CITATION: Makepeace v. Brenninkmeyer, 2024 ONSC 1405
COURT FILE NO.: FS-19-009107-000
DATE: 20240307

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SUSAN MAKEPEACE, Applicant

AND:

CORNEL BRENNINKMEYER, Respondent

BEFORE: M. D. Faieta J.

COUNSEL: *Kristen Normandin, Harold Niman & Matthew E. Pike,* for the Applicant

Robert M. Halpern, Erin Caplan & Alexander Sennecke, for the Respondent

HEARD: November 16, 2023

ENDORSEMENT

FAIETA J.

[1] The Applicant's brings this motion for an order that:

a) The Applicant shall receive $1,550,000 from the net proceeds of sale from the Port Carling property, with the remaining to be held in trust by the real estate lawyer pending trial.

b) The Respondent be ordered to pay the sum of $1,644,637.26 in interim fees and disbursements to the Applicant less any amount released to the Applicant from the net proceeds of sale from the Port Carling property.

[2] The motions for this relief, and other relief, came before me earlier and was adjourned for further submissions: See *M.S. v. B.C.*, 2023 ONSC 6363.

BACKGROUND

[3] The background facts are described in my earlier decision.

[4] The Applicant brought two earlier motions for interim fees and disbursements.

[5] On November 21, 2021, the Respondent was ordered to pay $186,000.00 to the Applicant. In his Endorsement dated January 21, 2022, Pinto J. ordered that such amount be regarding as having been paid for interim fees and disbursements.

[6] On August 11, 2022, this court dismissed the Applicant's motion for interim fees and disbursements of $775,000 to bring this case to trial. The Respondent submitted that the motion should be dismissed as the Applicant could fund this litigation from her 50% share of the net proceeds of sale of the Port Carling property without prejudice to their rights in this proceeding.

[7] In his oral reasons, Pinto J. stated:

> So, I have given this some thought. I do appreciate the importance of this motion to both sides, but particularly the applicant.
>
> Despite that, I am going to dismiss the request for disbursements. You can tell from the nature of my questions, but having gone over, again, the legal test, one of the foremost requirements is that the claimant must demonstrate that he or she is incapable of funding the requested amounts. I do not find that the applicant is incapable of funding the requested amounts given her ability to sell primarily the cottage, and in the alternative, the other properties.
>
> Alternative to that, I find that she has not satisfied the Court that she is incapable of raising funds through further financing, and the evidence does not indicate that the respondent is opposed to the sale of the cottage or would object to the encumbrance of the other properties. Therefore, I find that she is capable of funding the requested.

[8] Subsequently, the parties agreed to the sale of the Port Carling property. It was sold for about $6 million dollars. The sale was completed in August 2023. The net proceeds of sale of about $3.3 million remain held in trust by their real estate solicitor. On this motion the Respondent has refused to have 50% of those net sale proceeds paid to the Applicant on a without prejudice basis as he suggested to this court in 2022.

ISSUE #1: SHOULD ONE-HALF OF THE NET PROCEEDS OF SALE FROM THE PORT CARLING PROPERTY BE DISTRIBUTED TO THE APPLICANT?

[9] There Applicant seeks an order that $1,550,000 be paid to her from the net proceeds of sale and that the remainder continue to be held in trust pending trial.

[10] The Respondent seeks an order that $250,000 be paid to each party from the net proceeds of sale.

[11] There is a presumption in favour of an equal distribution of the proceeds of sale of the jointly held property, subject to the need for a preservation order to satisfy an equalization payment under s. 12 of the Family Law Act, R.S.0. 1990, c. F.3 ("FLA") or in respect of future support obligations under s. 40 of the FLA : *Weitzner v. Lupu*, 2021 ONSC 4701, para. 9.

[12] I adopt the principles outlined by Sachs, J. in *Bronfman v. Bronfman*, [2000] O.J. No. 4591, at paras. 26-31:

[26] Is it appropriate to articulate a simple test or formula for deciding when a spouse has met the burden to obtain a preservation order under s. 12? Like interlocutory injunctions, s. 12 orders are a discretionary remedy. In discussing interlocutory injunctions Robert Sharpe (now Sharpe J.A.) stated:

> . . . [I]t is difficult, dangerous and, perhaps, undesirable to attempt to lay down explicit formulations or guidelines. The decision properly depends very much upon the particular circumstances before the court. [See Note 4 at end of document]

[27] However, as Sharpe points out, it is appropriate that there be a focus for the decision-making. As a starting point, he articulates the problem posed by any type of interlocutory injunction. The exercise is one of balancing risks. On one side there is the risk that in the time it takes to get to trial, the plaintiff's rights may be so impaired that a final judgment would represent nothing more than a Pyrrhic victory. On the other hand, there is the risk that a defendant may be restrained from doing something that he or she is ultimately shown to have the right to do. The task is complicated by the fact that at an interim stage a court is being called upon to grant a remedy before the merits of the dispute have been fully explored.

[28] In dealing with interim or interlocutory injunctions, the courts have developed a checklist of factors they consider. They are:

> (a) The relative strength of the plaintiff's case;
>
> (b) The balance of convenience (or inconvenience); and
>
> (c) Irreparable harm.

[29] The first two factors are relevant to the determination of an application for a non-dissipation or restraining order under s. 12. Clearly, a court will want to consider how likely it is that the plaintiff or petitioner will receive an equalization payment. It will also want to consider the effect that granting, or not granting, such an order will have on the parties. Under s. 12, the agenda is to protect the spouse's interests under the *Family Law Act*, so that if a spouse is successful in obtaining relief under that Act, there are assets available to satisfy that relief. Relevant to this exercise is an assessment of the risk of dissipation of the assets in existence prior to trial.

[30] In considering the debate in the case law on the subject of interlocutory injunctions, particularly concerning the strength of the plaintiff's case, Sharpe had this to say:

> The weight to be placed upon the preliminary assessment of the relative strength of the plaintiff's case is a delicate matter which will vary depending upon the context and the circumstances. As the likely result at trial is clearly a relevant factor, the preliminary assessment of the merits should, as a general rule, play an important part in the process. However, the weight to be attached to the preliminary

> assessment should depend upon the degree of predictability which the factual and legal issues allow. [See Note 5 at end of document]
>
> [31] This comment is helpful when considering an application under s. 12 of the Family Law Act. There are certain cases where the factual record, and the applicable legal principles, make it very clear that a spouse will be entitled to an equalization payment in a particular amount. In such cases, considerable weight will be given by the court to this factor when deciding an interim application under s. 12, and perhaps less weight to the other factors. There are others where the facts and the law are disputed and complicated. In addition, the record may not be fully developed, as both sides may not yet have been in a position to obtain their experts' reports on some of the more difficult valuation issues. Further, even if the reports have been obtained, if they differ substantially, it may be impossible for a court, on an interim motion, to assess with any degree of certainty which expert's report will prevail at trial. In such cases, the court will want to go on and give serious consideration to the other factors, being the balance of convenience and the risk of dissipation prior to trial.

[13] While I have found, as will described below, that the Applicant has advanced an arguable case for spousal support and an equalization payment, given the available evidence it is impossible at this point to determine with any degree of certainty which party will owe an equalization and the amount of that payment, particularly given the uncertainty surrounding the Respondent's date of marriage assets and the merits of his resulting trust claim.

[14] Given that the Applicant is in dire financial straits, I find that the Respondent bears the greater risk of irreparable harm if he is successful at trial. The Respondent came to the same conclusion but nevertheless submitted that it was appropriate for the court to order that the sum of $250,000 be released to each party. I accept this submission and so order.

ISSUE #2: WHAT AMOUNT OF INTERIM FEES AND DISBURSEMENTS, IF ANY, SHOULD BE GRANTED TO THE APPLICANT?

[15] The authority to make an order for the payment of interim fees and disbursements in a family law proceeding is found in Rule 24(18) of the *Family Law Rules* which states:

> The court may make an order that a party pay an amount of money to another party to cover part or all of the expenses of carrying on the case, including a lawyer's fees.

[16] A person making a claim for interim fees and disbursements must show that:

(a) Their claim has merit;

(b) The costs and disbursements claimed are necessary and reasonable for them to pursue their claim;

(c) The claimant is unable to fund the requested amounts; and,

(d) The opposing party has the resources or access to resources to pay the interim costs and disbursements requested.

See *Ludmer v. Ludmer*, 2012 ONSC 4478, para. 34; *Peerenboom v. Peerenboom*, 2018 ONSC 5118 (Div. Ct.), paras. 25 & 26

[17] As with any order made by this court under the *Family Law Rules*, this court is required to exercise it discretion under Rule 24(18) in a way that enables the court to deal with cases justly by, amongst, other things, ensuring that the procedure is fair to all parties, saves expense and time, deals with a case in a way that is appropriate to its importance and complexity, and gives appropriate court resources to the case while taking into account the need to give resources to other cases: See Rules 2(2),(3) and (4) of the *Family Law Rules*. An order for interim fees and disbursements furthers the primary objective of fairness: *Ma v. Chao*, 2016 ONSC 585, para.4. In the context of a request for interim fees and disbursements, the interests of justice are served by the court exercising its discretion in a manner that "level[s] the playing field where there appears to be [a] very significant disparity in resources": *Peerenboom*, para. 24. On the other hand, an order for interim fees and disbursements should not amount to a "…a license to litigate": *Ludmer*, para. 16.

[18] It is no longer necessary to find exceptional circumstances to make an order for interim fees and disbursements: *Ludmer*, para. 15; *Fiorellino-DiPoce v. Di Poce*, 2019 ONSC 7074, para. 13.

[19] Further, an order for interim fees and disbursements should not be limited to cases where there will be an equalization payment: *Ma v. Chao*, 2016 ONSC 585, para. 10 (Div. Ct.). More generally, an interim order for fees and disbursements should not be refused because the moving party may not be able to repay the award. Such outcome undermines the overriding objective of enabling an impecunious litigant to pursue a meritorious claim: *Romanelli v. Romanelli*, 2017 ONSC 1312, paras. 17-20.

[20] The Applicant submits that the motion for interim fees and disbursements would have been unnecessary had the Respondent maintained his representations that he would share the proceeds of sale of the Port Carling property with the Applicant. In his November 2021 affidavit, the Respondent stated that "I am prepared to have the net proceeds of sale of same divided equally between us on a without prejudice basis to either of our claims in these proceedings". In his affidavit sworn August 8, 2022, the Respondent stated that he proposed to "sell the jointly held cottage property and divide the net proceeds of sale equally between us on a without prejudice basis". He went on to say that "if [the Applicant] agreed to list the jointly held cottage for sale (or any of the other properties held by her as suggested by my counsel), S.M. would prima facie receive 50 percent of the net proceeds of sale on a without prejudice basis to either of our rights in this proceeding". As noted above, the Applicant submits that the Respondent has resiled from his earlier position by submitting that only $250,000 should be released from the proceeds of sale held in trust. However, I have accepted the Respondent's position that only $250,000 should be released to the Applicant from the net proceeds of sale of the Port Carling property that are being

held in trust. The fact of the Respondent's change in position on the release of funds is neither a material consideration on this interim fees and disbursements motion nor on the motion for the release of funds.

Does the Applicant's claim have merit?

[21] A claimant must provide the court with evidence to show that their claim has merit. The threshold is not a high one. The claimant need only establish an arguable case: *Peerenboom*, para. 29. An arguable case is "… a case with some merit, and some realistic chance of success": *R. v. Amin*, 2010 MBCA 15, para. 9.

[22] The Applicant is advancing a claim for spousal support and equalization of net family property.

[23] There is no dispute that the Respondent is a member of one of the wealthiest families in Europe. He retired in 2008. The Respondent admits that he had a personal net worth of about $116 million CAD in 2008. He states that he has lived off investment income and had depleted his capital to meet expenses. In his Financial Statement sworn November 7, 2023 the Respondent states that his annual income is $1,126,992, the net value of property that he owned on the date of marriage was about $39.6 million and that the net value of property that he owned on the date of separation had decreased to about $36.5 million.

[24] Prior to meeting the Respondent, the Applicant was a partner in a home design and construction business. She declared personal bankruptcy in January 2009 and was discharged from bankruptcy in 2010. The parties met in July 2009, began cohabiting in August 2009 according to the Applicant (and sometime in 2010 according to the Respondent) and were married in February 2013 in the Bahamas. The parties separated on February 8, 2019.

[25] Each party has children from previous relationships. The Applicant states that she acted as a caregiver to two of the Respondent's children. In September 2015, P.B. moved to Canada to live with the parties. The Applicant states that one child, N.B., suffers from ADHD and other developmental disorders, and that N.B. lived with the parties from about 2016 to September 2019 (after their separation). The Applicant states that the Respondent spent most of 2018 in Germany and that she was N.B.'s primary caregiver from May 2018 to September 2019. The Applicant states that she was not able to work due to the demands that the Respondent placed on her to care for his children and spend time with him whenever he wished.

[26] The Applicant states that money was never a concern and that the parties lived an incredibly lavish lifestyle including frequent (almost monthly) international travel, luxury cars, homes that they rented or owned all around the world. In addition, the parties had drivers, personal assistants, a housekeeper, chefs, and care workers for the children. Between December 2016 and January 2019, the Applicant's monthly spending on credit cards was about $79,500.00 per month.

[27] The Applicant states that the Respondent has continued to live a lavish lifestyle. She states that his bank statements show that the Respondent spent about $109,600.00 CAD on his credit

cards on hotels, flights, restaurants, jewelry, and clothing over a four-month period from May 2021 to September 2021. He also purchased a Ferrari in April 2021 for about $329,000 CAD and a second Ferrari in July 2022 for about $860,000 CAD.

[28] The Applicant solely owns three properties:

- A house in Toronto ("the Castle Frank property") purchased in March 2018. It has a current value of about $11.5 million. There are three mortgages. The first mortgage held by DUCA Credit Union of about $4.1 million. The second mortgage held by a private lender of about $2.2 million that was placed on the property after the date of separation. The third mortgage held by a private lender in the amount of $500,000 that was placed on the property after the date of separation.

- A farm in Mono, Ontario ("the Mono farm") purchased in April 2017. It has a current value of about $1.9 million. There are two mortgages. The first mortgage is held by the CIBC of about $685,000. The second mortgage is held by a numbered corporation in the amount of $400,000 that was placed on the property after the date of separation.

- A condominium in Grand Isle Exuma, Bahamas that was purchased in May 2013. It has a current value of about $700,000. It appears to be debt free however since the date of separation there have been two cash calls of about $193,400 to top up the condominium corporation's reserve fund.

[29] In addition, the parties jointly owned a cottage in Port Carling, Ontario. The cottage was owned by the Respondent prior to their marriage. The Respondent transferred the cottage into a joint tenancy with the Applicant prior to their marriage.

[30] The Respondent asserts a 100% resulting trust interest in all of the above properties.

[31] The Port Carling property was sold in May 2023 for $5,950,000 and that sale closed on August 18, 2023. The net proceeds of sale are being held in trust. The purchasers have commenced an action against the parties claiming damages of $200,000 for breach of contract as there were certain alleged deficiencies in respect of the property and chattels.

[32] The Applicant states that she has been subject to "extreme financial stress" since their separation. The Applicant states that she has been unable to meet her monthly financial expenses of $128,779 outlined in her Financial Statement sworn October 13, 2023. The Applicant states that she has been forced to reduce her expenses and, as a result, this statement does not reflect her lifestyle during the marriage. Her current expenses include a payment of $22,681 on the first mortgage on the Castle Frank property (which is not being paid), a payment of $18,700 on the second mortgage on the Castle Frank property, a payment of $4,166 on the third mortgage on the Castle Frank property, property taxes of $3,680 per month on the Castle Frank property (currently not being paid), a payment of $3,921 on the first mortgage on the Mono Farm, a payment of $4,000 on the second mortgage on the Mono Farm, rent of $2,661 per month on an apartment in Yorkville,

condo fees and property tax of $7,264 per month on her condo in the Bahamas, dog walking expense of $4,235.35 per month, $1,347 per month for pet food and supplies, payments of $2,725 per month on a Bentley automobile, personal trainer expenses of $3,000 per month; housekeeper expenses of $5,500 per month; personal assistant expenses of $3,000 per month; groceries of $1,462 per month.

[33] In her Financial Statement, the Applicant states that the net value of her property on the date of marriage was about $2.6 million and the net value of her property on the date of separation was about $7.4 million. She states that the amount of her net family property is about $4.7 million.

[34] The Respondent submits that the Applicant's economic circumstances have vastly improved over the course of the parties' six-year marriage. However, whether the Applicant owes the Respondent an equalization payment turns not only on the issue of whether the Respondent's resulting trust claim is successful but also whether his date of marriage net worth is much higher based on allegedly unsupported contingent litigation receivables from his first spouse, unsupported significant tax liabilities and undisclosed assets. The suggestion that the Respondent has not made full and timely financial disclosure is supported by findings that the Respondent had acted in bad faith in failing to make financial disclosure and later that he had failed to comply with a court order to provide financial disclosure: See the Endorsement of Justice Pinto, dated March 1, 2022 and the Endorsement of Justice Kraft dated March 20, 2023.

[35] I find that the Applicant's claim for spousal support and equalization of net family property satisfies the arguable case standard.

Are the fees and disbursements necessary and reasonable given the needs of the case and the funds available?

[36] As noted, the purpose of an order for the payment of interim fees and disbursements is to level the playing field such that all parties can equally advance their case.

[37] Counsel for the Applicant estimate that it will cost $1,644,637.26 in legal fees and disbursements, inclusive of HST, to prepare for and attend trial on April 22, 2024. Their trial budget is based on the use of three lawyers (Mr. Niman at $1,250 per hour, Ms. Normandin at $595 per hour, Matthew Pike at $325 per hour) based on eight-hour days and includes attendances before trial (questioning, settlement conference and trial management conference) as well as preparation for trial based on two days of preparation for each day of trial except for Mr. Niman which is on a one-to-one basis). It also includes disbursements of $42,391.20 for photocopying and research based on 3% of total legal fees. Not included in the estimated costs of Mr. Jim Muccilli estimated at between $100,000 to $135,000 for forensic accounting services in relation to, amongst other things calculating the Respondent's income for support purposes for the years 2016-2021, investigating the Respondent's alleged unreported assets as well as preparing for and attending the trial

[2] Ms. Normandin notes that the Applicant owes about $819,000 in fees to various service providers including at least $600,000 to her former counsel (LHC Family Law, KFG Law, Martin Kenney & Co, Ambrosino Law Group, MacDonald & Partners, Pike Family Law, Denis Litigation).

[38] Mr. Niman states that this trial is scheduled for 31 days and that the Applicant will not have counsel at trial unless they are paid.

[39] Amongst other things, the Respondent submits that:

(a) The Applicant's trial budget is inflated and unrealistic.

(b) The Applicant's trial budget includes several litigations such as Questioning, a Settlement Conference and a Trial Scheduling Conference which have already been held and which are not to be repeated as contemplated by Justice Shore's Trial Scheduling Endorsement Form dated June 15, 2023.

(c) The number of witnesses to be called by the Applicant at trial will be reduced because she has failed to confirm her witness list by September 30, 2023.

(d) While the Applicant is entitled to engage counsel of her choice and thus retain Mr. Niman at $1,250 per hour, this does not mean that the Respondent should be required to pay for a "Cadillac".

(e) In her affidavit sworn October 10, 2023, at para. 70, the Applicant states:

> The trial is scheduled for 31 days commencing April 22, 2024. To bring this matter to trial, I have been asked to provide trial retainers in excess of $950,000. I have not been able to provide any counsel with trial retainers.

I note that, at that time, the Applicant was represented by Ms. Lenkinski and Mr. Pike.

[40] Mr. Niman submitted that the Respondent's suggestion that the amount of interim fees and disbursements claimed by the Applicant is excessive was not genuine given that the Respondent had not disclosed his trial budget. The Respondent submitted that he is under no obligation to disclose his trial budget. While that submission is correct, his initial failure to provide such information eliminates an opportunity to provide this court with information that would help the court in assessing the reasonableness and necessity of the costs claimed. At the hearing of this motion, Mr. Halpern advised the court on a without prejudice basis that the sum of $500,000 would be a reasonable estimate of the amount of legal fees and disbursements to be incurred at trial for either party. I do not place a great deal of weight on this submission as it is not supported by a written budget for trial.

[41] In any particular case, the objective of providing a party with a level playing field becomes does the Applicant have enough money to reasonably prosecute this case considering the circumstances such as the complexity of the issues and evidence and the scheduled length of trial?

[42] In my view, the trial budget submitted by the Applicant is inflated and excessive. Questioning, settlement conferences and a trial scheduling conference have been held. Such claims are not properly included as a claim for interim fees and disbursements is forward looking. While the Applicant is at liberty to hire whoever she wishes to represent her regardless of their hourly rate, the Respondent should not pay more than what is reasonable. On the other hand, given the animosity between the parties, the complexity of the case and the Respondent's own estimate for the length of the presentation of his case, I do not accept that the trial will be shorter than the scheduled 31 days.

[43] In light of the principles and factors described above, I reduce the Applicant's trial budget to $975,000.00.

Is the Applicant unable to fund the requested amount of interim fees and disbursements?

[44] The Applicant's latest financial statement shows that her monthly expenses are $128,779. This amount includes mortgage and other carrying costs in respect of the properties that she owns. The Applicant states that her bank statements show that most of the funds that she has borrowed against her properties and other funds that have been have to her since the parties separated have been used to pay the carrying costs of the properties. The Applicant states that the carrying costs of the properties exceed the $65,000 per month that she receives in interim spousal support.

[45] The Applicant states that her share of the net proceeds of sale from the Port Carling property would be sufficient to meet her financial needs pending trial if the Respondent would consent to the release of her share of the net proceeds (which equals $1,646,221.32).

[46] The Applicant further states that selling her other properties is not a practical solution to accessing funds as the Respondent advances a resulting trust claim against all of her assets and has threatened to bring an urgent motion to hold any proceeds of sale in the event that she sold or refinanced any of those properties.

[47] A great deal of money has passed through the Applicant's hands since 2022 whether as a result of court orders, funds directly provided by the Respondent and financing obtained by the Applicant. In the main, I accept the Applicant's evidence that these funds were spent on carrying the costs of the several properties that she owns and were used, to some great extent, to continue the lifestyle that she had during the marriage.

[48] In these circumstances I find that the Applicant is unable to contribute to her interim fees and disbursements other than for the $250,000 that she will receive from the net proceeds of sale being held for the Port Carling property. To ensure that these funds are not applied for other purposes, the funds that I have ordered to be paid to the Applicant shall be paid to the Applicant's counsel in trust.

Does the Respondent have the Resources to Pay the Requested Interim Fees and Disbursements?

[49] The Respondent asked the any interim disbursement be paid from as a distribution from the net proceeds of sale of the cottage being held in trust. The Applicant's share of $250,000 that I have ordered to be paid from the trust funds is insufficient to cover the amount of interim fees and disbursements that I have ordered. There is no dispute that the Respondent can pay for his lawyer to attend this 31-day trial. Aside from that fact, I have no concern that the Respondent will be unable to pay the balance of the interim fees and disbursements that I have ordered.

ORDER

[50] Order to go as follows:

(1) Subject to paragraphs 2, 3 and 4, the sum of $250,000 shall be paid to each party from the net proceeds of sale being held by the parties' real estate solicitor in respect of the sale of the Port Carling property.

(2) The sum of $250,000 paid to the Applicant pursuant to paragraph 1 above shall be paid by the real estate solicitor to the Applicant's counsel, Normandin Chris LLP in trust.

(3) The Respondent shall pay the sum of $725,000 to the Applicant for interim fees and disbursements as follows:

a. The sum of $250,000 that is to be paid to the Respondent from the net proceeds of sale of the Port Carling property pursuant to paragraph 1 above shall be paid by the real estate solicitor directly to the Applicant's counsel, Normandin Chris LLP, in trust.

b. The sum of $525,000 shall be paid by the Respondent to the Applicant's counsel, Normandin Chris LLP, in trust within 14 days.

(4) The funds paid to the Applicant's counsel, Normandin Chris LLP, in trust pursuant to paragraphs 2 and 3 shall be solely used for purpose of paying the Applicant's future litigation expenses in respect of this case unless the parties otherwise agree or this court otherwise orders.

(5) On consent of the parties, references to the names of the parties in this case, including in the title of the proceedings, shall no longer be anonymized.

(6) The parties shall submit their costs submission within two weeks and shall submit their responding costs submissions within three weeks. Costs submissions to be no greater than three pages exclusive of a bill of costs and any offers to settle that were made.

Mr. Justice M. D. Faieta

Released: March 7, 2024