
CANADA / JUDGMENT

Ostro v. Kotyk

2020 BCSC 1004

COURT

Supreme Court of British Columbia

DECIDED

6 July 2020

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2020 BCSC 1004 Ostro v. Kotyk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ostro v. Kotyk,

2020 BCSC 1004

Date: 20200706

Docket: E063193

Registry: Vancouver

Between:

Anastasia Joan Ostro also known as Anastasia Joan Kotyk

Claimant

And

Melvin Samuel Kotyk

Respondent

Before: The Honourable Madam Justice Iyer

Reasons for Judgment

Counsel for Claimant:

I. A. Pietrow

Counsel for Respondent:

L. A. Cruickshank

Written Submissions Received:

Vancouver, B.C.

June 22, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 6, 2020

OVERVIEW

- [1] In this application by written submissions, Ms. Ostro seeks an interim distribution of the remaining proceeds of sale of the family home. She says this is necessary in order to allow her to fund her family law claim, which is scheduled for a seven-day trial commencing August 10, 2020.
- [2] The parties had a long marriage of over 25 years and both parties are now in their sixties. They separated in 2005 and divorced in 2008. Ms. Ostro commenced a family law claim under the former Family Relations Act, R.S.B.C. 1996, c. 128 [FRA].
- [3] After the family home was sold, the mortgage was paid off, the parties each received an interim distribution, the net proceeds were paid to the law firm of Jon Ardagh to be held in trust. Further distributions were made to the parties over the years. As of July 2019, \$121,379 remained.
- [4] Ms. Ostro then applied for an interim distribution of a portion of the remaining funds, on the basis that this was necessary for her to fund the trial of her claim against Mr. Kotyk. On July 31, 2019, Justice Jackson ordered an interim distribution to Ms. Ostro of \$60,000. She determined that she had jurisdiction to do so under either s. 66(1) of the FRA or s. 89 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], and granted Ms. Ostro's application. Jackson J. noted that a distribution of \$60,000 represented roughly half of the remaining proceeds and Mr. Kotyk had conceded that Ms. Ostro was entitled to a 50% share of them.
- [5] At that point, the trial was scheduled for October 2019. It was adjourned, and new dates were set for March 2020. In February 2020, Master Vos adjourned the trial at Mr. Kotyk's request and set the present trial dates peremptory on Mr. Kotyk.

ISSUES

- [6] For the purposes of the present application, I do not consider it necessary that I rule on Mr. Kotyk's objections to Ms. Ostro's affidavit as I do not rely on the paragraphs he has identified. I do not agree with his claim that the application cannot be decided on the material before me because of conflicting affidavit evidence. The uncontentious evidence is sufficient. In particular, I have not considered any of the evidence relating to the alleged settlement agreement. That is a matter for trial.
- [7] The only issue before me is whether Ms. Ostro is entitled to an interim distribution of \$62,174.37, which represents the remainder of the proceeds from the sale of the family home. To decide that question, I must determine the applicable legal test and then apply it to the facts.

ANALYSIS

What Legal Test Governs the Interim Distribution Ms. Ostro Seeks?

- [8] Ms. Ostro's claim was commenced under the FRA, which has been repealed and replaced by the FLA. Section 252 of the FLA provides that the FRA applies to any proceeding respecting property division started under the FRA, or in relation to an agreement made prior to the enactment of the FLA. That means the FRA applies.
- [9] Section 66(1) of the FRA empowers the court to make orders necessary to give effect to its determinations:
- 66 (1) In proceedings under this Part or Part 6 or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 65, or under Part 6 and may make orders that are necessary, reasonable or ancillary to give effect to the determination.
- [10] The cases have established that s. 66(1) permits a court to order an interim distribution of property where the applicant spouse demonstrates both that the advance is required to challenge the other spouse's party's position at trial and that there is no prejudice to that other spouse's position at trial: *Jiwa v Jiwa* [1992] BCJ No. 3024 at para 8.
- [11] This test continues to be applied under s. 89 of the FLA, which specifically addresses the interim distribution of property: see *McKenny v. McKenny*, 2015 BCSC 1345 at para. 57.
- [12] Mr. Kotyk submits that the test for granting an interim distribution under the FRA was more stringent than it is under the FLA, relying on *Cao v. Chen*, 2018 BCSC 831 [Cao]. In my view, that is not entirely accurate. In the relevant passages of *Cao*, Justice Forth reviews cases decided under both statutes. While she notes that courts were generally more cautious in granting interim distributions under the FRA, she concludes (at para. 89) that under either statute, "the question that needs to be answered is whether the advance is required to mount a challenge at trial." (Emphasis in original.)

[13] Cases decided under the FRA reflect this approach. For example, in *Erskine v. Erskine* (1991), 31 R.F.L. (3d) 273, the court ordered an advance to cover the costs of retaining an expert valuation of certain disputed property in California. Although the respondent claimed 100% of those assets, the court found (at 277):

[It is] necessary and reasonable for this petitioner to have the opportunity to present information to the Court so that the Court may be in the position to decide whether or not the asset in the foreign jurisdiction is subject to the provisions of the community property law in the state of California

[14] In other words, the unfairness to the claimant in not ordering the advance outweighed the possible prejudice to the respondent in ordering a distribution of the property he claimed.

[15] In *Ford v. Ford*, (February 6, 1992), Vancouver A9133765 (B.C.S.C.), the court ordered an advance of almost \$90,000 to cover general legal expenses in circumstances where the claimant was almost certainly entitled to that amount. Although the unfairness to the claimant was not as specific or pronounced as in *Erskine*, there was almost no prejudice to the respondent in making the advance in question.

[16] Courts have considered similar factors when applying each prong of the test under either statute. Under the first prong, relevant factors include the applicant spouse's level of financial need, the complexity of the matter, whether the advance is necessary to meet an "emergent" situation, and whether the respondent's conduct has contributed to the applicant's financial difficulty.

[17] Under the second prong, relevant factors include the strength of the applicant's entitlement to the property, the applicant's ability to repay the amounts advanced, the extent to which the value of the assets is known or ascertainable, and the liquidity of the assets in question.

Has Ms. Ostro Shown that the Distribution is Necessary?

A. Is a distribution required to allow Ms. Ostro to mount a challenge to Mr. Kotyk's position at trial?

[18] I am satisfied that Ms. Ostro has demonstrated financial need. Her F8 form shows that she does not have other assets that could fund the litigation. Her description of her anticipated legal expenses is reasonable. The matter is somewhat complex in that it requires determination of the validity of a 2006 separation agreement, application of the now-repealed FRA, and expert actuarial evidence. I am satisfied that there is a potential for serious prejudice to the claimant if she is forced to proceed to trial without financial assistance.

[19] An "emergent situation" is not confined to an emergency: *Ghuman*, paras. 32-33. Here, the trial length has increased from five to seven days and it is commencing in a month. There are a number of essential steps that must be taken before then. I am satisfied that the situation is emergent.

- [20] In their affidavits and submissions, the parties blame each other for various delays and allegedly unnecessary expenses that have plagued the proceedings. Sadly, that is not unusual in family law cases. I cannot ascribe blame to either party based on the information before me.
- [21] Turning to Mr. Kotyk's arguments, the fact that Ms. Ostro's counsel has continued to represent her for a period of time after the retainer was exhausted does not mean counsel can be expected to continue to do so through the trial. Ms. Ostro's history of legal representation and the income she had previously are irrelevant to her present financial situation and her present ability to pursue her claim.
- [22] Ms. Ostro has demonstrated that she requires an interim distribution to mount a challenge to Mr. Kotyk's position at trial.

Would a distribution prejudice Mr. Kotyk's position at trial?

- [23] Ms. Ostro's claim to the remaining funds in the trust account differs from her previous interim distribution application. Before Justice Jackson, she was seeking an advance based on her 50% entitlement to the family home. Now she is essentially seeking what remains of Mr. Kotyk's half of the proceeds of that sale. Ms. Ostro does not have a claim to this particular asset. However, that does not end the analysis.
- [24] Ms. Ostro clearly has the ability to repay Mr. Kotyk an advance of \$62,174.37. This is because Mr. Kotyk agrees that she is entitled to a share of his pension plans. In his affidavit, he deposes that she is entitled to a payment of \$37,588.24 in relation to his municipal pension and of \$79,030.14 in relation to his fisheries pension. The fisheries pension alone exceeds the amount of the interim distribution Ms. Ostro is seeking. That means that the amount of Ms. Ostro's entitlement to Mr. Kotyk's fisheries pension can be reduced by the amount of the advance. Further, the value of the asset sought to be distributed is known and it is liquid.
- [25] I find that Mr. Kotyk will not be prejudiced by an interim distribution.

CONCLUSION

- [26] In conclusion, I grant Ms. Ostro's application. I order that the amount of \$62,174.37, being the balance remaining from the proceeds of sale of the former matrimonial home of the parties located at 2934 Panorama Drive, North Vancouver, British Columbia presently held in trust at Jon Ardagh Law Corporation, shall be paid out to the claimant as an interim distribution of capital for the purpose of funding this litigation matter.
- [27] I leave costs to the trial judge.

"Iyer J."

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