is liberty to argue at trial that the claimant should be entitled to ongoing or lump sum spousal support.
- [55] As to retroactive support, given my conclusions and the dispute about when support was first claimed, this is an issue best left for trial.

Child support

- [56] The child support the respondent has agreed to pay is roughly the table amount for an income of \$300,000. The respondent's declared income is not \$300,000. I did not have, however, any analysis of the benefit to the respondent of having expenses paid for by the parties' corporations.
- [57] I am satisfied that there is at least sufficient evidence for me to conclude that he may be benefitting significantly by the payment of such expenses. I cannot conclude in the circumstances that the interim child support order that the respondent consented to is in any way inappropriate.
- [58] Given that the respondent appeared to concede that point, in my view, the order should stand. The respondent will, therefore, pay interim child support of \$4,000 per month for the two children in the claimant's care, on the first day of each month until agreement or further order.
- [59] The issue of retroactive child support is adjourned to the trial of this matter.

Interim distribution

- [60] An interim distribution of family assets is provided for in s. 89 of the FLA:

Orders for interim distribution of property

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.

- [61] Although the evidence of the claimant on this point is not particularly detailed, I do accept that the conduct of this case through a ten-day trial could well cost her the \$282,500 estimated by her counsel, or more. I note that this estimate provided only \$17,500 for dealing with experts and \$10,000 for disbursements. I conclude that the estimate did not include significant amounts for payment of experts for the valuation of the companies and the properties.
- [62] I am equally satisfied that the claimant has no ready access to income or property that would allow her to fund this litigation in any other way.

- [63] The respondent urged me to consider that such an advance should not be used to fund ordinary litigation expenses. He relied on the reasons of Mr. Justice Macaulay in *Ansari v. Ansari*, 2000 BCSC 634 at paras. 22 and 23:
- [22] Melnick J. has since pointed out, in *Pierce v. Pierce*, [1994] B.C.J. No. 3079 [S.C.], that "the focus in ordering an advance is not whether it is required for one spouse to fund his or her lawsuit against the other, but rather whether, in order to make a determination regarding assets, as contemplated by s. 52 of the Family Relations Act, [R.S.B.C. 1996, c. 126] such an advance is, in equity, required".
- [23] Both Kirkpatrick J. and Melnick J. reviewed other decisions since *Erskine*. Of those, only one allowed an interim distribution to cover ordinary legal fees and disbursements: see *Ford v. Ford* (6 February 1992), Vancouver A913765. Others permitted an advance to help fund an evaluation: for example, see *Belzberg v. Belzberg* (1991), 34 R.F.L. (3d) 449 (S.C.). It is noteworthy that, in *Erskine*, Melvin J. disallowed a claim for the former but permitted a claim for the latter.
- [64] I note, however, that *Ansari* was decided before the FLA came into force, and in my view, is distinguishable on that basis. My review of the decisions founded on s. 89 of the FLA satisfies me that the interim distribution provided for is intended to cover ordinary legal fees and disbursements.
- [65] I referred counsel to the words of Madam Justice Ballance in *I.F. v. R.J.R.*, 2015 BCSC 793 at para. 192, 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.
- [66] Counsel for the respondent distinguished this case on the basis that the claimant has access to the dividends from M & S. As those funds are supporting the day-to-day expenses of the claimant, I do not see that they in any way take away from the fact that here, the respondent controls "the majority of the wealth and assets" and as a result, the litigation playing field is skewed.
- [67] As to such a distribution being harmful to the respondent, I note that his evidence as to that point is vague and lacks any support. As noted in *I.F.*:
- [193] In my opinion, the plain meaning of the phrase "harmful to the interests of the spouse" in s. 89 contemplates actual or potential economic harm, and is likely broad in its scope. 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.

- [68] The bald assertion of the respondent that an interim distribution could negatively impact his credit rating or business does not allow the necessary individualized inquiry.
- [69] In support of her assertion that the respondent would not suffer harm if an interim distribution was made, the claimant relied on the decision of the Court of Appeal in *Bartch v. Bartch*, 2018 BCCA 271:
- [65] Ms. Bartch contends that, apart from the s. 88 issue, the judge erred by failing to properly apply the "harm" and "necessary for a purpose listed" criteria in s. 89. She contends, further, that he erred by failing to craft an order that restricts the use of the distributed property to s. 89 purposes, and in ordering a distribution of property that is not family property.
- [66] With respect to the harm criterion, Ms. Bartch says that the judge erred by failing to address inconvenience or inefficiencies, described in her affidavit, occasioned by her payment of a large sum to Mr. Bartch from monies retained by the numbered company.
- [67] I do not consider the judge erred as alleged. The inconvenience and inefficiencies discussed by Ms. Bartch from "cashing in" assets to make the distribution are generally matters that sound in money, and any financial consequences that result from doing so may be quantified for appropriate compensation in due course. In my view, it was open to the judge in this case to conclude any difficulties that would be experienced by Ms. Bartch in amassing the funds were not "harm" within the meaning of s. 89.
- [70] Given that the respondent has apparently conceded that the claimant's share of the value of M & S is at least \$2.4 million, there are ample assets such that the respondent could be compensated for any financial impact on him of an interim distribution. Thus, on the authority of *Bartch*, I conclude that an interim distribution would not be harmful to the interests of the respondent.
- [71] An order for an interim distribution remains discretionary, however, even where the tests in s. 89 of the FLA are met. This action is a complex one, with several companies, different jurisdictions, and several real properties. There is a very real risk that, without an interim distribution, the claimant would be unable to properly advance her claims. In the circumstances here, I conclude that it is in the interests of justice that an interim distribution be made.
- [72] The claimant will have an interim distribution of family assets pursuant to s. 89 of the FLA in the amount of \$200,000, payable within 60 days from the date of this judgment.

Costs

[73] The claimant was largely successful in this application and is entitled to her costs in the cause.

"Master Muir"

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