
CANADA / JUDGMENT

Stapleton v. Stapleton

2018 BCSC 1818

COURT

Supreme Court of British Columbia

DECIDED

19 October 2018

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2018 BCSC 1818 Stapleton v. Stapleton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stapleton v. Stapleton,

2018 BCSC 1818

Date: 20181019

Docket: 17-3995

Registry: Victoria

Between:

Daniel Ivor Stapleton

Claimant

And:

Jamie Lynn Stapleton

Respondent

- and -

Docket: 18-2036

Registry: Victoria

Between:

Olwen Lorraine Stapleton

Petitioner

And:

Daniel Ivor Stapleton and Jamie Lynn Stapleton

Respondents

Before: The Honourable Mr. Justice Bracken

Reasons for Judgment

Counsel for Daniel Ivor Stapleton:

D. Davison

Counsel for Jamie Lynn Stapleton:

J. M. Hutchison

Counsel for Olwen Lorraine Stapleton:

G. E. Coad

Place and Date of Trial/Hearing:

Victoria, B.C.

July 12 and 13, 2018

Place and Date of Judgment:

Victoria, B.C.

October 19, 2018

- [1] In this family law proceeding there are two applications for determination, one filed by each of the parties. There is also an application for partition of the family residence brought by the claimant's mother, Olwen Lorraine Stapleton. She and the claimant are the registered owners of the property.
- [2] In the family law matter, the claimant ("Daniel") filed the first application. He seeks an order that the parties have equal parenting responsibility and parenting time. He also seeks an order for child support and that he have exclusive occupancy of the family residence. The respondent ("Jamie") is opposed to the application.
- [3] Jamie filed an application in the family law matter and seeks orders that she have exclusive responsibility for parenting of the children and that the Daniel have set parenting time. She also seeks exclusive occupation of the family residence and an order restraining Daniel and Olwen Stapleton ("Olwen") from disposing of the property. She also seeks child and spousal support. There is no opposition to an order preventing any disposition of the property without court order or agreement of all the parties and I grant that order.

- [4] Olwen brings the third application, which is for partition of the family residence property. She seeks an order for sale of the property.

Issues

- [5] There are essentially three issues for resolution. Jamie seeks an order granting her exclusive occupancy of the family residence. Daniel and Olwen want it listed and sold. Jamie seeks exclusive primary care and guardianship of the children, Daniel wants equal parenting time and guardianship. Jamie wants an order for child support and spousal support. Daniel agrees to pay child and interim spousal support but says that he cannot do so until he is free of the mortgage and other payments related to the family residence. A sub-issue related to support payments is the determination of Daniel's income.
- [6] Daniel also maintains that Jamie should find work outside the home. Jamie argues that the demands of the children do not allow her to work outside the home at least not on a full-time basis.

Background Facts

- [7] Daniel and Jamie lived together in a marriage-like relationship from August 2009 until they separated. They were married November 11, 2011. They disagree on the date of their separation. Daniel says that they separated May 1, 2017; Jamie says that they separated in October 2016, but continued to reside in the same house until September 17, 2017 when Daniel moved out of the family residence to reside elsewhere.
- [8] The parties have three children. Samantha Bottomley is 18. She is Jamie's daughter from a previous relationship and Daniel is a step-parent to her. Daniel and Jamie also have two children of their relationship; Oliver, born June 28, 2011 and Thomas, born December 5, 2012.
- [9] Samantha is still living at home and in school and Jamie says she is still a dependent. Oliver and Thomas have both been diagnosed with autism spectrum disorder.
- [10] The family residence was purchased in March 2003. It has a suite in the lower part of the house and Olwen occupied the suite when she was in Victoria. In May 2014, she moved to Alberta and she vacated the suite. It was rented out for a time after May 2014 and Daniel resided in the suite from the time of separation until he left the home. However, it has remained empty since that time, although apparently Olwen has now moved back to the Victoria area. Jamie says has offered to allow Olwen to move back to the suite but she has not done so. Daniel says that when he brought Olwen to the house to stay in December 2017, Jamie yelled and screamed at her and Olwen chose not to stay. Jamie denies that allegation.

- [11] Jamie says that they purchased the family residence after she and Daniel searched the market for a suitable family home. She says when they found the home and wanted to buy it they were not able to qualify for a mortgage as she was not working and Daniel was not able to qualify on his own. As a result, Olwen agreed to invest \$25,000 toward the purchase price and Daniel contributed the same amount from the proceeds from his RRSP account.
- [12] Jamie says that she believed Olwen's contribution to the purchase of the home was a loan that was to be paid back when the couple were able to do so. She says Daniel told her that Olwen was on the title only as a way to secure her loan.
- [13] Daniel says that he purchased the house jointly with his mother on the clear understanding that she would own one-half of the house and he and Jamie would own the other half. He says the arrangement was that his mother would make one-half of the mortgage payments and pay one-half of the expenses, including the property taxes.
- [14] Daniel says Jamie was well aware of the arrangement and that she accepted Olwen was a one-half owner of the house and that her investment was not a loan secured by having her name on title. When the mortgage for the house was placed on the title, Jamie signed a postponement agreement in which she acknowledged that her interest was subordinate to the mortgage. She met with a lawyer to execute the agreement and received advice at least to the extent that she was aware of how the title issued. She acknowledged doing so but said that she always understood that was simply the way Olwen was protecting her loan.
- [15] When the parties first separated Daniel lived in the suite but Jamie says that he did not respect her privacy and was disruptive. She says that even after he left the house he still went into the house without asking. She wants exclusive occupation of the house.
- [16] Daniel and his mother submit that the house should be listed for sale. They argue that the sale of the residence is inevitable given the financial position of the parties and that any dispute over the distribution of the sale proceeds can be resolved by holding the funds in a trust account until entitlement to the money is decided. Daniel submits that he cannot afford to make the payments on the mortgage and pay child and spousal support as well. Jamie says that she and the children have nowhere else to go and it is impossible to find any alternative accommodation without money.
- [17] As to the issue of parenting time, Jamie has set out a schedule in her application filed June 6, 2018 that she says provides appropriate parenting time for Daniel. Under her schedule Daniel would have the two boys from 5:00 p.m. Friday until 7:00 p.m. Sunday every other weekend and from after school to 7:00 p.m. on Tuesday one week and from after school until 7:00 p.m. on Thursday of the next week. She has also set out school and vacation breaks as well as holidays.

- [18] Daniel seeks equal parenting and decision-making responsibilities for the boys. His suggested schedule is set out in his affidavit number 3 and it provides 7 days of parenting time out of every 14 days for each of the parties. He says that currently he is only being allowed limited time with the boys.
- [19] Jamie also seeks child and spousal support based on a much higher income level for Daniel than the amount stated in his 2017 income tax return. She says that for the two years prior to 2017 Daniel earned \$101,755 in 2015 and \$164,963 in 2016. Daniel earned \$75,767 in 2017 but Jamie argues that his income is understated and has been reduced artificially. She submits that child and spousal support should be based on a much higher level of income. She argues that his true income for 2017 was over \$200,000 and that he has sheltered a substantial portion of his income by means of a personal corporation.
- [20] Daniel is a realtor working in the Victoria area. Jamie does not work outside the home and has a limited work history. She worked as an assistant to Daniel for a period of time but problems emerged in their working relationship and she says that the parties agreed she should stay at home to care for the children. She says that the children require her full-time presence at home. Daniel argues that she is capable of employment and that she should be making an effort to find a job.
- [21] On September 8, 2017, the parties attended a mediation session. They reached an agreement at the mediation session but it had a revocation clause that allowed either party to revoke the agreement for a period of about 48 hours after the agreement was reached. Jamie chose to revoke the agreement.
- [22] Daniel submits that there is no prospect that Jamie can buy his interest in the home or the interest/loan of Olwen. Counsel for Daniel and Olwen argue that in order to resolve all matters there must first be a sale of the family residence. They submit that an appraisal is needed and the house should be listed for sale at fair market value as soon as possible.

Discussion

- [23] While Daniel sees the sale of the family residence as the most critical issue, Jamie does not agree. To her, the most important issues are to determine an appropriate level of child and spousal support and to resolve parenting issues.
- [24] I will begin with the issue of child support. Jamie seeks child support for all three children. Daniel says that Samantha is not a dependent child and, in any event, Jamie did not file her application for support for Samantha within one year of separation as required under the Family Law Act, S.B.C. 2011, c. 25, s. 147(4)(b). Jamie says that Daniel has made payments for Samantha that were made within the one-year period.
- [25] There is little in the evidence to show that Samantha is still a dependent child. There is reference to her need for textbooks and fees but it is not clear whether she is in full time or part-time attendance in school or if she is working. There is also little to indicate whether

there is potential for payment from her natural father. In the circumstances, I am not prepared to include Samantha as a child for the purposes of this interim order. I will leave that issue unresolved and grant liberty to Jamie to make a further application for child support for Samantha upon filing additional evidence.

- [26] There is no dispute that Jamie is entitled to child support for Oliver and Thomas under the current parenting regime. Daniel's pattern of earning, albeit relatively brief, demonstrates his ability to earn a significant annual income. No doubt, his earnings depend on the real estate market and are likely at least somewhat seasonal; however, the drop of more than one-half of his income from one year to the next seems unusual. As noted above, counsel for Jamie suggests that Daniel has deliberately lowered his income by establishing a personal corporation. I make no finding on that issue. However, I agree that Daniel's income should be increased from his 2017 reported taxable income for the purposes of setting child support payments.
- [27] Based on his history of earnings, I will set Daniel's income at \$125,000 for the purposes of determining interim child support for Oliver and Thomas. Based on that income level I set child support at the level of \$2,000 per month. I have rounded up that figure slightly from the guideline amount to allow for some special expenses. However, special expenses must be calculated each month, supported by receipts and will be payable by Daniel as part of the next month's child support payment in addition to the basic level of child support.
- [28] For the purposes of this interim order, the child support order is retroactive to September 17, 2017 without prejudice to either party to argue at trial that an earlier or later date is appropriate. Hopefully, counsel will be able to resolve payment of the retroactive amount. If not, either party may apply for a further order. The material is not clear as to how much, if any, has been paid by Daniel since the date of separation but I trust that counsel will be able to determine any adjustments they need to make on that account.
- [29] Payments pursuant to this order shall be made on the first day of each month commencing October 1, 2018 and on the first day of each month after that until further order.
- [30] As to parenting time, the parties have had an acrimonious relationship since separation. It is not likely that they will be able to manage a highly flexible parenting schedule. As an interim measure, I direct Jamie will have exclusive responsibility for decisions under the Family Law Act, s. 41(b) and (c). The parties will share responsibility for decision making in all other respects.
- [31] I can see no reason Daniel should not have overnight visits with Oliver and Thomas. I appreciate that there is a level of animosity between Daniel and Jamie now but that is not a sufficient reason to restrict Daniel's parenting time.
- [32] I direct that an interim parenting arrangement will be somewhat similar to what the parties tried to do in their mediation. Commencing the first Friday after the release of these reasons, in week one, Daniel will have the boys from 5:00 p.m. Friday until 6:00 p.m. Sunday.

In week two, he will have them from after school on Tuesday and Thursday until 7:00 p.m. each of those days. The next week he will have them from 5:00 p.m. Friday until 6:00 p.m. Sunday, and then on Tuesday and Thursday after school until 7:00 p.m. the following week. That rotating schedule will continue until a final order is made or the parties agree to a permanent arrangement. In that way, Daniel has every other weekend and two days after school in the alternate weeks.

- [33] As to holidays and school breaks, the schedule set out in Jamie's application of June 6, 2018 seems appropriate and should be sufficient to serve as an interim order. Therefore, para. 3, sub-paras. (e) to (l) of Jamie's application of June 6, 2018 will form part of this order. As Jamie had the boys on Christmas day last year, Daniel will have them on Christmas day this year. I am mindful of the fact that Daniel will do all of the pick-ups and drop-offs but as there is not a great distance to travel I leave that responsibility to him rather than try to implement a shared driving responsibility.
- [34] Neither party shall infringe on the other party's parenting time except as they may agree.
- [35] Jamie has had exclusive occupation of the family residence since September 2017. In his application, Daniel seeks exclusive occupation and in the partition action Olwen seeks an order for partition and sale pursuant to the Partition of Property Act, R.S.B.C. 1966, c. 347.
- [36] As Jamie has occupied the family residence since the date of separation, I do not think it appropriate to make a change in the occupation of the residence. The purpose of an interim order is to preserve the status quo until the trial of the action: *Vujicic v. Vucicevic*, 2015 BCSC 402, at para. 31. Therefore, I order that Jamie will have continued exclusive occupation of the residence on an interim basis. I decline to make a restraining order, as I have no reason to believe Daniel or Olwen will not respect this order.
- [37] Counsel for Daniel and Olwen both argue that unless the house is listed for sale no progress will be made in this matter. Olwen submits that an order for partition is justified and an order for sale should follow. She relies on *Harmeling v. Harmeling*, [1978] B.C.J. No. 5, where Seaton J.A. said at para. 10:

... The observations have been taken as statements of limitation in other courts including the trial court of this province. In my view we should not limit the discretion in that manner. I think that we ought to accept without qualification the general statement that there is a *prima facie* right of a joint tenant to partition or sale and that the court will compel such partition or sale unless justice requires that such an order should not be made.

- [38] In *Luo v. Vesterinen*, 2018 BCCA 167, Lowry J.A. said at para. 4:

Given what this Court has said in *Harmeling v. Harmeling* (1978), 90 D.L.R. (3d) 208; *Bradwell v. Scott*, 2000 BCCA 576; and *Sahlin v. Nature Trust of British Columbia, Inc.*, 2011 BCCA 157, it is clear that the right a co-tenant has under the Partition of Property Act (whether under s. 2 or s. 6) to an order for sale is subject to the exercise of what is a broad and unfettered discretion to refuse to make the order where to do so would not do justice between the parties in the particular

circumstances of the case, and the exercise of such discretion is to be afforded substantial deference.

[39] While I accept that Olwen is *prima facie* entitled to an order for partition and I accept that there is no evidence to suggest any improper purpose on her part, the order can be refused if it "would not do justice between the parties" in all of the circumstances. While Jamie is not, strictly speaking, a party to the partition action as she is not registered as one of the owners on the title, she does claim to be entitled to a one-half interest in the property subject to a loan to her and Daniel from Olwen. Daniel and Olwen seem to accept that Jamie is at a minimum entitled to one-half of Daniel's interest.

[40] Jamie, through her counsel, notes that the Family Law Act, s. 104, provides that where there is a conflict between the Family Law Act and the Partition of Property Act, the Family Law Act prevails. Jamie also referred to *L.M.R. v. J.F.R.*, 2010 BCSC 363, at para. 21, where the court noted that courts should be cautious in ordering a sale of a family residence as such orders have permanent consequences. Although, it is noted in *Reilly v. Reilly*, [1992] B.C.J. No. 2561 at para. 35 where the court said:

... The status quo for one spouse may be the perpetuation of an injustice for another. In light of the infinite variety of circumstances arising out of human relationships it is fruitless to attempt to catalogue in advance the factors to be taken into account on an application for an interim sale. At the risk of over simplification my own view is that what the rule requires, where necessity is not in issue, is that the proposed sale be advantageous to both parties. Advantageous is a primary dictionary meaning of expedient. As to its application to all parties see *In re Craven's Estate*, [1937] 1 Ch. 431 (Ch.D.). In that case the statute in question authorized the sale of property by trustees in the absence of any express power but where it was expedient in the opinion of the court to do so. The court declined to order a sale which was advantageous to one beneficiary but not to others.

[41] In the circumstances of this case, I do not consider it appropriate to proceed with the partition action until Jamie's interest in the property can be at least investigated or perhaps determined by agreement or court order. In my view, the partition action should be stayed for a reasonable period of time to allow Jamie to try and establish her claim to one-half of the property subject to a loan from Olwen. In the meantime something must be done as none of the parties appear able or willing to buy out the interest of the others. The situation cannot continue for any prolonged period. At some point, it is likely inevitable that the house will have to be sold pursuant to Olwen's application for partition or by an application by Daniel or Jamie in the family law proceeding.

[42] To that end, I direct that the parties obtain an appraisal of the property within 15 days of the release of these reasons. Each of Olwen, Daniel and Jamie will share the cost of the appraisal equally.

- [43] If the parties are not able to agree to a sale or buy-out of the interests of the other parties by one of them, the property will be listed for sale on the Victoria Multiple Listing Service no later than February 1, 2019. Any proposed sale must be agreed to by all of the parties or approved by the court. Hopefully, the parties will be able to agree on a listing agent and the terms of any listing but if not any of the parties will have liberty to apply.
- [44] I direct a stay of the partition action until after February 1, 2019. After that time barring any agreement among the parties, the stay of proceedings will be ended and, subject to any contrary order of the court, the property will be listed for sale in the partition action. I expect, without making any order that the parties will be able to agree to have both actions heard at the same time if the matter proceeds to trial.
- [45] As to spousal support, Jamie has, in my view, established entitlement to support at least on an interim basis. The difficulty is that Daniel is paying all of the expenses of the house, including mortgage payments, property taxes, insurance and perhaps some of the expenses for utilities. Therefore, there must be an adjustment to account for the benefit of those obligations to Jamie. Daniel argues that he is not able to make any significant payments in addition to his obligations respecting the residence, but something must be paid toward spousal support on an interim basis.
- [46] Using the income figure of \$125,000 for Daniel, spousal support is approximately \$1,800 per month based on the spousal support guidelines. That figure assumes Jamie has no income, a fact I accept at this point. As Daniel is paying all of the expenses of the house, some compromise must be made to establish a figure that takes into account some of that expense. It is likely that when all matters between the parties are satisfied by agreement or court order, the benefit of those payments to Jamie will be adjusted. In the interim, a reasonable figure for spousal support is \$800 per month. Spousal support will commence on November 1, 2017 without prejudice to Jamie to claim retroactive support as part of a final order.
- [47] Costs will be in the cause.

"J. K. Bracken, J."

The Honourable Mr. Justice Bracken

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/18/18/2018BCSC1818.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/stapleton-v-stapleton-2018>

Prepared on 25 October 2026 · Esheria