

CANADA / JUDGMENT

Priebe v. Baker

2022 BCSC 306

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Supreme Court of British Columbia

DECIDED

28 February 2022

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2022 BCSC 306 Priebe v. Baker

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Priebe v. Baker,

2022 BCSC 306

Date: 20220228

Docket: E210312

Registry: Vancouver

Between:

Lancelot Darren Priebe

Claimant

And

Alicia Ann Baker

Respondent

Before: Master Muir

Reasons for Judgment

In Chambers

Counsel for the Claimant:

Paul R. Albi, Q.C.

N. Liu

Counsel for the Respondent:

W. Shields

Place and Date of Hearing:

Vancouver, B.C.

February 2, 2022

Place and Date of Judgment:

Vancouver, B.C.

February 28, 2022

Introduction

[1] This is an application by the claimant under s. 90(2) of the Family Law Act, S.B.C. 2011 c. 25 [FLA] for an order that he have exclusive occupancy of the former family residence in Kelowna, BC (the "residence"). I note that the application was originally filed on July 21, 2021. The application has been delayed, according to the claimant, due to the respondent repeatedly changing counsel and on two occasions when the application was scheduled, there was insufficient court time for the hearing.

Background

- [2] The claimant is the founder of a video game and software development company located in Kelowna, BC. The respondent is American and was living in Los Angeles when the parties met. She initially entered Canada on a visitor's visa, but the claimant arranged for her to obtain a work permit on November 27, 2015, which was renewed in 2016. The respondent was employed by the claimant's company.
- [3] The parties did not have any children together. The claimant has three children from a previous marriage. The two younger children are teenagers and live with the claimant. The eldest is now an adult, is married, and resides with his wife elsewhere. It appears that the respondent never assumed the role of a parent to the children.
- [4] The residence was built by the claimant in 2011 prior to this relationship.
- [5] The dates of cohabitation and separation are disputed. The claimant says the parties began cohabiting in April 2015. The respondent says that the parties began cohabiting in the spring of 2014.
- [6] The parties entered into a Cohabitation/Marriage Agreement (the "Agreement") said to have been made on November 15, 2016. In the recitals to the Agreement, it is noted that the parties began dating in January 2014 and started cohabiting on or about April 24, 2015.

- [7] Because of the Agreement, the circumstances of this case are somewhat unique and counsel have advised that they were unable to find a case that was factually close to being on point.
- [8] The Agreement sets out that, at the time, the claimant had approximately \$50 million in assets and the respondent less than \$62,000.
- [9] The Agreement provides that the parties will keep their property separate and that, upon separation, the claimant will provide the respondent with the sum of \$250,000 plus \$500,000 for each year of cohabitation. Spousal support is waived.
- [10] The claimant says that both parties had counsel and were provided with extensive legal advice and proper disclosure was made by him before the Agreement was entered into. He seeks to enforce the Agreement.
- [11] The respondent seeks to have the Agreement set aside.
- [12] The Agreement defines separation as including either party giving notice in writing to the other party of their wish to end the relationship.
- [13] The claimant's position is that the parties separated in March 2020, when his counsel wrote to respondent's counsel regarding issues to do with the break-up of the relationship. That letter noted, amongst other things:

We have been engaged by Mr. Priebe to assist in the resolution of issues arising from the breakdown of his relationship with Ms. Baker.

- [14] The respondent acknowledges this letter, but says the parties continued to work on their relationship and did not separate until January 2021.
- [15] The parties attempted mediation in 2020. The claimant says this was to deal with separation issues. The respondent says this was an attempt to "deal with their differences".
- [16] As a result of a mediation session held on November 20, 2020, the parties apparently came to an agreement that is captured in a November 26, 2020 letter from the mediator, in which he noted:

Where Alicia is to reside in the interim until a resolution is reached.

After discussion of various options, it was agreed that Alicia would continue to reside at [address redacted] occupying the rooms that she is presently residing in with joint use of the kitchen. The rooms to which Alicia has occupancy include the guest bedroom and the guest bathroom downstairs in the basement, together with use of the fridge in the basement. This is subject to Alicia being treated with respect whilst she is residing at [address redacted].

This interim arrangement will be reviewed by February 20, 2021.

- [17] This interim arrangement was never reviewed, as the respondent cancelled the ongoing mediation.

- [18] The respondent's position at present appears to be that she is entitled to occupy, not just both her rooms downstairs with joint use of the kitchen, but also the entire living area of the second floor and the deck. She invites friends to socialize there.
- [19] The claimant has paid the respondent \$1.9 million, which, according to his calculation, is the respondent's entitlement under the Agreement. The claimant paid the respondent the initial payment of \$387,500 in June 2020. The balance was paid subsequently. The respondent received these payments on a without prejudice basis.
- [20] In his recent Form F8 financial statement, the claimant shows assets of \$52 million and, in hers, the respondent shows assets slightly in excess of \$2.3 million.
- [21] The residence itself is 7,000 sq. ft. over three storeys. The claimant and his children's bedrooms are on the third floor, the kitchen and living areas are on the second floor, and the respondent resides in the guest bedroom on the lower floor.
- [22] The residence is on a 50-acre parcel of land adjacent to another 50-acre parcel with a house owned by the claimant in which the claimant's father and step-mother reside. There is a second house on the parcel with the residence, but I am satisfied by the claimant's evidence that it is not presently legally habitable.

Positions of the Parties

The claimant

- [23] The claimant says he developed the residence with the children in mind and so that his extended family could live in close proximity and enjoy the amenities of the residence, including a pool and a large model railway build by the claimant's father.
- [24] In addition to his father and step-mother living in an adjacent home, the claimant's brother and his four children live nearby, as well as claimant's children's maternal grandparents.
- [25] The claimant's evidence is that prior to the breakdown of the parties' relationship, the family regularly enjoyed spending time in each other's homes and hosted large gatherings, including with their church groups, at the residence.
- [26] The claimant says the residence was treated as a "hub" for the children and their friends.
- [27] The claimant says that the parties' relationship began to deteriorate following an incident in June 2018, when the claimant allegedly overheard the respondent tell his youngest son, who was 13 years old at the time, that the respondent hoped that he (the claimant's youngest son), his siblings, and his mother would die in a helicopter crash during a trip they were taking that day. The comment was also allegedly heard by the claimant's daughter.

- [28] The respondent denies making that comment, but acknowledges that the claimant's youngest son reported the comment to his biological mother and that this caused a significant outcry in the claimant's extended family--the children's biological mother and the claimant's father both told the claimant that they would report the respondent to the police should another incident occur.
- [29] Conflicts have arisen since the parties' separation, including an incident in which the claimant alleges the respondent stole his laptop and hid it in the trunk of her vehicle, an incident in which the respondent claims the claimant attempted to or did push her down the stairs, and numerous disagreements over the parties' purchasing, storage, or throwing away of food. There have also been several disputes regarding guests in the home and disputes regarding privacy. The police have been called at the instance of each party.
- [30] There was a theft of golf clubs and bicycles from the garage in December 2021. The children were concerned and asked for locks to be installed on their bedroom doors. In addition, the claimant had security cameras installed.
- [31] The respondent objected to the security cameras as an invasion of her privacy and she apparently damaged the front door camera and forcibly removed one other camera.
- [32] Further, on January 24, 2022, when the claimant was not home, the respondent, with a male companion, entered the claimant's locked bedroom on the upper level of the home and was searching the room and bathroom. This was caught on the security camera the claimant had placed in his bedroom--including showing the pair removing the security camera.
- [33] The respondent does not deny this--a difficulty given the video--but says it was an isolated incident and they were looking for a cat. The claimant says this is simply not believable and, in any event, there is no explanation for their removal of the security camera.
- [34] The claimant says that the breakdown of his relationship with the respondent has interfered with his and the children's relationship with their extended family. They are unable to have the family and friends in the residence that it was intended for.
- [35] He also says that the presence of the respondent in the residence and the frequent disagreements is causing unnecessary stress for the children. He asserts that the children feel uncomfortable with the respondent and her friends in the residence and often leave or retreat to their rooms.
- [36] He points out that both of his younger children are suffering from this stress. He notes that his daughter asked to be taken to the hospital in October 2021, as she was afraid of harming herself. That situation is being dealt with by doctors and counsellors, but the claimant says the unnatural living situation is exacerbating her depression and stress.

- [37] The claimant's son is also suffering from stress. Both children had been boarding at private school, but it was felt, in consultation with the school, that their psychological issues would be better dealt with if they were living at home. Apparently, their biological mother is not able to accommodate them presently and they are, as a result, residing in the residence on a permanent basis.
- [38] The claimant notes that according to the Agreement, the residence is his sole property. In any event, having built the residence in 2011, well prior to the relationship, he points out that even if the Agreement was set aside, the respondent would only be entitled to claim a portion of any increase in its value during their relationship. His submission is that the property has actually decreased in value.
- [39] He argues that the escalation in family violence evidenced by the trespass to his bedroom, the removal of cameras and the other matters set out above, along with the psychological harm to the children, is sufficient to establish that the continued sharing of the residence is a practical impossibility.
- [40] He also argues that the balance of convenience favours his staying in the residence with the children. He built the residence for the children and his extended family, his office is in the residence, and the respondent has conceded that she will leave the residence when the family litigation is resolved.
- [41] The claimant also argued that the provisions of the Agreement should be given considerable weight. He submitted that it is unjust that the respondent, having received the funds she is entitled to under the Agreement, should remain in the residence.
- [42] He pointed out that the respondent has done little to advance the litigation--to the point of having failed even to produce a list of documents. She has repeatedly changed counsel, delaying matters, including delaying the trial originally set for 2022 into 2023. He says that while she remains in the residence, it is to her advantage to string out the litigation. Essentially, that she is having her cake and eating it too.
- [43] The claimant submits that there are no cases that deal with the intersection of a cohabitation agreement and an application for exclusive occupancy. The claimant referred to the decision of Justice Ballance in *I.F. v R.J.R.*, 2015 BCSC 793, where the existence of an agreement waiving spousal support was considered in the context of an application for interim spousal support. There, Justice Ballance noted:
- [173] The evidence concerning the circumstances surrounding the execution of a marriage agreement and its contents, to the extent it has been developed on an interim application, is to be examined through the lens of *Miglin v. Miglin*, 2003 SCC 24 and *Hartshorne v. Hartshorne*, 2004 SCC 22.
- [44] The claimant argued that a similar approach should be taken here, in that the respondent must show a reasonable prospect that the Agreement will be set aside.

- [45] The claimant argued that the respondent has completely failed to provide any evidence that the Agreement was in any way unfair or failed to meet the objectives of the Divorce Act, R.S.C. 1985, c. 3 [Divorce Act] or the FLA--either at the time it was signed or now.
- [46] Thus, he argues that, just as in the context of an application for interim spousal support, where there is no reasonable prospect shown that the Agreement will be set aside, the provisions of the Agreement should be given deference.
- [47] As the claimant has made the payments that the respondent is entitled to under the Agreement, the claimant argues that he should be granted the use and enjoyment of his separate property unless and until the Agreement is set aside.
- [48] In addition to the payments under the Agreement, the claimant offers without prejudice to pay the respondent \$60,000 to assist her in relocating.

The respondent

- [49] The respondent disputes much of the evidence provided by the claimant. She says the residence is not the claimant's primary residence as he spends most of his time at his house in Big White. She says the residence was not a hub for the children as they were often away with friends, with their biological mother, at camp or at boarding school.
- [50] The respondent disputes that the Charleswood residence is the primary residence of the claimant's parents as she asserts that they reside primarily in a condo in Kelowna.
- [51] The respondent disputes that there are issues as between her and the claimant's children and says although she has not acted as a parent, she is a role model for them.
- [52] In her affidavit sworn January 27, 2022, the respondent acknowledges that there have been increasing difficulties living together in the residence. She cites, in particular, the following actions of the claimant:
- a) turning off the power when the respondent was having her girlfriends over for the US Thanksgiving Day dinner on November 25, 2021;
 - b) turning off the hot tub, sauna, and hot water;
 - c) not having the pool heated for use during the summer 2021;
 - d) failing to do any snow removal to allow easy access in and out of the property during the winter months;
 - e) making it uncomfortable for the respondent to have any friends visit at the residence, despite the fact that he freely comes and goes with his friends, as do the children and their friends;
 - f) refusal by the claimant to purchase food for the children and cancelling pet care appointments;

- g) changing the locks and door codes to the residence, requiring the respondent to use the dog's door to access the home;
 - h) recently disrupting a social gathering the respondent arranged with her friends on January 14, 2022 by opening doors in the winter and verbally intimidating her friends who felt uncomfortable and left the residence;
 - i) installing ten cameras in the residence since September, 2021 to monitor the respondent's movements and record her conversations in the home;
 - j) disabling the surround sound in the home and removing the home entertainment system; and
 - k) installing locks on internal rooms to deny access to the games room and printer.
- [53] As noted, she does not dispute that she recently entered the claimant's locked bedroom with a male friend and removed the security camera the claimant had installed there, but asserts that she was looking for a cat.
- [54] She acknowledges that she intends to leave the residence when the litigation is resolved, but says that to force her to do so before then would cause her hardship. She says she is a US citizen and has resided in the residence since coming to Canada. She has no family in Kelowna. She says she is being forced to live off of her capital and that she has been unable to obtain an appropriate rental unit because of her lack of credit rating, employment, income and references.
- [55] The respondent's evidence from her affidavit sworn January 27, 2022 reads, in part:
47. Once the family law proceedings have been resolved either by settlement or at Trial, I will vacate the Family Home and seek permanent accommodation elsewhere. I am not in a position at this time to consider where I will ultimately reside on a permanent basis, and I do not want to have any further disruption in my life by having to relocated from the Family Home, which has been my only residence for the past eight (8) years.
- [56] She says that although there has been some acrimony, the evidence does not show that it is a practical impossibility for the parties to continue to reside together in the residence.
- [57] As to the Agreement, the respondent's only evidence as to why the Agreement should not be upheld is in her affidavit sworn January 27, 2022, as follows:
46. I recognize the fact that the Claimant is asking that the Cohabitation Agreement signed between us be upheld. There are numerous reasons why the Cohabitation Agreement should be varied or set aside, of which I intend on providing detailed evidence once Examinations for Discovery have been undertaken and disclosure of all documentation has been completed.

Legal basis

[58] The law is not in dispute. Section 90 of the FLA provides jurisdiction for granting exclusive occupancy of property to one spouse:

Temporary orders respecting family residence

90 (1) For the purposes of this section, "family residence" means a residence that is

(a) owned or leased by one spouse or both, and

(b) the ordinary place of residence of the spouses.

(2) The Supreme Court may make an order granting a spouse, for a specified period of time,

(a) exclusive occupation of a family residence, or

(b) possession or use of specified personal property stored at the family residence, including to the exclusion of the other spouse.

[59] The parties both cited various cases for the proposition that the test is twofold:

a) Continued cohabitation must be a practical impossibility, and

b) If so, on the balance of convenience which party should occupy the premises.

[60] In addition, as noted, the claimant urges deference to the Agreement.

Analysis

Effect of the Agreement

[61] In *Miglin v. Miglin*, 2003 SCC 24, the Supreme Court of Canada considered the question of the impact of a waiver of spousal support in an agreement on an application for interim support. The analysis of the majority on that point was:

[64] An initial application for spousal support inconsistent with a pre-existing agreement requires an investigation into all the circumstances surrounding that agreement, first, at the time of its formation, and second, at the time of the application.

[62] Of course, that analysis is done under the Divorce Act and regarding spousal support, not family property.

[63] Entitlement to family property is governed by the provisions of the FLA, generally speaking, the regime is as follows:

a) Section 81 of the FLA provides that upon separation spouses have an undivided half interest in family property.

b) Section 85 of the FLA provides that family property does not include property that belonged to one spouse when the relationship began.

- c) Section 84(2)(g) of the FLA provides for the increase in value in excluded property during the relationship to be considered family property.

[64] The FLA allows for agreements regarding family property and also has provision for setting aside or varying such agreements:

Setting aside agreements respecting property division

93

- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
- (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
- (c) a spouse did not understand the nature or consequences of the agreement;
- (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

[]

- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

- (a) the length of time that has passed since the agreement was made;
- (b) the intention of the spouses, in making the agreement, to achieve certainty;
- (c) the degree to which the spouses relied on the terms of the agreement.

[65] As noted, the claimant says that the Agreement was negotiated after full disclosure by him of his assets and that the respondent had independent counsel involved when the Agreement was drafted.

[66] The only evidence before me indicates that the respondent was entering into the Agreement freely, with full disclosure and with proper legal advice.

[67] I have had no assistance from the respondent as to the basis for her assertion that the Agreement should be set aside.

- [68] A rough analysis of the assets, based on the information provided by the claimant, does not show any obvious prima facie unfairness.
- [69] As a result, based on the evidence before me on this application, the respondent has not shown that the Agreement is obviously unfair.
- [70] There is no suggestion that the respondent's circumstances have changed in a way not contemplated at the time, such that the Agreement, though fair when executed, now works a practical unfairness.
- [71] I have no jurisdiction to make final determinations about family assets and that is not the application before me. I do agree, however, that in the unique circumstances of this case, that the lack of any evidence that the Agreement is unfair is a factor that can weigh in the consideration of the application for exclusive occupancy.

Is continued co-habitation a practical impossibility?

- [72] The respondent brought many cases to show that incompatibility, bickering, and unpleasant and acrimonious circumstances are not sufficient to establish a practical impossibility.
- [73] Each case, however, must be considered in its factual matrix. Many cases identify that the financial ability of the parties and the existence or lack of a viable alternative is a consideration in the assessment. Often the parties share children and are unable to afford two residences that are adequate for proper parenting time.
- [74] The test is not that it be an impossibility, but that it be a practical impossibility.
- [75] It is an objective test. One of the cases relied upon by the respondent is instructive in that regard: *Dennis v Regehr*, 1996 CanLII 2392 (BC SC). That was an appeal from a master's decision allowing exclusive occupancy to the wife. The facts of that case were, in essence, increasing bickering and acrimony, which had led to an exacerbation of the wife's depression. The parties' financial circumstances were such that they could afford separate residences without undue hardship. Justice Coultas refused to set aside the master's decision and noted at para. 45:
- [45] With great respect to Ms. Kenney who argued this appeal very ably, I am not persuaded that the Master interpreted and applied the "practical impossibility" test in a subjective manner. The lengthy affidavit of Ms. Dennis filed October 3, 1995, is replete with references to her emotional response to her husband's alleged treatment of her, those are subjective responses, but the Master did not refer to that evidence and I cannot infer that it influenced her decision. But there is objective evidence, furnished by both parties, of escalating conflict between them, commencing in May and continuing. The Master had that evidence before her and referred to some of it. The Master had objective evidence that Ms. Dennis' depression, for which she had sought treatment years before, had returned. The Master was entitled to consider Ms. Dennis' evidence about the effects of the increasing conflicts upon her, and did so.

- [76] The claimant and the respondent both provided evidence that the tension and incidents of family violence in the home have increased. For the respondent and a male friend to break into the claimant's locked bedroom and search around is an intolerable breach of the claimant's privacy.
- [77] I cannot help but conclude that this is negatively impacting the children. It is obvious that the claimant's children have exhibited objective symptoms of stress and depression. I accept that the stress and depression they have exhibited is exacerbated by the present situation.
- [78] The respondent, unlike most parties in family litigation, has already been paid some or all of what she would be entitled to upon separation. I agree with the claimant that it smacks of unfairness for her to insist upon continuing to reside in the residence despite, at least according to the claimant's position, her interest having been paid out.
- [79] In all of the circumstances here, I conclude that the parties continuing to live together in the residence is a practical impossibility.

Who, on a balance of convenience, should occupy the property?

- [80] The claimant built the residence for his children and in close proximity to his extended family well before this relationship.
- [81] There was no scenario presented to me that would ever result in the respondent being given title to the residence. Even if the Agreement is set aside, the most she will be entitled to is some payment for her interest in the residence. She acknowledges that.
- [82] Although the respondent argues that it would work a hardship on her to force her to leave what has been her home since at least 2015, the reality is that she will have to do so at some point.
- [83] There is no rational reason why the respondent should continue to live in the residence. Given she has been paid \$1.9 million towards her interest in the family assets, she can clearly afford to live elsewhere and her concerns about having no references and lacking a credit rating can surely be resolved, as they inevitably will have to be.
- [84] Whether she decides to remain in Canada or return to the US, she can certainly make her permanent relocation now and return for the trial if necessary.
- [85] The conclusion on a balance of convenience is obvious. The claimant and the children are entitled to occupy the residence.

Conclusion

- [86] The claimant's application is allowed on condition that he makes the without prejudice payment that he consented to on this application. He is to pay \$60,000 to the respondent on or before March 15, 2022. The respondent will vacate the residence and the property in issue on or before March 31, 2022.

Costs

[87] The claimant will have his costs of this application in the cause.

"Master Muir"

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