

CANADA / JUDGMENT

Sime Duchesne v. Duchesne

2019 BCSC 284

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 284 Sime Duchesne v. Duchesne

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sime Duchesne v. Duchesne,

2019 BCSC 284

Date: 20190305

Docket: E162390

Registry: Vancouver

Between:

Nadine Lynne Sime Duschesne also known as Nadine Lynne Sime

Claimant

And

Norman Albert Enis Duchesne

Respondent

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Claimant:

D.E. Labun

Counsel for the Respondent:

R.C. Gibbs Q.C.

Place and Date of Hearing:

Vancouver, B.C.

October 31, 2018

Place and Date of Judgment:

Vancouver, B.C.

March 5, 2019

- [1] This is an application by the claimant, Ms. Sime, for interim support. The parties were in a marriage-like relationship from 1991, and married in 1997. They had two daughters together, who are now 22 and 20 years of age. The claimant is now 45 years old; the respondent, Mr. Duchesne, is 51. Ms. Sime has re-partnered, in a common law relationship.
- [2] Throughout the marriage the family relied primarily on Mr. Duchesne's income. He works as a power engineer in a natural gas plant. There were periods of time when Ms. Sime was employed as a bookkeeper or office administrator, or worked in a family drycleaning business. She has been employed regularly since after separation, but took an unpaid leave of absence beginning in May 2017, and in August 2017 went on disability after being diagnosed with clinical depression. Practically speaking, the length of the marriage and Ms. Sime's age and limited work experience would ordinarily tend to point to Mr. Duchesne having a spousal support obligation.
- [3] The parties separated in September 2013. They entered into a form of separation agreement in March 2014 (the "Separation Agreement"), under which spousal support was waived. Ms. Sime now contests the enforceability of that agreement.
- [4] This action was commenced in August 2016, and Mr. Duchesne filed his Response in February 2017. No trial date has been set. The parties have not divorced. In addition to the issues of spousal and child support, any final order will have to address the division of family property including pensions. It appears from his work history that Mr. Duchesne will have a substantial pension that will presumably be subject to division as family property.
- [5] This application was filed October 18, 2018. The Notice of Application sought arrears of child support pursuant to the Separation Agreement, and monthly spousal support calculated under the Spousal Support Advisory Guidelines [SSAG]. Mr. Duchesne's position is that neither form of support is payable.
- [6] On the hearing of the application, Ms. Sime's counsel conceded that the arrears of child support cannot be dealt with appropriately as an interlocutory order, due to there being a conflict in the parties' evidence as to which parent each child was residing with at certain times. The only substantive relief being sought on this application therefore is interim spousal support.

- [7] However, in respect of any concern on Mr. Duchesne's part regarding Ms. Sime's ability to repay any interim amounts of spousal support, if no basis for spousal support is established at trial, Ms. Sime's counsel asks that I find a substantial amount of retroactive child support will likely be awarded, which could stand as security against any prospect of a final order requiring Ms. Sime to repay any amount of the interim spousal support I might order.
- [8] The Separation Agreement was drawn up on a stationer's form, without legal advice. It provided that neither party claimed entitlement to spousal support, and that both parties expressly waived any claim to spousal support. With respect to child support, it stated:
10. The Husband will pay child support in the amount of \$0.00 (or the amount payable pursuant to Federal Support Guidelines of Canada) monthly to the Wife. Child support payments will commence on January 1, 2014 and will be paid on the 1st day of each and every month.
11. The Husband and Wife shall pay the cost of special and extraordinary expenses, such as Husband will pay 70% wife will pay 30% of extraordinary expenses, in proportion to their respective incomes as long as the child is a "child of the "marriage" within the meaning of the Divorce Act of 1985.
12. The Husband and the Wife agree that each shall provide the other a copy of their income tax return and any notices of assessment and re-assessment issued, on an annual basis.
- [9] The parties differ significantly in their evidence as to how the Separation Agreement came to be concluded.
- [10] Ms. Sime says that terms of the Separation Agreement were insisted on by Mr. Duchesne. She describes in her affidavit sworn October 18, 2018, a background of her being under considerable emotional pressure after they had separated in September 2013. She says:
21. I began to look for my own place, but learned that I would have to be removed from the mortgage in order to qualify to buy a place where I could live and have space for the Children. I became desperate to get out.
23. I can sum up the Agreement this way: everything was the way Mr. Duchesne wanted it; I signed it out of a desperation to have a means of breaking from him.
24. In that Agreement, the separation date was stated to be January 1, 2014. This was because Mr. Duchesne insisted he wanted it this way for the purpose of 2013 tax deductions.
25. The child support payable to me was set at "\$0.00 (or the amount payable pursuant to Federal Support Guidelines of Canada)". Mr. Duchesne insisted that it had to be \$0.00 in the Agreement, or he would not be able to qualify for the financing to take me off the mortgage and pay me \$120,000 for my interest in the marital home.
26. The spousal support was waived as follows: "Neither party claims entitlement to spousal support. Both parties expressly waive any claim to spousal support now and in the future, regardless of any change in circumstances experienced by either party."

27. I knew that I needed spousal support to have anything like a reasonably comfortable life, but I did not know I had an "entitlement" to spousal support. I received no legal advice, independent or otherwise, before signing the Agreement. I had found a mediator in Dawson Creek and had asked Mr. Duchesne to go to mediation with me, but he refused. Mr. Duchesne flat out refused to pay any spousal support and told me that if I involved lawyers, I would get "nothing". By that, he meant the \$120,000 to buy me out of the marital home. Mr. Duchesne had also previously threatened to spend [our elder daughter's] "school money" going to a lawyer to fight me for custody, so he could have meant that as well.
- [11] Mr. Duchesne, on the other hand, says that a signed agreement was something Ms. Sime needed in order to get her name removed from the mortgage registered against the former family home; that she "researched, prepared and then gave me the Separation Agreement to sign"; that she dropped it off, he signed it after several days, and he left it for her to pick up while he went away on vacation. He says that he made no changes, it was "exactly as Nadine had drafted and given to me to sign". Other than this narrative, and other than denying that there was any fund set aside to pay for either child's post-secondary education, Mr. Duchesne does not specifically refute any of Ms. Sime's above-quoted evidence.
- [12] Mr. Duchesne's position on this application is that in the face of the Separation Agreement, Ms. Sime's entitlement to spousal support is a triable issue, and should not be dealt with on an interim basis.
- [13] The general considerations relevant to interim support applications, well-established under the case law, were summarized by Master Keighley in *Robles v. Kuhn*, 2009 BCSC 1163 at para. 12:
1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: *Gibb v. Gibb*, [2005] B.C.J. No. 2730 (S.C.);
 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: *Grossi v. Grossi*, [1993] B.C.J. No. 878 (S.C.);
 3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: *Randhawa v. Randhawa*, [1999] B.C.J. No. 3299; *Newson v. Newson*, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);
 4. The courts should not unduly emphasise any one of the statutory considerations above others;
 5. On interim applications the need to achieve economic self-sufficiency is often of less significance;

6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: *Ladd v. Ladd*, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.);
 7. Interim support should only be ordered where it can be said a *prima facie* case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, [2005] B.C.J. No. 2966, 2005 BCSC 1786 (S.C.) [*L.G.B.*];
 8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support: *L.G.B.*
- [14] The justification for point #7 in that list, regarding the specific considerations that can apply when entitlement to interim spousal support is at issue, was stated by Mr. Justice Barrow, in *L.G.B.*:
- [14] First, given the limitations of both time and evidence which necessarily constrain interim applications, caution should be exercised before descending into the merits of an issue. The greater the need to resolve contested issues of fact, especially those going to a threshold issue as in this case, the more likely it is that the decision ought not to be made on an interim basis.
- [15] Second, the need for caution is all the greater when, as a result of an interim order, money will be paid and there is an issue as to whether it can be recovered following a trial if it is determined that the recipient is not entitled to the funds.
- [16] Third, and related to the first, where an interim issue requires a determination of credibility, there is a risk that such a finding may embarrass the trial judge when called upon to make findings of credibility in relation to the very same issue. When this is so, even greater circumspection is required before making such an order.
- [17] Finally, to minimize the mischief inherent in the first and third of these observations, interim decisions should only be made where it can be said that a *prima facie* case for entitlement has been made out.
- [15] In *I.F. v. R.J.R.*, 2015 BCSC 793, Madam Justice Ballance commented on the considerations that apply to an interim spousal support application where the effect of an agreement that could preclude a support claim is at issue. She articulated the test to be applied in determining whether the agreement would ultimately be enforced in terms of whether the applicant was able to demonstrate a "substantial question" or a "reasonable prospect of success":
- [170] It is within the court's discretion to make an interim order for spousal support despite the existence of a marriage agreement that purports to disentitle the applicant from support, provided the applicant is seeking to have the agreement set aside at trial: *Thompson v. Thompson*, [1987] B.C.J. No. 2339 (S.C.); *Ziniuk v. Ziniuk* (1986), 2 R.F.L. (3d) 398 (BCCA). The

twin factors that typically dominate the analysis, beyond the applicant's financial need and the payor's financial means and ability to pay, are the strength of the applicant's case to set aside the agreement and his or her capacity to repay the amount awarded on an interim basis.

[172] Drawing on the authorities, and placing particular emphasis on the instructive analysis of the Saskatchewan Court of Appeal in *Evashenko v. Evashenko*, 2011 SKCA 22, it is my view that an applicant is not required to demonstrate a strong *prima facie* case or a likelihood or probability of success of impeaching the marriage agreement. Those standards pose too high a bar to meet at the interim stage. Rather, the test is whether the preliminary evidence is sufficient to raise a substantial question about the enforceability of the impugned agreement. Stated another way but to the same evidentiary effect, the applicable threshold test is whether the evidence shows there is a reasonable prospect of success in impeaching the marriage agreement at trial.

[16] The Family Law Act, S.B.C. 2011, c. 25, sets out the jurisdiction of the Court to set aside an agreement respecting spousal support, under s. 164(3) on the basis of the circumstances when the agreement was entered into, or under s. 164(5) on the basis of specifically enumerated considerations of fairness. The latter include the degree to which the agreement meets the objectives of spousal support as set out in s. 161:

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (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;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[17] The mutual waiver of spousal support in the Separation Agreement appears to accomplish none of the s. 161 objectives. On the hearing of the application, Mr. Duchesne's counsel was unable to suggest any reason why Ms. Sime would have voluntarily surrendered her claim, other than her being - as she asserts in her affidavit - unaware of her legal rights. Whether the test is "a *prima facie* case", or a "substantial question", or a "reasonable prospect of success", I am satisfied that the circumstances surrounding the execution of the Separation Agreement, or its effect in relation to the statutory objectives of spousal support, are not such as to disentitle Ms. Sime to an interim support order.

- [18] Mr. Duchesne contests Ms. Sime's entitlement to support on a needs basis, by reason of her current living expenses of approximately \$26,500 annually being covered under her current level of income, as disclosed in her most recent Financial Statement. I agree with Ms. Sime's counsel's characterization of her current personal living expenses (e.g. as "barebones" with claimed personal expenses of \$0.00), and her Financial Statement does not fully detail her monthly obligation servicing her line of credit loan. However, there is no evidence that the standard of living she now enjoys at the current level of expenses disclosed in her Financial Statement approximates the standard she enjoyed during the marriage.
- [19] Mr. Duchesne further points to the fact that Ms. Sime's has re-partnered, but there is no evidence of whether or to what extent her and her boyfriend's expenses are intertwined.
- [20] I find this is an appropriate case for interim support to be ordered. Any residual concerns as to Ms. Sime's ability to repay ordered interim support amounts, in the event the Separation Agreement is not set aside, are satisfied by the security created by Ms. Sime's apparent entitlement to a share of Mr. Duchesne's pension; and beyond that, by setting the amount of interim support at the lower end of the range provided by the SSAG. I do not find it necessary to express any opinion on whether there is additional security afforded by Ms. Sime's claim for retroactive child support.
- [21] The current financial statements of the two parties put Mr. Duchesne's income for spousal support purposes at \$138,677.98, and Ms. Sime's at \$30,264. The "Without Child Support" formula under the SSAG provides for a range between \$2,981 and \$3,975 per month.
- [22] I order that commencing on the first day of April 2019, and on the first date of every month thereafter, until further order of the Court, Mr. Duchesne will pay Ms. Sime monthly interim spousal support in the amount of \$2,981. In addition, I order retroactive interim spousal support be paid by Mr. Duchesne for the months of November 2018 to March 2019, in the amount of \$14,905.
- [23] The balance of the claimant's notice of application filed October 18, 2018, is adjourned generally.
- [24] The parties are directed to set this action for trial at the earliest mutually convenient dates.
- "A Saunders J."

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