
CANADA / JUDGMENT

Sigurdson v. Sigurdson

2016 BCSC 1141

COURT

Supreme Court of British Columbia

DECIDED

21 June 2016

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2016 BCSC 1141 Sigurdson v. Sigurdson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sigurdson v. Sigurdson,

2016 BCSC 1141

Date: 20160621

Docket: E160195

Registry: Vancouver

Between:

Colleen Ruth Sigurdson also known as Colleen Ruth Fraser

Claimant

And

Layne Dolf Sigurdson

Respondent

Before: Master MacNaughton

Reasons for Judgment

Counsel for the Claimant:

Paul Daltrop

Counsel for the Respondent:

Eli C. Walker

Place and Date of Hearing:

Vancouver, B.C.

June 8, 2016

Place and Date of Judgment:

Vancouver, B.C.

June 21, 2016

The Application

- [1] The claimant seeks an order that, under s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3, and s. 165 of the Family Law Act, S.B.C. 2011, c. 25, the respondent pay her interim spousal support in the amount of \$15,000 a month commencing June 1, 2016 and continuing on the first day of each month thereafter until further order of this court or agreement of the parties.
- [2] There is no dispute that the claimant is entitled to spousal support. The parties disagree on the quantum.
- [3] The claimant seeks spousal support in accordance with the Spousal Support Advisory Guidelines after a determination of the respondent's guideline income under s. 18 of the Federal Child Support Guidelines and an imputation of income pursuant to s. 19.
- [4] The claimant also seeks an order pursuant to s. 89 of the Family Law Act that the respondent pay her \$160,000 as an interim distribution of family property to fund this proceeding.
- [5] Finally, the claimant seeks production of certain financial documents from the respondent. The respondent has consented to produce most of the documents sought in the application. What remains in issue is whether the respondent should produce a copy of the general ledger for the sawmill in which he is a 50% shareholder.

The Parties' Relationship

- [6] The parties began cohabiting in June 2006, were married on July 29, 2009 and separated on January 4, 2016.
- [7] They were both in earlier relationships and had seven children between them but none together. The claimant, who is 54, had five children ranging in age from 18 to 35. The respondent, who is 56, had two children the youngest of whom is 19 and the eldest 36.
- [8] The two youngest children lived with the parties. The claimant says that she left her employment in September 2006 to care for the two youngest children who were then young teenagers. She has not worked since except for casual work for the respondent's company. Although the respondent disagrees about the circumstances which led to the claimant giving up her employment, there is no dispute that she did so and remained at home while he travelled for work. In addition, the claimant has a painful degenerative spinal condition

which may require surgery. It prevents her from working.

The Spousal Support Application

- [9] The respondent is an equal shareholder in a company, Sigurdson Forest Products Ltd. ("SFP") which he jointly owns with his brother. SFP operates a sawmill in Williams Lake. The brothers owned an earlier company which also operated a sawmill. It ran into financial difficulties in 2009 and, eventually, went into receivership. SFP is described by the respondent's brother as a "successor business". The claimant says that the brothers borrowed money against the parties' family home to start SFP.
- [10] The parties disagree about the respondent's income for the purposes of spousal support. His most recent income tax return, for 2014, indicates that he earned line 150 income of \$276,603.92. His Form 8 financial statement indicates 2015 employment earnings of \$285,000. However, the respondent agrees that during 2015 he deposited a total of \$305,000 into the parties' joint account gross of tax. He also acknowledges that SFP will remit approximately \$90,000 in income tax on his behalf in 2016. As a result, the respondent acknowledges that the total income he drew from SFP in 2015 was approximately \$395,000. The respondent urges me to use this number as the basis for calculating his spousal support obligation.
- [11] The claimant uses \$395,000 as a starting point for her submission as to the respondent's income for support purposes. She would add to that figure certain personal expenses paid on his behalf with respect to, at least, a vehicle, some meals, a cell phone, gasoline for vehicles and, on occasion for the family boat, and for some travel and accommodation. In addition, she submits that SFP's May 31, 2015 year-end financial statements indicate that SFP had pre-tax corporate income of over \$1,300,000, half of which she says should be included in the respondent's guideline income for spousal support purposes.
- [12] The claimant relies on the discussion of the inclusion of all or part of corporate pre-tax income for child support purposes in *Hausmann v. Klukas*, 2009 BCCA 32. In particular, the claimant argues that the onus is on the respondent to rebut, with clear evidence, the "emerging presumption" that pre-tax corporate income is assumed to be available to a payor unless there is evidence to the contrary (*Hausmann*, para. 51 citing *Jeffery v. Motherwell*, 2006 BCSC 140, at para. 13).
- [13] In addition, the claimant relies on Professor James McLeod's comments as cited in *Hausmann* at para. 54, in particular:

A spouse who controls the business and chooses to leave the money in the business must be prepared to explain why his or her decision is reasonable from a business point of view.

Whatever the reason alleged for retaining earnings in a business, most courts assume that a spouse should take as much money as is available as income from his or her business and a spouse who does not do so is trying to avoid his or her family obligations.

- [14] In response, the respondent submits that Hausmann and the cases referred to in it, are considering a parent's obligation to pay child support and that there are public policy reasons for casting a wide net to include as much available income as possible to support children of a relationship. Similar policy considerations do not apply to spousal support.
- [15] Further, the respondent submits that the available evidence on this application rebuts the presumption of inclusion if it applies. That evidence is from Brian Sigurdson, the respondent's brother, who says that he has been primarily responsible for SFP's finances while the respondent has been primarily responsible for its' operations.
- [16] Brian Sigurdson says that SFP's financial survival depends largely on securing future inventory by way of timber sale deposits, logs and lumber. As a result, at any given time, SFP may be sitting on timber sale deposits, logs and lumber worth between \$4.5 and \$8.0 million. Therefore, any "profit" on SFP's income statement which appears on the year-end snapshot reflected in the financial statements is generally already sunk into inventory. Thus, although SFP's 2015 Financial Statements show earnings before taxes of \$1,333,431, SFP did not have that money in a bank account at the end of the fiscal year. Rather that amount was tied up in timber sales deposits and a sufficient cushion of logs and lumber to meet the mill's requirements and to provide flexibility to ramp up production in the event of peaks in the lumber market.
- [17] I have concluded, based on the evidence currently available to me, and which is not yet the subject of expert evidence, that it would be inappropriate to determine that 50% of SFP's pre-tax income should be allocated as income to the respondent for spousal support purposes. Brian Sigurdson has provided an explanation of why SFP must retain earnings for operational purposes. That evidence has not been refuted by evidence from the claimant or otherwise.
- [18] Further, I note that SFP is not an alter-ego corporation. It is an operating business with two equal shareholders and with about 100 employees in William's Lake.
- [19] In considering the submissions, I was concerned by the apparent contradiction in Brian Sigurdson's evidence about the need for significant retained earnings and the fact that during the fiscal 2015 year, he took a draw of about \$575,000 on his shareholder loan account. The respondent did not take a matching draw. That suggested that the SFP's cash flow was sufficient for a significant disbursement to one of the shareholders. However, Brian Sigurdson says that he drew the amount in smaller increments over the course of the 2015 fiscal year, as the company could afford it, including in the approximately eight months before the parties to this proceeding separated. Brian Sigurdson says that it was the first significant draw that he had made against his shareholder loan account in some years and it represented more than a four-year accumulation of company earnings. The plan was that the respondent would be allowed a similar draw, when cash flow allowed, at some point in the future.

- [20] The current evidence does not suggest that the draws taken by Brian Sigurdson were motivated by the separation of the parties.
- [21] It is also unclear on the evidence, whether, and to what extent Brian Sigurdson's evidence about the need for ready cash flow for timber sales deposits and logs and lumber exceeds the timber sales deposits and inventory reflected in the assets listed on SFP's balance sheet.
- [22] I find that I am unable, on the evidence before me, to determine whether a lesser amount of the corporate pre-tax income should be allocated to the respondent for spousal support purposes. The parties have agreed to a joint business valuation and, while I am unable to accept her arguments on this application, the claimant may renew her application after receipt of the valuation report which will presumably analyze SFP's need for ongoing retained earnings to support its operations.
- [23] As a result, I turn to consider spousal support based on the claimant's needs and the respondent's ability to pay.
- [24] After separation, the respondent continued to pay the parties' joint credit cards and to deposit funds into the joint account for the claimant's use. At some point thereafter, he cancelled the credit cards and withdrew funds from the parties' joint chequing and savings accounts. As of March 2016, he began depositing \$15,000 a month into their joint chequing account for the claimant's use. The respondent says that deposits at that level are no longer sustainable and exceed the claimant's needs.
- [25] According to DivorceMate calculations filed by the respondent, based on an income of \$395,000, and taking into account post-secondary expenses the respondent says he will continue to pay on behalf of the claimant's daughter, spousal support would range from a low of \$3,290 to a high of \$4,387 with a mid-point of \$3,838. If the respondent's contributions to the claimant's daughter's post-secondary expenses are not considered, the range of spousal support is between \$3,634 and \$4,846 a month. However, the respondent acknowledges that spousal support at these levels is inadequate to meet the claimant's needs.
- [26] I also note that there are certain personal expenses which are paid on the respondent's behalf by SFP and which would increase his income from \$395,000.
- [27] Based on her Form 8 financial statement, the claimant's needs total \$12,185 per month without taking into account the taxes she would have to pay on any spousal support she receives. She indicates that she may have additional household and personal expenses following her treatment or surgery.
- [28] The respondent's counsel did his own analysis of what he considered to be the claimant's actual expenses and arrived at a monthly total of \$4,875. When questioned by me, he acknowledged taking an arbitrary approach to reducing or deducting entirely some of the claimant's sworn expenses. Some of the arbitrary deductions or deletions included all pet care expenses on the basis that the claimant would turn the dog over to the respondent,

allowing the claimant nothing for vacation and reducing personal expenses from \$2,280 a month to an arbitrary \$400 a month.

- [29] On the rough and ready approach to calculating interim spousal support, summarized by Master Keighley in *Robles v. Kuhn*, 2009 BCSC 1163, I have reviewed the claimant's financial statement and have concluded that, on an interim basis, some of the expenses she claims are too high.
- [30] As her daughter is now living with the respondent, I have reduced the amount claimed for food, household supplies and meals out by \$300 a month. In addition, I have reduced her claims for furnishings and equipment, vacation, and personal expenses by half. I have allowed an amount for income tax the claimant will have to pay on any support she receives and an amount for car insurance and licence. I conclude that the claimant's needs amount to, roughly, \$8,750 a month assuming that the respondent will continue to pay the claimant's daughter's rent and the lease costs of the claimant's vehicle.
- [31] I am also satisfied that, on an interim basis, the respondent has the ability to pay support of \$8,750 a month and to continue to pay the claimant's daughter's rent and the lease costs of the claimant's vehicle.
- [32] The respondent's financial statement indicates that he had monthly expenses of \$19,169.63 on an income of \$285,000. However, as set out above, the respondent acknowledges an income in 2015 of approximately \$395,000 and he says that in 2016 so far, like he did in 2015, he has drawn between \$20,000 and \$25,000 a month from SFP. As I have said, his income is actually higher than \$395,000 when personal expenses paid for by SFP are taken into account. The respondent has the income to pay interim support in the amount of \$8,750 a month and the other expenses that I have itemized.
- [33] I therefore order that, commencing on June 1, 2016, and on the first day of each month thereafter, the respondent is to pay the claimant \$8,750 in interim spousal support. The respondent is also to continue to pay the lease payments on the claimant's vehicle and the claimant's daughter's rent while she is at school. Such support is to continue until further agreement of the parties or court order. The respondent is to be credited for any amounts he has already paid in June 2016.

Interim Distribution of Family Property

- [34] The claimant seeks an interim distribution of \$160,000 to fund this litigation. In support, she has filed an affidavit from a partner in her counsel's firm which estimates that the fees associated with this family litigation will total \$160,000, not including tax. I accept that to be a reasonable estimate of the cost of this litigation, if it goes to trial.

- [35] Section 89 of the Family Law Act permits the court to order an interim distribution of family property if necessary to fund family dispute resolution, all or part of a proceeding, or the obtaining of information or evidence in support of family dispute resolution or an application. Any such order cannot be made unless the court is satisfied that the interim distribution would not be harmful to the interests of a spouse.
- [36] In *Drinkall v. Drinkall*, 2016 BCSC 373, the court said that the onus is on an applicant to show that the interim distribution that is sought will not jeopardize the other spouse's position at trial.
- [37] The respondent argues that, in this case, an advance of \$160,000 could well be in excess of the claimant's entitlement to a share of the family property at trial.
- [38] There are three potential family assets which might be used to fund an advance under s. 59. The first is the parties' former matrimonial home at 4651 Centre Road and an adjacent parcel of land ("Madeira Park"). There is a dispute as to whether the claimant has any entitlement to Madeira Park. The respondent says it was bought by him and his brother in 2007 and 2008 using savings which he accumulated before the parties' marriage, and is thus partly not his property and partly excluded property. The claimant disputes the respondent's evidence in that regard.
- [39] The respondent also says that the current assessed value of Madeira Park is less than the assessed value when it was purchased. As a result, there may be no increase in value for which the claimant may seek a share. No appraisal has yet been done of Madeira Park and I cannot assess whether the two lots have a combined value which exceed the sum of the value of them individually which may be the case.
- [40] The second is the respondent's RRSPs which, according to his financial statement, have a total value of \$454,320.32 of which the respondent says \$324,613 is excluded property. There will, of course, be tax consequences as a result of cashing in RRSPs to fund the litigation and the parties will lose the opportunity for a tax free spousal rollover to adjust for the claimant's interest in this family property.
- [41] The final item of family property is the value of the respondent's shares in SFP and the potential growth in value from 2006 to 2016. The value of those shares has not been determined as the parties are just in the process of retaining a business valuator. It is not currently possible for me to determine whether there has been a sufficient increase in the value of the respondent's 50% shareholding in SFP such that the claimant's share will exceed \$160,000.
- [42] As a result, I am not satisfied that, at this stage, it would not be harmful to the interests of the respondent to order an advance out of any of these three family assets.

- [43] The parties have now agreed that SFP will, in the first instance, pay the cost of the business valuation. The cost will later be adjusted as between the parties in the division of family property.
- [44] The business valuation will be helpful to the court in determining the value of the respondent's shares and the claimant's potential share in that family asset. The claimant may renew her application for an interim distribution of family property after the business valuation and/or an appraisal of Madeira Park has been completed.
- [45] I have also taken into account the fact that through the amounts the respondent has already paid in spousal support in 2015, the claimant has received approximately \$9,000 over her stated expenses and has, presumably, saved some money to pay legal costs. Those funds may be reflected in the \$10,000 she has in a chequing account in her name.

Disclosure

- [46] The remaining outstanding disclosure issue is whether SFP should be required to produce its general ledger. The respondent opposes the application on the basis that SFP is an operating sawmill with a general ledger containing thousands of journal entries each year and its production is neither relevant or proportionate. I disagree.
- [47] The general ledger is relevant to the claimant's ability to assess the respondent's and his brother's evidence about SFP's requirement for retention of pre-tax income for operating purposes and to assess the extent to which SFP is paying personal expenses on the respondent's behalf. In any event, the business valuator will require access to the general ledger and to avoid the need for a further application, it is efficient to order its disclosure now.

"Master MacNaughton"

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