
CANADA / JUDGMENT

S.L.N. v. D.G.N.

2018 BCSC 1778

COURT

Supreme Court of British Columbia

DECIDED

10 September 2018

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2018 BCSC 1778 S.L.N. v. D.G.N.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.L.N. v. D.G.N.,

2018 BCSC 1778

Date: 20180910

Docket: E173331

Registry: Victoria

Between:

S.L.N.

Claimant

And

D.G.N.

Respondent

Before: Madam Justice Murray

(Via Teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

K. Smith, Articling Student

(as agent for W. Murphy-Dyson)

Counsel for the Respondent:

F. Maxwell

S. Bate

Place and Date of Trial/Hearing:

Victoria, B.C.

August 28, 2018

Place and Date of Judgment:

Victoria, B.C.

September 10, 2018

- [1] THE COURT: This is my ruling on the application I heard August 28 in Victoria. The claimant wife seeks interim lump sum spousal support and an interim distribution of property pursuant to s. 89 of the Family Law Act, S.B.C. 2011 c. 25 [FLA]. Additionally, she seeks disclosure in an order that the respondent pay her \$5,000 for failing to provide the disclosure order by Mr. Justice Gaul on December 5, 2017.
- [2] The respondent opposes the application for spousal support on the grounds that the claimant is receiving the appropriate amount of support and, alternatively, that this is an inappropriate case for lump sum spousal support, which he argues is a relatively rare award. With respect to the disclosure applications, he contends that he is trying to comply with them.

Background

- [3] By way of background, the parties married on September 20, 1991, and separated August 12, 2017. They have had a tumultuous relationship. The claimant alleges that the respondent abused her physically and emotionally. As a result of her fear of continued abuse, she applied for and obtained restraining orders and protection orders against the respondent in the fall of 2017.
- [4] Through their marriage, the parties accumulated significant wealth, which is held personally and through various companies. They own many properties in British Columbia, Arizona, and Alberta. Since 2010, all of the wealth has been managed by the respondent. He has control of all of the corporate bank accounts and other assets of five corporations. He has controlled and kept the income from rentals of at least seven of the properties since 2010. Of note, the claimant owns a 49% interest in four of the five of those companies and is on title for the properties. The claimant believes that since 2010, the respondent has been transferring assets from the corporation that she owns shares in to Mifaco Inc. which he

owns wholly. She points to bank statements to support this contention.

- [5] Also, since 2010, the respondent has controlled all of the parties' money and provided to the claimant a monthly allowance of \$2,000 from which she was expected to pay all of the household expenses and expenses for herself and their three children. He has paid the claimant a monthly allowance of \$2,500 since separation, save a few months when he cut her off completely.
- [6] The claimant is unemployed. According to her F8 Financial Statement filed in January of this year she has annual expenses of approximately \$70,000. Since separation, the claimant used a \$100,000 joint line of credit to pay off accumulated debts, but now owes \$53,000 for unpaid expenses as well as \$35,000 for accounting and legal fees. She has no way to pay any outstanding debts as she is unable to get any more credit.
- [7] The claimant contends that since separation the respondent has purchased a vehicle and another property in Arizona. He travels between houses in British Columbia, Alberta, and Arizona and has exclusive use of the family's boat, motorhome, airplane, and other vehicles. The respondent does not deny these claims.
- [8] The respondent argues that the parties accumulated their wealth by living modestly. He takes the position that the claimant has amassed substantial unilateral debt including the \$100,000 line of credit since separation as a result of careless spending.
- [9] The respondent consented to a disclosure order at the judicial case conference. Under the December 5, 2017 order, ("the Gaul order"), the respondent was to produce, by December 15, 2017, corporate and personal bank statements, corporate financial statements, and credit card statements from January 1, 2015. Some disclosure was made but not all. Until the eve of this application no further disclosure was made despite requests from claimant's counsel. The respondent claims that he is trying to track down financial records and blames difficulties in doing so on his former accountant. In his F8 Financial Statement, filed with the court December 15, 2017, the respondent deposes that he has a total annual income of \$38,000, which he earns as a self-employed pilot. He reports no rental income from the seven properties that he has rented nor does he list any rental expenses. He further deposes that he spends \$100 per month on food and \$60 per month eating out. His reported monthly entertainment expenses of \$100 and gift expenses of \$63 are more than he claims to spend on food.
- [10] The parties own nine properties, four in B.C., one in Alberta, and four in Arizona. The respondent lists them as assets in his F8 Financial Statement, but claims that the value of them is unknown. Likewise, he claims the value of the 13 vehicles he owns - seven cars, a motorhome, an airplane, a snowmobile, a trailer, and two boats are unknown. Also unknown, according to the respondent, is the value of his listed business interest. In her F8 Financial Statement the claimant has valued the total of the properties at just under \$5,000,000 and vehicles at just under \$300,000.

[11] A trial date of June 3, 2019 has been set.

Issues

[12] At the outset of the hearing, the claimant adjourned generally her application to have the respondent found in contempt of the Gaul order. There remains four issues to be addressed on this application:

- 1) whether the claimant is entitled to interim spousal support retroactive to the date of separation and, if so, whether it should be in the form of a lump sum payment;
- 2) whether the claimant should be awarded an interim distribution of property pursuant to s. 89 of the FLA;
- 3) whether the respondent should be ordered to pay a sum to the claimant of up to \$5,000 pursuant to s. 213 of the FLA for failure to make disclosure; and
- 4) whether the respondent should be ordered to disclose the information sought by the claimant.

[13] I will address each issue separately, beginning with interim spousal support.

Interim Spousal Support

[14] The obligation to pay spousal support is set out in s. 160 of the FLA. Section 161 of the FLA requires the court to consider the following objectives in determining entitlement to spousal support:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses; and
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[15] The same essential objectives are set out in s. 15.2(6) of the Divorce Act, R.S.C. 1985 c. 3 (2nd Supp).

[16] Compensatory support, which relates to the first two objectives, is intended to provide or address for economic disadvantage arising from the marriage or the conferral of an economic advantage on the other spouse. Non-compensatory support, which relates to the last two objectives, aims to narrow the gap between the needs and means of the spouses on marital breakdown.

[17] The principles applicable on an application for interim spousal support are as follows:

1. The applicant's needs and the respondent's ability to pay assume greater significance;
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;
3. On interim support applications, the court does not embark on an in-depth analysis of the parties' circumstances, which is better left for trial. The court achieves rough justice at best;
4. The courts should not unduly emphasize any one of the statutory considerations set out in the FLA;
5. On interim orders, the need to achieve self-sufficiency is often of less significance; and
6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines, unless exceptional circumstances indicate otherwise.

[18] The factors for whether to award retroactive support have been applied to retroactive spousal support. In *Kerr v. Baranow*, 2011 SCC 10, Cromwell J. specifically applies the principles to a retroactive award of spousal support and stated as follows:

While D.B.S. was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support.

[19] With those principles in mind, I turn to the facts of this application.

[20] Together, the parties are very well off financially. I accept that since separation, the claimant has suffered financially. The accuracy of the respondent's F8 Financial Statement is very much in question. The property holdings and personal belongings, the movement of cash between the different corporations and his lifestyle, all belie his reported income and expenses. Statements in his affidavit, filed August 25, 2018, that the claimant's concerns about how he spends money and her belief that he transferred money from the corporation she co-owns into a corporation he wholly owns are irrelevant, indicate that he sees no requirement to explain his finances.

[21] Having considered all of the evidence, I am satisfied that the claimant needs more support than is being provided and that the respondent has means to pay. As per above, on this interim application, the court does not go into an in-depth analysis, but rather takes a rough justice approach. Following that principle, and taking into account all of the evidence before me, I am satisfied that an income of \$250,000 should be imputed to the respondent for the purposes of calculating spousal support.

- [22] Based on her F8 Financial Statement, I am satisfied that an income of \$14,000 should be imputed to the claimant for the same purpose.
- [23] I order that interim spousal support be paid using those figures commencing October 1, 2018 and continuing on the first day of each month until further order of this Court or by agreement of the parties.
- [24] I further order that spousal support arrears, being the difference between the spousal support calculated in the midrange using the imputed incomes above, and \$2,500, multiplied by 13 months, be paid to the claimant in a lump sum no later than September 17, 2018.

Interim Distribution of Property

- [25] Moving on to the issue of whether there should be an interim distribution of property pursuant to s. 98 of the FLA, it is clear that this will be a hard fought, likely bitter battle. Money will have to be traced between companies. Assets will have to be valued. Both sides will need accountants and joint, and perhaps separate, business valuers and property appraisers. Legal costs will be substantial. From the tone of the application before me, there is a good likelihood that this will go to trial which is a costly process.
- [26] The complainant has incurred approximately \$53,000 in accounting and legal fees to date and the battle has just begun. Clearly, she needs more to fund this litigation. The claimant should not be at a disadvantage in advancing her interests because she has been locked out of funds.
- [27] Taking into account all of the circumstances, I am satisfied that there should be an interim distribution of funds to the claimant, pursuant to s. 98 of the FLA, of \$300,000.

Penalty for Non-Disclosure

- [28] Moving now to the third issue whether there should be a penalty imposed for failing to comply with the Gaul order.
- [29] The respondent claims that he has been making reasonable efforts to fulfill his disclosure obligations. He says that it has been difficult as his former accountant is no longer practicing and he is having trouble tracking down documents.
- [30] I do not accept his explanation.
- [31] It has been over eight months since the respondent entered into the Gaul order. The letters of claimant's counsel have gone without meaningful response. It took this application for the respondent to make an effort to obtain more disclosure from his previous accountant.
- [32] Section 5(1) of the FLA provides that:

A party to a family law dispute must provide to the other party full and true information for the purposes of resolving a family law dispute.

[33] Section 213 of the FLA deals with enforcing orders regarding disclosure. It applies if a person fails to comply with orders for disclosure made under s. 212 of the FLA. While the order in question does not specify that they are made under s. 212, I find that they are.

[34] Disclosure is essential in enabling parties to resolve their disputes. As Mr. Justice Punnett stated in *J.D.G. v. J.J.V.*, 2013 BCSC 1274 at para. 1:

Non-disclosure or delayed disclosure of financial information is a costly impediment to the timely and just disposition of family disputes.

[35] The gravity of the issue was described as follows by Mr. Justice Fraser in *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93, at para. 9:

Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained [parties] simply to give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done.

[36] Based on the evidence, I find that the respondent has failed to comply with the orders for disclosure made under s. 212 of the FLA.

[37] The impact of the respondent's breaches is that the claimant has been unable to move forward with her claim. It is safe to conclude that she has also incurred considerable legal fees trying to enforce the orders.

[38] Given the blatant disregard of the December 2017 court order, it is my view that a penalty must be imposed under s. 213 to make clear to the respondent the importance of providing accurate financial disclosure in a timely manner.

[39] Accordingly, I order that the respondent pay to the claimant \$3,000.

Disclosure

[40] Finally, the last issue: whether the disclosure order sought by the claimant should be made.

[41] The claimant seeks documents, including cancelled cheques listed in bank statements and financial statements, for all of the corporations so she can attempt to trace the money flow between the companies.

[42] Without specifying what documents he is taking issue with, the respondent takes the position that the request is overly broad and should be made at an Examination for Discovery.

- [43] I do not agree. The disclosure requests seem reasonable in the circumstances of this complex case and the requested information is required in order for the claimant to conduct a meaningful discovery.
- [44] The orders for disclosure outlined in the claimant's notice of application are granted. The respondent shall make disclosure of same within 14 days of today's date. If he has difficulty obtaining any of the disclosure within that time, he shall advise the claimant in writing as to that difficulty and advise when he expects to be able to fulfill the request.

Conclusion

[45] In conclusion, I make the following orders.

1. The claimant's contempt application is adjourned generally;
2. An income of \$250,000 is imputed to the respondent and \$14,000 to the claimant for the purpose of calculating spousal support;
3. The respondent shall pay to the claimant interim spousal support in the midrange using the imputed income commencing October 1, 2018, and continuing on the first day of each month until agreement of the parties or further order of this Court;
4. The respondent shall pay to the claimant spousal support arrears, being the difference between the monthly support calculated above and \$2,500, multiplied by 13 months, in a lump sum no later than September 17, 2018;
5. There shall be an interim distribution of property of \$300,000 to the claimant pursuant to s. 89 of the FLA by October 1, 2018;
6. The respondent shall pay \$3,000 to the claimant pursuant to s. 213 of the FLA by September 17, 2018; and
7. Within 14 days of this order, the respondent shall produce and deliver to counsel for the claimant the disclosure details in paras. 5 and 6 of the claimant's notice of application.

[46] Costs to the claimant in any event of the cause.

[47] Anything further, counsel?

[48] MS. SMITH: No, My Lady.

[49] THE COURT: Thank you. Mr. Maxwell?

[50] MR. MAXWELL: No, My Lady. Just one point where you mentioned children, you mentioned in your review of the facts that the children are all adults.

[51] THE COURT: They are all grown.

[52] MR. MAXWELL: I -- I hope --

- [53] THE COURT: Yes.
- [54] MR. MAXWELL: You're -- you're aware of that?
- [55] THE COURT: Yes, I am -- I am aware of that, yes. The only time I mentioned the children was by way of background.
- [56] MR. MAXWELL: No, I understand that, but you did not say that they were adult children and I -- so I -- I'm not taking issue with it. I just want to be sure that we were correct in --
- [57] THE COURT: No, I -- I know that they are all adults and they do no not -- they -- well, I know one of them pays rent to his mother. No, I know that they are all --
- [58] MR. MAXWELL: That's right, and the other two don't live there.
- [59] THE COURT: Yes.
- [60] MR. MAXWELL: Yeah, all right.
- [61] THE COURT: Okay.
- [62] MR. MAXWELL: Thank you very kindly.
- [63] THE COURT: Thank you
- [64] MS. SMITH: Thank you, My Lady.
- [65] THE COURT: Thank you.
- "The Honourable Madam Justice Murray"

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