

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kieffer v. Brown*,
2023 BCSC 871

Date: 20230524
Docket: E212158
Registry: Vancouver

Between:

Timothy James Kieffer

Claimant

And

Stephanie Anne Brown

Respondent

Before: The Honourable Madam Justice E. McDonald

Reasons for Judgment

Counsel for the Claimant:

L.A. Murphy

Counsel for the Respondent:

M.G. Perry

Place and Date of Trial/Hearing:

Vancouver, B.C.
April 6, 2023

Place and Date of Judgment:

Vancouver, B.C.
May 24, 2023

Table of Contents

INTRODUCTION 3
ISSUES..... 4
BACKGROUND..... 4
ANALYSIS..... 5
 Mr. Kieffer’s Application..... 6
 Ms. Brown’s Application 7
 Alternative Applications 8
DISPOSITION..... 10

Introduction

[1] There are cross-applications before me concerning what to do with the proceeds from the sale of the parties' former family home.

[2] The parties, Timothy James Kieffer and Stephanie Anne Brown, are former spouses. On August 18, 2021, the parties entered into a separation agreement (the "Agreement") which dealt with, among other things, division of family property and spousal support obligations. Notably, the Agreement provided that, if the parties' family home was sold, the parties would share the sale proceeds equally.

[3] Ms. Brown has now challenged the enforceability of the Agreement on the grounds that Mr. Kieffer failed to disclose material information about his income at the time the Agreement was negotiated. Her challenge is set to be heard at trial in February 2024.

[4] On March 30, 2023, the parties sold the family home. The net proceeds from the sale totaled approximately \$2,699,146.90. Those proceeds have been held in a lawyer's trust account since the sale completed.

[5] In the present proceeding, both parties apply to have all or some of the sale proceeds detained and held in trust pending resolution of Ms. Brown's challenge to the Agreement. Specifically, Mr. Kieffer seeks that all of the proceeds be detained so that no amount is distributed to either party. In contrast, Ms. Brown applies to have her one-half share distributed to her under s. 89 of the *Family Law Act*, S.B.C. 2011, c. 25 [FLA], and additionally seeks that \$900,000 from Mr. Kieffer's share be detained.

[6] For the reasons that I will explain, I have decided that the proceeds shall be distributed to the parties, except for \$900,000 from Mr. Kieffer's half share of the proceeds, which shall be detained pending determination of the enforceability of the Agreement or further agreement of the parties.

Issues

[7] The only issue to be determined on this application is whether a portion of the proceeds currently held in trust ought to be distributed to the parties and, if so, in what amounts.

Background

[8] The parties commenced a marriage-like relationship in May 1988 and married in September 1994. They separated in July 2019.

[9] The parties have three children together.

[10] On August 18, 2021, the parties entered into the Agreement, which was filed in the court registry on August 20, 2021.

[11] Prior to entering into the Agreement, Mr. Kieffer paid Ms. Brown periodic spousal support payments each month. However, pursuant to the Agreement, Mr. Kieffer was to pay a single lump sum spousal support payment in lieu of further periodic payments and in full satisfaction of his past and future spousal support obligations (the “Spousal Support Buyout”).

[12] The Spousal Support Buyout amount totaled \$500,000. This was to be paid out as a \$100,000 cash transfer to Ms. Brown by September 30, 2021, and \$400,000 coming from Mr. Kieffer’s share of the equity in the family home.

[13] Since the Agreement was executed, a dispute has arisen concerning spousal support and, more specifically, regarding Mr. Kieffer’s income. Ms. Brown claims that she agreed to receive lump sum spousal support in circumstances where Mr. Kieffer failed to make a material disclosure that his income was likely to increase significantly. Ms. Brown submits that the Agreement as to spousal support ought to be set aside.

[14] As noted, a trial has been set for February 2024 to hear Ms. Brown’s challenge.

[15] On March 30, 2023, the former family home was sold. The parties agreed for the net proceeds of the sale to be held in the trust account of Ms. Brown's counsel pending determination of the present applications.

[16] It is not disputed that the claimant paid Ms. Brown the first \$100,000 payment required by the Spousal Support Buyout. However, he has not paid the remaining \$400,000 that was to be taken from his share of the equity in the family home. The payment has not been made due to the dispute about the enforceability of spousal support terms in the Agreement.

Analysis

[17] Both parties rely on Rule 12-1 of the *Supreme Court Family Rules* for their respective applications.

[18] Rule 12-1 deals with the detention, preservation and recovery of property that is the subject of a family law dispute. Among other things, Rule 12-1 authorizes the court to make an asset preservation order with regards to funds that are in dispute:

Rule 12-1 — Detention, Preservation and Recovery of Property

Property that is the subject matter of a family law case

(1) The court may make an order for the detention, custody or preservation of any property that is the subject matter of a family law case or as to which a question may arise and, for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter on any land or building.

Fund that is the subject matter of a family law case

(2) If the right of a party to a specific fund is in dispute in a family law case, the court may order the fund to be paid into court or otherwise secured.

...

Recovery of specific property

(4) If a party claims the recovery of specific property other than land, the court may order that the property claimed be given up to the party, pending the outcome of the family law case, either unconditionally or on terms and conditions, if any, relating to giving security, time, mode of trial or otherwise.

[19] The test for an asset preservation order under Rule 12-1 involves considering the following:

- a) Is there a fair or serious question to be tried, on the evidence and not just on the pleadings, as to the claimant's entitlement to a proprietary interest in property?
- b) Is there a fair or serious question to be tried, on the evidence and not just on the pleadings, that the property is threatened with disposition or transfer outside the jurisdiction?
- c) Does the balance of convenience favour granting the injunction?

(*Chahal v. Chahal*, 2016 BCSC 1814 at para. 28.)

Mr. Kieffer's Application

[20] Mr. Kieffer seeks an order that all the sale proceeds be held in trust pending determination of Ms. Brown's challenge to the Agreement. He submits that, if the Agreement is set aside, a new regime of spousal support may be ordered, such as periodic support. In such a case, the court would need to redetermine the parties' respective family property entitlements, including their entitlements to the family home. Therefore, Mr. Kieffer submits that it would be inappropriate to distribute any amount of the sale proceeds until Ms. Brown's challenge to the Agreement is resolved.

[21] I am not satisfied that there is a serious issue to be tried regarding Mr. Kieffer's entitlement to all of the sale proceeds. In the event the Agreement is set aside, Ms. Brown is presumptively entitled to an equal interest in all family property, including the family home: *FLA*, s. 81; *Storey v. Terry*, 2020 BCCA 30 at para. 11. Mr. Kieffer has not provided any evidence demonstrating how setting aside the Agreement would result in Ms. Brown receiving less than her presumptive entitlement.

[22] Further, if the Agreement is upheld, Ms. Brown is entitled to an equal share of the proceeds pursuant to the Agreement's express terms. Therefore, irrespective of

the outcome of Ms. Brown's challenge to the Agreement, she will be entitled to a one-half share of the sale proceeds.

[23] I find that there is not a serious issue to be tried, on the evidence and the pleadings, as to Mr. Kieffer's entitlement to all of the sale proceeds. His application to detain the sale proceeds under Rule 12-1 is dismissed.

Ms. Brown's Application

[24] Ms. Brown seeks an order that \$900,000 from Mr. Kieffer's share of the proceeds be held in trust pending determination of her challenge to the Agreement. This amount comprises the \$400,000 Mr. Kieffer owes her as the balance of the Spousal Support Buyout pursuant to the Agreement, plus an additional \$500,000 to account for what she may be entitled to in the event the Agreement is set aside. In this regard, Ms. Brown argues that, in light of Mr. Kieffer's recent increase in income, a court may exercise its discretion to grant her a lump sum spousal support award of approximately \$900,000, to be paid from the sale proceeds, if the Agreement is set aside.

[25] First, I have no difficulty finding that there is a serious issue to be tried regarding Ms. Brown's entitlement to \$900,000 from Mr. Kieffer's share of the sale proceeds. If the Agreement is ultimately upheld, Ms. Brown is entitled to payment of the \$400,000 pursuant to the express terms of the Agreement. If the Agreement is found to be unconscionable and set aside, I agree with Ms. Brown that her spousal support award might increase due to Mr. Kieffer's change in income.

[26] In regards to the second step in the test, I find that if the \$900,000 is distributed to Mr. Kieffer, there is a serious risk that the funds will be disposed of. In fact, Mr. Kieffer's evidence is that he plans to use his share of the proceeds to purchase a family home where his new partner and family can live. The potential for payment out of funds from trust has been found to satisfy the second step of the injunction test: *Chahal* at para. 32.

[27] If the \$900,000 is not held in trust, and if the court ultimately decides that Ms. Brown is entitled to a lump sum of spousal support greater than \$500,000, I find there is a serious risk of disposition by Mr. Kieffer which could effectively eliminate the possibility a lump sum spousal support award. Neither party submits that besides the sale proceeds, there are other available means to fund a potential lump sum award of spousal support.

[28] I also conclude that the balance of convenience favours the granting of an asset preservation order respecting the \$900,000 amount. Such an order ensures that Mr. Kieffer will be in a position to meet his spousal support obligations whether or not the Agreement is set aside and specifically in the event that Ms. Brown is successful in convincing the court that it is appropriate to grant her a lump sum spousal support award in excess of the \$500,000 provided for in the Agreement.

[29] Further, I find that there is limited prejudice to Mr. Kieffer. If the court is not convinced that Ms. Brown is entitled to a lump sum spousal support award in excess of \$500,000, or if the court concludes that periodic spousal support is more appropriate in all of the circumstances, there is no risk of disposal by Ms. Brown. In addition, Mr. Kieffer will still be entitled to distribution of the remainder of his share of the sale proceeds, totaling approximately \$480,000, and he is not prevented from making future life plans which was a concern of his.

Alternative Applications

[30] In the alternative, Mr. Kieffer applies under s. 91 of the *FLA* and, in the further alternative, s. 39 of the *Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*], to have all of the sale proceeds held in trust. Section 91 of the *FLA* provides:

Temporary orders respecting protection of property

91 (1) On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 [*Pension Division*] until or unless the other spouse establishes that a claim made under this Part or Part 6 will not be defeated or adversely affected by the disposal of the property.

(2) The Supreme Court may make one or more of the following orders:

- (a) for the possession, delivery, safekeeping and preservation of property;
- (b) for the purpose of protecting the applicant's interest in property from being defeated or adversely affected,
 - (i) prohibiting the other spouse from disposing of, transferring, converting, or exchanging into another form, property in which the applicant may have an interest, or
 - (ii) vesting all or a portion of property in, or in trust for, the applicant.

Section 39 of *LEA* provides:

Injunction or mandamus may be granted or receiver appointed by interlocutory order

39 (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

(2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.

(3) If an injunction is requested either before, at or after the hearing of a cause or matter, to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the court thinks fit, whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

[31] The respondent in an application, pursuant to s. 91 of the *FLA*, carries the burden to show that the other side's claim will not be defeated if the property is disposed of: *Yang v. Williams*, 2019 BCSC 156 at para. 23 citing *Steinberg v. Miller*, 2013 BCSC 2443 at para. 26.

[32] For reasons similar to the reasons already discussed above, I would also decline to restrain Ms. Brown from disposing of her half share of the proceeds under these provisions. That is because I find no basis in the evidence before me to support Mr. Kieffer's contention that a successful challenge to the Agreement could reduce her entitlement to equal division of family property. In short, I conclude that Ms. Brown meets the onus of demonstrating that distributing half of the proceeds to her will not defeat Mr. Kieffer's claim.

[33] Having dismissed Mr. Kieffer’s claim, it follows that Ms. Brown is entitled to her one-half share of the sale proceeds. As there is no basis upon which her share of the proceeds should remain in trust, I need not address her application to distribute those proceeds under s. 89 of the *FLA*.

Disposition

[34] Pursuant to Rule 12-1, \$900,000 of Mr. Kieffer’s half share of the sale proceeds shall be held in trust with his counsel pending final determination of the enforceability of the Agreement unless the parties otherwise agree or the court orders otherwise. The balance of Mr. Kieffer’s share of the sale proceeds shall be disbursed to him.

[35] The entirety of Ms. Brown’s one-half share of the sale proceeds shall be disbursed to her.

[36] Mr. Kieffer’s application filed March 17, 2023, is dismissed.

[37] Ms. Brown is entitled to costs on the applications.

“E. McDonald”