
CANADA / JUDGMENT

Nelson v. Woodward

2020 BCSC 399

COURT

Supreme Court of British Columbia

DECIDED

9 March 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 399 Nelson v. Woodward

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nelson v. Woodward,

2020 BCSC 399

Date: 20200309

Docket: E-53712

Registry: New Westminster

Between:

Wendy Ann Nelson

Claimant

And

Trevor Lance Woodward

Respondent

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

S. Zukerman

Counsel for the Respondent:

D. Boyd

Place and Date of Hearing:

New Westminster, B.C.

February 5, 20, 2020

Place and Date of Judgment:

New Westminster, B.C.

March 9, 2020

Introduction

- [1] This is an application by Ms. Nelson, the claimant in this family law matter, pursuant to s. 89 of the Family Law Act, for an interim distribution of family property of \$200,000 to fund the conduct by her current counsel of her upcoming trial. Mr. Woodward, the respondent, opposes the application. He argues that it is unlikely that Ms. Nelson will recover such an amount at trial and that, in any case, he is not in a position to borrow that amount on the security of the property in question.
- [2] The trial is scheduled to begin on April 6, for ten days. It appears that the key issues during it will be the financial implications of the parties' 15 year marriage-like relationship - in particular, division of the former family residence and Ms. Nelson's entitlement to spousal support.

Evidence

- [3] According to Ms. Nelson, she began to live with Mr. Woodward in a marriage-like relationship on his previous property, contributing to the mortgage during that time. While she did not contribute to the subsequent purchase of the former family residence, all of her earnings were spent on various needs of the family.
- [4] In addition, she served as the bookkeeper for Mr. Woodward's business and was integrally involved in the renovations that doubled the size of the residence.
- [5] She deposes to quite a dire financial situation. She currently works as a dispatcher for a transport company and earns just over \$30,000 per year. After she was hospitalized for a suicide attempt in 2017, she was not permitted to return to the family residence and had been renting an apartment on her own since May of that year.
- [6] There was a fire in her previous apartment building last November, rendering it uninhabitable, and she had to obtain a new apartment on short notice that had rent of \$450 per month more. Her belongings were not insured and she expects to have to replace most of them.

- [7] Her total monthly expenses, not including any non-essential items, were \$3,123, which she cannot meet on her monthly take-home pay of \$2,208. For that level of income she has what I would describe as a substantial level of credit card debt and she is also stuck with a high interest loan on a vehicle, which she entered into at a time when Mr. Woodward had agreed to pay her spousal support and she could afford a more expensive one.
- [8] On the critical expense that has led to this application, she explains that she owes legal fees and disbursements to her counsel of about \$72,000, including for the interim application of which this forms a part.
- [9] She describes needing about \$125,048 to take this matter to trial, which will include such tasks as continuing the examination for discovery of Mr. Woodward, assembling relevant documents, making additional interim applications, obtaining a necessary report and carrying out preparation for trial. As a result, at total \$197,048 will be required to satisfy her existing obligations to the firm and proceed to trial.
- [10] These costs have increased since her description of them in her affidavit from December, because her former counsel is no longer able to carry on with the case and her present counsel, who is from the same firm, has a higher hourly rate.
- [11] Most importantly for our purposes, Ms. Nelson deposes that "I will be unable to continue with my legal counsel unless I receive an interim distribution of funds."
- [12] Relevant to the issue of her legal costs so far, Ms. Nelson explains that Mr. Woodward is now on his third counsel in this matter. His second counsel delayed matters substantially by contesting the fact the parties were ever in a marriage-like relationship and seeking adjournments of previous trial dates. There have also been some difficulties in having this application, which was filed on December 9th, heard in a timely manner.
- [13] As of last August, the former family residence was appraised at being worth \$1.7 million. On the material before me, there is an indication that the mortgage is about \$441,000, leaving equity of approximately \$1.59 million. It is 6400 square feet in size and is divided into a series of suites, from which Ms. Nelson says Mr. Woodward should receive rent in the range of \$4075 per month. This greatly exceeds the \$2633 per month that he had sworn as being his total expenses for mortgage, insurance, and property taxes in his most recent financial statement of February 2018. She disputes his claim that he receives only \$2100 per month in rent. She points out that his claimed rent for one of the suites is below the market level for Surrey; that a suite for which he claims no rent is shown by photographs that were attached to her previous affidavit to be currently occupied; and that there is a further suite that was formerly occupied by his daughter now sitting vacant, for which he could obtain \$1000 per month.
- [14] She takes the position that Mr. Woodward is quite significantly under-reporting his income from his concrete contracting business, which he listed in his financial statement as being only \$25,358. He claimed annual expenses of almost \$95,000 in that statement, without

providing any basis on which they could be covered. In his most recently disclosed company financial statement, from 2016, the gross profit was over \$100,000. This was after deducting more than \$21,000 for amortization, which her counsel points out is not an actual out-of-pocket cost.

- [15] It was also established through Mr. Woodward's examination for discovery that a considerable number of his personal expenses, such as the mortgage, his credit card, utilities, and numerous others, are "run through" his company, or paid by his "shareholder's loan". He described doing this "in lieu of taking an income".
- [16] To compound the suspicions arising from his finances, as of the time of this application he had not yet provided an updated financial statement.
- [17] In response, Mr. Woodward sought to demonstrate that Ms. Nelson's entitlement to an equal division of property at trial is by no means a given. He says that he entered into the agreement to purchase the former family residence before any marriage-like relationship between them began, and that it was paid for using funds from the sale of his previously-owned property and his own savings. In contrast, she neither contributed to the purchase of the home nor to any ongoing expenses related to it.
- [18] He also disputes that she ever played any meaningful role in his business.
- [19] As of his first affidavit for this application, he stood by an annual income from the business of approximately \$34,000 per year and denied carrying on any cash or other off-the-books transactions, as Ms. Nelson has alleged, that would have increased his income.
- [20] He suffered a broken arm last summer and explains that the yearly revenue of his business will, as a result, be more in the \$180,000 range, down from its usual \$250,000 in preceding years.
- [21] Further, he rejects the claim that he is not realizing the full possible rental income from his property.
- [22] He emphasizes Ms. Nelson's ongoing addiction problems, including a period in 2007 when he required her to leave the home for six months to address them, and another period in which she was unable to continue in her previous employment as a waitress. He says that these problems continue. (Ms. Nelson concedes ongoing struggles with substance use, including an addiction to prescription painkillers to cope with chronic pain in the later years of the relationship, but she denies that it has ever had any significant effect on her functioning.)
- [23] In Mr. Woodward's most recent affidavit, he contends that he has no access to credit from the equity in the family residence in the amount that Ms. Nelson is seeking. During previous settlement discussions, the substantive contents of which I ordered struck from the affidavit, he had secured a \$300,000 "equity takeout" from Coast Capital Savings, to pay what he claimed was the agreed \$200,000 settlement amount to Ms. Nelson. However, the settlement

was not ultimately concluded and he deposes that that institution, "will not loan me any money without a full settlement."

[24] He has attached a letter from Coast Capital confirming his pre-approval for the \$300,000 loan, which expired in January 2018. He claims in his affidavit that this is "confirmation that I could raise these funds for a settlement." (However, this letter does not refer to the purpose of the loan.) Mr. Woodward says that as a result, "I have no money nor any way to obtain money if the court ordered me to raise money as requested by the claimant."

[25] Ms. Nelson notes that in a text message to her from December 2017, during the period that the approval of the \$300,000 loan was in effect, Mr. Woodward wrote that, "The bank will lend me two hundred thousand dollars, that's it, at a higher interest rate because of my income."

Governing Principles

[26] The parts of s. 89 that are relevant to this application read as follows:

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

(b) all or part of a proceeding under this Act

[27] The correct approach to an application under s. 89 was helpfully explained in *I.F. v. R.J.R.*, 2015 BCSC 793:

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.

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.

[28] However, Justice Ballance elaborated, beginning at 197:

197 Adoption of a strict interpretation of "harmful" could mean that the applicant must be in a position to repay the distributed funds more or less immediately upon the failure of his or her claim. Were the court to endorse that formulation, then it would follow that a distribution might only be sanctioned where the applicant has assets equal or greater to the amount of the distribution, or a corresponding borrowing power or an assured minimum entitlement to family property so the court could be confident of repayment. Such an interpretation would place the most economically disadvantaged spouses beyond the reach of s. 89 and is not harmonious with a purposive approach.

198 In my view, 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. Accordingly, the fact that the recipient spouse may only be able to repay the distribution over a reasonable period of time into the future, as opposed to immediately following an unfavourable outcome at trial, would not, of itself, qualify as being harmful to the other spouse's interests.

[29] Or, as it was pithily expressed in *Negus v. Yehia*, 2015 BCSC 857, at paragraph 8:

The fact that it may be commercially inconvenient or awkward for Mr. Yehia to generate these funds does not mean that it is harmful to his interests within the meaning of the section.

[30] I will just add, to the extent that an application of this nature must be considered "extraordinary and must be assessed carefully" (*McKenny v. McKenny*, 2015 BCSC 1345 at paragraph 57), I see that as a description of the inevitable effect of the proper application of the statutory criteria, as they were explained in I.F., not as imposing additional criteria in addition to the statutory ones.

[31] Similarly, I do not read *McKenny's* description of the second component of the statutory test - that the advance or payment on an interim distribution basis "will not jeopardize the other spouse's position at trial" - as adding any gloss on the concept of the interests of a spouse as I.F. has interpreted them. Inevitably, the sort of prejudice to a spouse's financial interests that I.F. envisions will manifest itself at trial and affect that spouse's position at trial, because it will either diminish the family property that is subject to division, or consist of expenses that cannot be recovered through the trial process, even though they are family-related.

Discussion

[32] It is important to note at the outset that there are numerous disputed financial issues in this case, which cannot be resolved at the application stage and may well affect the manner in which the family property is divided. It is not certain that Ms. Nelson will receive half of the equity in the home but, as I.F. makes clear, the fact that the claim may ultimately be unsuccessful and the funded party have to repay the interim distribution over time is not determinative of the payment being harmful to the interests of the funding party.

- [33] In fact, on the very limited snapshot I have of these proceedings, Ms. Nelson actually appears to have an arguable case for an equal division, especially given the Court of Appeal's comments that there should not be an inordinate focus on the relative contributions of the spouses during the marriage: *Jaszczewska v. Kostanski*, 2016 BCCA 286, at para.43. And even if the purchase price is excluded property, her share of the increased value from \$323,000 to net \$1.59 million still exceeds the distribution she is seeking.
- [34] There is no reason to doubt the description provided by Ms. Nelson of her current indebtedness to her counsel, or of the amount she is required to pay to them to carry the case through to a conclusion. There is no evidentiary basis for the submission on behalf of Mr. Woodward that Ms. Nelson's counsel would continue to trial without being paid, and the application for this distribution was made in a timely way in relation to the trial date, even though there have been delays in hearing it.
- [35] I am satisfied this is a factually and legally complex claim, with a narrative of events that extends over a lengthy period. It is being very vigorously defended by experienced counsel, with numerous aspersions on Ms. Nelson's character and credibility being woven into the defence. I find that representing herself in such an action would leave her at a very serious disadvantage.
- [36] Accordingly, I am satisfied that an advance is required to mount a challenge to the other spouse's position at trial.
- [37] The argument that funding an interim distribution will be harmful to Mr. Woodward's interests rests on his contention that he is unable to raise those funds on the equity in the property, and would have to sell it in order to raise them. This, in turn, rests on his bare assertion that he was and is only able to obtain a loan to fund a settlement. There is no documentary support for this assertion, and in the absence of such support it seems to me a highly unusual position for a financial institution to take. To be more direct, I do not believe it.
- [38] There is also reason to doubt the accuracy and completeness of his financial disclosure to this point - in particular, the income he effectively takes from his business and the actual effect of the injury on his earnings. Another troubling factor is that he was claiming to Ms. Nelson to only be able to borrow \$200,000 in December of 2017, at a time he was actually approved for an additional \$100,000.
- [39] On the current record, I find his position unconvincing and conclude instead that, with the equity available to him and an accurate disclosure of his actual income to a financial institution, it is not unreasonable to expect him to be able to borrow the requested amount on the security of this very valuable property.
- [40] Accordingly, I also find that funding the distribution would not be contrary to Mr. Woodward's interests in any respect.

- [41] I therefore order an interim distribution of \$200,000 of family property to Ms. Nelson. It will be carried out in the terms set out in the draft order provided by her counsel, except for term 3, which dealt with the adjournment of the balance of her applications to a date that has now passed.
- [42] I will just emphasize for Mr. Woodward's comfort that the provision in the order that the costs of borrowing will be borne by him "in the first instance until further order of this court", means that it is open to him in the trial to seek an allocation of his costs of borrowing in whole or in part to Ms. Nelson.
- [43] Ms. Nelson has had substantial success in this application, so if she is successful at trial she will receive the costs of this application at the ordinary scale of difficulty.

"Schultes J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/03/2020BCSC0399.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/nelson-v-woodward-2020>

Prepared on 29 October 2026 · Esheria