

CANADA / JUDGMENT

Y.Q. v. J.D.

2022 BCSC 208

COURT

Supreme Court of British Columbia

DECIDED

9 February 2022

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2022 BCSC 208 Y.Q. v. J.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Y.Q. v. J.D.,

2022 BCSC 208

Date: 20220209

Docket: E201247

Registry: Vancouver

Between:

Y.Q.

Claimant

And

J.D.

Respondent

Before: Master Muir

Reasons for Judgment

Counsel for the Claimant, appearing via video conference:

B. Lin

Counsel for the Respondent, appearing via video conference:

C. Ke

Place and Date of Hearing:

Vancouver, B.C.

January 24, 2022

Place and Date of Judgment:

Vancouver, B.C.

February 9, 2022

Introduction

- [1] This was an application by the claimant, Y.Q., for an order pursuant to s. 89 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] that she receive an interim advance of \$175,000 from \$380,797.18, being the total net proceeds of sale of the parties' former family home, currently held in trust by her counsel.
- [2] The claimant also seeks costs.
- [3] Paragraph 1 of the claimant's notice of application also sought that she be relieved from the requirement that a Judicial Case Conference ("JCC") be conducted prior to serving a notice of application. That was previously granted after an application by requisition filed April 14, 2021. Thus, paragraph 1 of the notice of application was not proceeded with.
- [4] As an aside, I note that although I gather reasons have yet to be transcribed, it has been held on appeal from me in another matter that the procedure set out in Rule 7-1(5) of the Supreme Court Family Rules, B.C. Reg. 169/2009 for obtaining relief from the JCC requirement is mandatory. Rule 7-1(5) provides:

How to apply for relief

- (5) To bring an application for relief under subrule (4), a party must file
- (a) a requisition in Form F17, and
 - (b) a letter signed by the party or his or her lawyer setting out the reasons why the relief is sought.
- [5] I have no jurisdiction to entertain an application for relief from the JCC requirement unless this procedure is followed. I have no jurisdiction to entertain an application in a family matter, other than those exempted from the rule, unless relief has been properly obtained or a JCC conducted.
- [6] Thus, had the claimant not applied by requisition in April 2021 and obtained the leave sought in paragraph 1 of the notice of application in advance of the hearing before me today, I would not have had jurisdiction to entertain the application. I presume, however, that such a requisition could be set to be heard concurrently with an application.

Background

- [7] The parties married on December 6, 2015 and separated in June 2019 according to the claimant, or in early 2020 according to the respondent, J.D.
- [8] There is one child of the marriage, born June 4, 2016.
- [9] The claimant is ordinarily resident in BC, having relocated here in 2015, and the child was born in BC. The respondent resides in China, although he spent considerable time here prior to the parties' separation.
- [10] In or about October 2019, the claimant's mother took the child to China for a visit. The child was supposed to be there for only two months. However, the respondent has kept the child in China since that time without the claimant's consent. He has obtained a Chinese residence card for the child based on a false declaration.
- [11] The respondent works in China as a pilot for Sichuan Airlines Co. Ltd. He had been working through 2019 with an income, according to the claimant, equivalent to \$325,000 Canadian per annum. The respondent says he had to step down from that position at the end of 2019 as a result of the stress of the separation. His evidence is that his income now is approximately \$160,000 Canadian per annum. There is evidence from a judgment in the Chinese action that his income is actually in excess of \$176,500 Canadian.
- [12] The claimant is an administrative assistant, and earns approximately \$37,440 per annum.
- [13] The respondent was the primary breadwinner during the relationship. That is not in dispute. His affidavit evidence acknowledges that and states:
- I contributed to her college tuition and covered most if not all of her financial needs and some of the needs of her immediate family.
- [14] The claimant says that the respondent normally provided approximately \$6,000 per month for support for her and the child. The respondent suggests it was more like \$9,000.
- [15] Despite that, and the financial disparity between the parties, the claimant says that the respondent's support for her and the child stopped after the end of 2019.
- [16] The notice of family claim was filed on July 6, 2020 and the respondent was served alternately. He filed a jurisdictional response on September 10, 2020.
- [17] The claimant was unable to afford the upkeep on the former family home in Richmond, BC. On October 6, 2020, Master Cameron granted an order that the former family home be sold. The property was in the claimant's name.
- [18] That sale took place on October 30, 2021 and, as noted, the net sale proceeds of \$380,797.18 are being held in trust by counsel for the claimant.

- [19] The jurisdiction question was heard by Justice Matthews on April 29 and 30, 2021. Reasons for judgment were issued May 17, 2021 (indexed as 2021 BCSC 943) in which Matthews J. held that the British Columbia Supreme Court has jurisdiction and should exercise jurisdiction over all issues in this case, despite a proceeding having been commenced in China.
- [20] Justice Matthews noted:
- [31] J.D.'s conduct in obtaining a residence card for A.D. without Y.Q.'s participation and falsely declaring to the Chengdu Court that Y.Q. resides in Chengdu "gives rise to obvious concerns that he is not forthright with the Court and is willing to manipulate facts to his advantage": *Xi v. Zhang*, 2018 BCSC 2559 at para. 30.
- [21] After a further hearing on May 25, 2021, in her Reasons for Judgment indexed as 2021 BCSC 1185, Matthews J. granted an interim order, inter alia, for the claimant's mother to have contact with the child, for video parenting time between the child and the claimant and for the respondent to cooperate with the claimant to renew the child's Canadian passport. Justice Matthews findings included:
- [8] During the time from October 2019 to the end of 2019, the parties were addressing the breakdown of their marriage, whether they could go forward with their marriage and on what conditions, and issues pertaining to property. J.D. sent Y.Q. video clips of A.D. and related information about A.D. that indicated that A.D. was having trouble adjusting to being in China, was crying regularly, and was voicing that she wanted to see her mother and her friends in her Richmond day care. During October 2019, A.D. first stayed with her maternal grandmother in Chengdu, but when her maternal grandmother asked J.D. for help with her care, J.D. arranged for A.D. to stay with J.D. at his parents' house where his parents care for her while he is working. It is not clear when A.D. last saw her maternal grandmother, but it appears it was sometime in late 2019 or early 2020.
- [9] Y.Q. asked and then demanded to see A.D. through video chats. She asserts that J.D. did not permit that between January 2020 and May 8, 2021. J.D. denies that, and asserts that he tried to arrange video chats between January 2020 and March 2020. Y.Q. did not respond to his proposed for video chats. I cannot resolve that on the evidence, but on at least one occasion J.D. said a video chat between Y.Q. and J.D. would be possible if Y.Q. agreed to his terms on how to move forward with their marriage. I described those terms in more detail in my jurisdictional reasons. They include that Y.Q. have tattoos that J.D. specified and that she agreed to give him power of attorney over financial matters, including the family home. Y.Q. alleges J.D. also required her to have sexual organs and body parts surgically removed. J.D. asserts that this was Y.Q.'s idea and that he tried to talk her out of it. In my jurisdiction reasons, I did not make a finding about that issue, and given the conflicting evidence before me on this application, I still will not do so. However, it is clear on J.D.'s evidence on this application that in the latter part of 2019, he communicated to Y.Q. that he required her to have tests for HIV and sexually transmitted diseases and would not permit her to have video chats with A.D. until that occurred.

- [10] In my jurisdictional reasons, I found that J.D. put Y.Q.'s ability to have a future relationship with A.D. into the negotiations about their marriage and threatened her about her future relationship with A.D. to compel her to accede to his demands. I held that J.D. perpetrated family violence during the associations. I held that the family violence involved A.D. and had the potential to threaten her, as it included threats of alienating her from her mother and refusing to discuss A.D. and her mother having video chats until Y.Q. addressed the plan for resolution of their disputes. I held that J.D.'s actions in precluding A.D. from seeing her mother and her maternal grandmother, the two persons with whom she had had the most contact from birth until October 2019, to not be in A.D.'s best interests. The evidence before me on this application does not change any of the findings I made in that regard.
- [22] The claimant deposes that many of the orders, including for parenting time, contact with the child's maternal grandmother, and renewal of the child's Canadian passport, have not been complied with.
- [23] Despite the length of time since those decisions, the respondent has not filed a response to family claim or a counterclaim.
- [24] There has been no JCC conducted, and the claimant has already had to deal with several applications, including the sale of the former family home, the jurisdiction application, her application for parenting time and shared parental responsibilities, and this application.
- [25] She anticipates further applications will be necessary as it is apparent that the respondent has little respect for the claimant or for orders made by this court.
- [26] At the outset of this application, the respondent sought an adjournment on the basis that there was an appeal pending from a decision of the Chinese court. Counsel for the respondent argued that with a final decision of the Chinese court, the respondent could apply to strike the claims in this action, despite the decision of Matthews J.
- [27] As things stand, the BC Supreme Court has jurisdiction over all issues, however, and I saw no need to grant such an adjournment.

Legal Basis

[28] Section 89 of the FLA provides as follows:

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

[29] In *I.F. v R.J.R.*, 2015 BCSC 793, Madam Justice Ballance discussed interim distributions:

[192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the FLA.

[193] In my opinion, the plain meaning of the phrase "harmful to the interests of the spouse" in s. 89 contemplates actual or potential economic harm, and is likely broad in its scope. Determination of the presence of harm requires the court to reasonably anticipate and then assess the consequences that may flow from the interim order being sought. That approach, in turn, invites a highly individualized component to the inquiry. For example, would the distribution being sought in the particular case require a sale of property or of the encumbering of assets; what income tax ramifications might be triggered and what other transactional costs would arise? The concept of harm under s. 89 would also encompass economic implications such as whether the distribution would adversely impact the other spouse's lifestyle or effectively undermine or prejudice his or her argument for reapportionment.

[30] Our Court of Appeal considered the question in *Etemadi v. Maali*, 2021 BCCA 298. That Court's analysis was summarized in *Jadavji v. Khadjieva*, 2021 BCSC 2267, as follows:

[9] Section 89 of the FLA allows the court to make an order for interim distribution of family property to provide money to fund a family law proceeding. In *Etemadi*, the Court of Appeal recently set out the principles applicable to s. 89 interim distribution orders at paras. 50-53. Those principles, written in the dissenting opinion of Justice Butler, were adopted by the Court. They are:

1. A chambers judge must determine whether the applicant is economically disadvantaged in relation to the prosecution of the litigation or otherwise in pursuit of dispute resolution. If so, then it may be appropriate to make an order that "levels the playing field" or provides for "balanced participation" in dispute resolution.
2. The judge must go through a preliminary assessment of the circumstances that considers both of the s. 89 requirements: namely, whether the applicant can show that it would not be harmful to the interests of the other spouse and it is necessary for the purpose of funding dispute resolution.
3. Whether an interim distribution is necessary involves careful consideration of the quantum required. A judge should not order distribution in an amount greater than what is necessary.
4. The judge must always exercise the discretion conferred by s. 89 on the basis of whether it is in the interests of justice to grant the order sought.

- [10] Where a party raises a threshold issue on the merits, the applicant must show that there is a reasonable prospect of success on that threshold issue: *Bartch v. Bartch*, 2018 BCCA 271 at para. 19 citing *I.F. v. R.J.R.*, 2015 BCSC 793 at paras. 190-194.

The Claimant's Position

- [31] The claimant points out that the actions of the respondent have resulted in unnecessary delay in this family proceeding and have caused her to incur significant expense. Those actions include the respondent unilaterally taking their child to China, using the child as a hostage in negotiations, not attorning to this jurisdiction, forcing her to bring several applications and defend the jurisdiction application, not complying with the BC Supreme Court orders for parenting time and contact with the child's maternal grandmother, and not filing a response to civil claim, counterclaim, or Form F8 financial statement.
- [32] The claimant notes that the respondent has also failed to pay \$1,000 lump sum costs ordered by Matthews J. to be paid forthwith. She points out that he offered to have that paid from the funds in trust, but she refused as she believes that there may not be sufficient funds in trust to satisfy her entitlement at trial. Her position is that she should have a greater portion of the family property due to her contribution to his career, her contribution to the property, and the existence of properties in China in the respondent's name. In addition, she has a claim for spousal support, and, potentially, costs.
- [33] Her evidence is that she borrowed \$250,000 from her parents before separation in order to fund part of the deposit on the former family home, purchase of a vehicle, and other family expenses. Since separation, she has had to borrow \$57,300 from her parents to fund the upkeep of the former family home and this litigation. Both of those amounts remain outstanding. Her parents have indicated they are unable to provide her with any further funds.
- [34] At the time of filing her Form F8 financial statement in April 2021, the claimant says she had only approximately \$5,800 in various bank accounts.
- [35] Her evidence is that by reducing her personal expenses, she can get by on her own income, but that she cannot afford the extra cost of this litigation.
- [36] In her affidavit sworn January 19, 2022, the claimant deposes that she owes her lawyers \$75,000 for work done on this action.
- [37] The claimant deposes that she has been forced to hold off on other applications because her lawyers have indicated that they cannot carry her financially and that, without an interim distribution, they will be forced to terminate the retainer. She further deposes that without counsel she does not believe that she could proceed with this difficult case on her own.

- [38] She indicates that she hopes to bring an application to have the respondent found in contempt of Matthews J.'s orders and to have the child returned to BC. She estimates the legal fees for those applications at \$30,000. She estimates that examinations for discovery and potentially applications about documents or other matters arising from the discoveries would cost at least \$20,000 and that fees for the presently scheduled five-day trial will run at least \$50,000.
- [39] Thus, she seeks an interim distribution of \$175,000.
- [40] The former family home was put in the claimant's sole name on purchase. The claimant says that although the respondent told her that it was a gift for her, she is of the view that it is a family asset.
- [41] The claimant points out that the interim advance sought is less than 50% of the funds being held in trust and submits that the respondent's position is amply protected by the funds that would remain.

The Respondent's Position

- [42] The respondent says that the claimant has not shown that she needs an interim distribution.
- [43] He submits that her financial circumstances are "murky" and that she has failed to disclose assets--including bank accounts and a property owned by her in Chengdu, China. The claimant deposes that the Chengdu property is in her name, but that her parents purchased the property and reside there and that she does not have any beneficial interest in the property. Her evidence is that she has made full disclosure of her assets.
- [44] I note that the respondent also owns at least one property in Chengdu, China. He indicates that he is the sole owner on title to the Chengdu property where he resides with his parents. He says the property was purchased in 2009 with his and his parents' funds.
- [45] Further, the respondent argues that the claimant has not proved that his interest in the family property will not be harmed by an interim distribution.
- [46] He argues that he paid most of the purchase price for the family home with his own excluded property and that since that time he has paid all of the taxes, mortgage, strata fees, and other expenses of the home.
- [47] He says he "will be" seeking an unequal division of former family property due to the length of the relationship and the disparity of contributions of the parties to the purchase and maintenance of the home. Thus, he asserts he will be entitled to all or virtually all of the funds in trust and that the claimant will not be able to repay any advance made.

Analysis

- [48] There is no question that the claimant is economically disadvantaged in relation to the prosecution of this litigation. Her financial circumstances and prospects are considerably less than those of the respondent. They have already been stretched to the breaking point by the respondent's failure to continue to contribute to the upkeep of the former family home and by her legal expenses.
- [49] In addition, the respondent has indicated, both in his communications with the claimant and in his actions, that he has no respect for this court or its orders and has no intention of willingly cooperating in a resolution in this jurisdiction.
- [50] That attitude on the part of the respondent has driven up the legal costs of the claimant and will undoubtedly continue to do so. Given the present position, with the claimant on the verge of losing counsel due to her inability to pay for her legal expenses, the complexity of the issues, and the recalcitrance of the respondent, I conclude that an interim distribution is necessary, not only for the claimant to advance her interests, but based on Matthews J.'s Reasons for Judgment, that an interim distribution is necessary in order to protect the child's interests.
- [51] The next question is whether an interim distribution to the claimant would be harmful to the interests of the respondent.
- [52] The parties have no family assets in BC other than the net sale proceeds of the former family home. The claimant is concerned that satisfaction of any entitlement she is found to have to family assets will only be able to be satisfied from those proceeds.
- [53] The respondent for his part submits that he expects to be awarded the lion's share of those funds. He has not, however, filed a Form F8 financial statement and we have only a limited idea of what assets he holds in China. It is his financial circumstances that are "murky" here. His substantial income suggests that there may well be assets in China that are undisclosed at this point.
- [54] The evidence indicates that the former family home was purchased in June 2016 for \$529,900. There is evidence that the parties took a mortgage of approximately \$380,000.
- [55] The respondent says he funded most of the property purchase from his excluded property. He does not provide any evidence of that, other than providing two bank drafts, one for \$20,000 on October 9, 2016 and the other for \$50,000 on March 1, 2017. Those do not coincide with the date of purchase of the property.
- [56] Those bank drafts were attached as exhibits to his affidavit #3 sworn December 24, 2020. He deposed then that he needed time to search for additional evidence. Despite that and the length of time since the filing of that affidavit, no such evidence has been produced.

- [57] The evidence of the respondent in his affidavit #3 at para. 55 concedes that the claimant paid 10% of the purchase price as down payment on the former family property. That amount is approximately \$53,000. If the balance of the down payment was funded by the respondent, that is just shy of \$97,000.
- [58] Assuming that both down payments for the purchase of the former family home are excluded property, the claimant and the respondent would receive \$53,000 and \$97,000 respectively from the \$380,797.18 in trust and the balance of \$230,797.18 would prima facie be divided equally.
- [59] Accordingly, the claimant is arguably entitled to at least \$53,000 plus \$115,398.59 ($\$230,797.18 \div 2$), for a total of \$168,398.59.
- [60] There is nothing in the evidence that convinces me that the respondent would be entitled to more than 50% of the remainder of the net proceeds of the sale of the former family home. Indeed, his failure to provide proper financial disclosure--or even to file a response and counterclaim--is telling.
- [61] I have concluded that, for the purposes of this application, I can assume that the claimant is entitled to receive a minimum of \$168,398.59 from the funds in trust.
- [62] The claimant also has a claim for spousal support and has a steady job. There is little risk that the respondent's interest will be harmed by an interim distribution.
- [63] As to quantum, the amount sought is \$175,000. Of that, \$75,000 is already owing by the claimant to her counsel. The balance of \$100,000 is, in my view, a very conservative estimate of what the balance of this litigation is likely to end up costing the claimant. Given the position of the respondent, I would expect to see necessary legal fees well in excess of that amount.

Disposition

- [64] The claimant's application is allowed. The claimant will have an interim distribution of \$175,000 from the funds being held in trust by her counsel. The interim distribution is to be held in trust by claimant's counsel and used only for the purposes of this litigation.

Costs

- [65] Given, amongst other things, the failure of the respondent to file a response, counterclaim and Form F8 financial statement, the claimant will have her costs of this application in any event of the cause.

"Master Muir"

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Prepared on 27 October 2026 · Esheria