

SUPERIOR COURT OF JUSTICE – ONTARIO – FAMILY COURT

RE: Avigdor Nachmias, Applicant

AND:

Dorit Nachmias, Respondent

BEFORE: The Honourable Mr. Justice G.A. MacPherson

COUNSEL: A. Feldstein, Counsel for the Applicant

D. Anthony, Counsel for the Respondent

HEARD: December 16, 2020

RULING ON MOTION

Relief Requested

- [1] The Applicant brings a motion requesting the following relief:
- (a) an Order severing the divorce from the corollary issues; and
 - (b) an order for the sale of the matrimonial home and the details of same.
- [2] The Respondent brings a cross-motion seeking the following relief:
- (a) an increase in child support;
 - (b) an increase in spousal support; and
 - (c) a determination of the apportionment of section 7 expenses.

Brief Background Facts

- [3] The parties were married August 29, 1983 and separated November 8, 2015.
- [4] There are five children of the relationship although only two continue to be dependant children of the marriage, Kedar and Arbel.
- [5] Kedar resides with the Respondent.

- [6] Arbel resides with the Applicant.
- [7] The Applicant is self-employed at ATH Stainless Steel Mfg. Ltd.
- [8] The Respondent did not work during the parties' 32-year marriage apart from participating in the Applicant's business affairs.
- [9] From October 2018 to October 2019, the Applicant paid child support of \$2,271 and spousal support of \$4,887 based on the Applicant's imputed income of \$285,000 and the Respondent's imputed income of \$31,360.
- [10] Commencing October 2019 the Applicant paid child support of \$4,539 and spousal support of \$8,843 based on the Applicant's imputed income of \$600,000 for child support and imputed income of \$480,000 for spousal support.

Sale of the Matrimonial Home

- [11] The parties own the matrimonial home, known municipally as 197 Garden Avenue, Richmond Hill, as joint tenants.
- [12] The Respondent continues to reside in the home.
- [13] The parties have been separated for five years.
- [14] The home has been listed for sale in the past without the receipt of any offers.
- [15] Sections 2 and 3 of the *Partition Act*¹, provides as follows:

Who may be compelled to make partition or sale

2 All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only. R.S.O. 1990, c. P.4, s. 2.

Who may bring action or make application for partition

3 (1) Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested. R.S.O. 1990, c. P.4, s. 3 (1).

¹ R.S.O. 1990, c P.4

When proceedings may be commenced

(2) Where the land is held in joint tenancy or tenancy in common or coparcenary by reason of a devise or an intestacy, no proceeding shall be taken until one year after the decease of the testator or person dying intestate in whom the land was vested. R.S.O. 1990, c. P.4, s. 3 (2).

- [16] In *Goldman v. Kudelya*, 2011 ONSC 2718, 5 R.F.L. (7th) 149, McGee J. provides a summary of the law with respect to a judicial Order for the sale of a property prior to trial. She states at paras. 17, 18 and 19:

A property owner, whether the holder of an exclusive interest or a joint interest has a *prima facie* right to sale. When the property consists of an interest in a matrimonial home, that *prima facie* right is subject to any competing interests under the *Family Law Act* that would otherwise be defeated.

To make a pre-trial order for the sale of a matrimonial home the court must first determine whether the resisting party has established a *prima facie* case that he or she is entitled to a competing interest under the *Family Law Act*. If not, then the right to sale prevails. If so, then the motion for sale is denied unless the selling party can demonstrate that the sale would not prejudice the rights of the resisting party.

There have been a number of cases in which the Court has denied an interim motion for sale prior to trial such as *Arlow v. Arlow* (1990), 33 R.F.L. (3rd) 44 (OCA,) *Walters v. Walters*, [1992] O.J. No. 1564, 1992 CarswellOnt 811 and more recently, *Kereluk v. Kereluk*, 2004 CanLII 34595, Ontario S.C.J. In each case there were compelling circumstances in which one or both tests favoured the resisting party, such as the availability of trial within a short period, prejudice on the equalization payment, or the need to preserve the residence for a vulnerable spouse or child who might well retain the home in the cause.

- [17] I am not persuaded, on the evidence before me, that there are compelling reasons to preclude the sale.
- [18] Trial dates may very well be far off.
- [19] There is no prejudice with respect to equalization.
- [20] Accordingly, the property shall be listed for sale.
- [21] The matrimonial home was listed for sale at the following prices: \$2,249,000 (2018), \$2,099,000 (2018), and \$1,899,000 (2019). There were no offers received.

- [22] The parties are about to enter the winter/spring market.
- [23] The home is likely overpriced as no offers were received in 2018 and 2019.
- [24] I have determined that an appropriate list price shall be \$1,850,000.
- [25] Should the parties agree to an alternate price, after speaking with their real estate agent, they may do so in writing.
- [26] The agent selected by the parties (in 2018 and 2019) was Mr. Hadida. Apart from the fact that the home has not sold, I see no reason to change the agent. As with many properties that linger on the market, it is generally the sale price or some issue other than real estate representation that hampers the sale. Based on the evidence presented by the parties, Mr. Hadida's representation was not a significant issue.
- [27] I am mindful that the Respondent continues to reside in the home with Arbel and time will be required, between the sale and closing so that alternate accommodations may be obtained. 90 days should be sufficient timing to permit the Respondent to re-locate. However, the parties may agree to an alternate lag time, in writing.

Severing the Divorce

- [28] As stated, the parties have lived separate and apart for five years.
- [29] The parties have finalized the parenting issues as well as equalization.
- [30] The outstanding issue relates to a determination of the Applicant's income for the purpose of determining child and spousal support.
- [31] The Respondent argues that reasonable arrangements for the care of the children have not been made and, therefore, the divorce should not be severed from the corollary issues. I disagree. There is a distinction between severing the divorce claim from the balance of the claims and obtaining the divorce where section 11 of the *Divorce Act* may be an obstacle.
- [32] It is noteworthy that from November 2015 – December 2016 the Applicant made uncharacterized payments to the Respondent in the amount of \$127,747.
- [33] From January 2017 through November 2018 the Applicant made monthly child support payments of \$2,271 and monthly spousal support payments to the Respondent of \$3,555.
- [34] From December 2018 through September 2019 the Applicant made monthly child support payments of \$2,271 and monthly spousal support payments of \$4,887.

[35] From October 2019 to present the Applicant made monthly child support payments of \$4,272 and monthly spousal support payments of \$8,843.

[36] For all of these reasons, the divorce shall be severed from the corollary issues.

Child Support Spousal Support/Section 7

[37] An income determination is necessary to be made for both the Applicant and the Respondent to determine an appropriate child support Order (with a set-off), spousal support Order and determination of the apportionment of section 7 expenses.

[38] The parties were married for 32 years.

[39] During the marriage, the Applicant was the breadwinner. He operated a successful company, ATH Stainless Steel Mfg. Ltd.

Respondent's Income

[40] The Respondent did not work outside of the home save and except to assist in the business operations.

[41] The Respondent does not have any post-secondary degrees or diplomas.

[42] The Respondent is 55 years old.

[43] As stated, the parties have been separated for five years. I was not provided with any attempts by the Respondent to obtain employment and contribute to her maintenance.

[44] It is appropriate that there be a modest imputation of income to her. In her SSAG reports the Respondent proposes an imputed income of \$31,360. This is slightly above minimum wage and I think, for the purpose of determining an appropriate quantum of temporary child and spousal support, this is a reasonable amount to impute.

Applicant's Income

[45] As stated, the Applicant runs his own successful corporation, ATH Stainless Steel Mfg. Ltd.

[46] In an effort to determine the Applicant's income for the purpose of child support and spousal support, there were four expert reports completed on the issue of the Applicant's income.

[47] The Weinstein Report was commissioned by the Respondent and indicates the Applicant's income as follows:

2015- \$389,000

2016 - \$580,000

2017 - \$672,000

2018 - \$827,000

2019 - \$1,007,000

[48] The Mozessohn Report was commissioned by the Applicant and indicates the Applicant's income as follows:

2015 - \$387,000

2016 - \$254,000

[49] The significant disparity between these two reports, in terms of 2015 and 2016 income, is the different treatment of cash income.

[50] In 2019 the Applicant indicated he was obtaining a new valuation report and would no longer be relying on the Mozessohn Report.

[51] The Mandel Report was commissioned by the Applicant and indicates the Applicant's income as follows:

2016 - \$460,000

2017 - \$576,000

2018 - \$770,000

2019 - \$921,000

[52] The Applicant also commissioned Mr. Russell (Kalex Report) to provide a valuation of income for 2020.

[53] The Kalex Report indicates income as follows:

2020 - \$537,000

[54] Of course, 2020 is not yet complete. The Kalex Report was just disclosed on the Respondent and she has not had opportunity to have her expert review or critique the amount.

[55] It is noteworthy that the Applicant, based on his expert report (the Mandela Report), has significantly underpaid child support. The Respondent states that the Applicant has underpaid support from 2015 – 2019 in the amount of \$610,233.

- [56] It is also noteworthy that the Notice of Motion did not request a variation of child and/or spousal support retroactively.
- [57] The Respondent requests an Order that ongoing child and spousal support be increased and based on an imputed income using a three-year average based on the numbers offered in the Applicant's Mandel Report or \$742,667.
- [58] The Applicant states that the income for 2020 is going to be dramatically reduced as a result of less economic activity. He argues that ongoing child and spousal support should be based on the new 2020 figure produced from the Kalex Report, or \$537,000.

Law

- [59] Section 15.2 of the *Divorce Act*, R.S.C. 1985 c. 3 (2nd Supp), states:

Spousal support order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time. 1997, c. 1, s. 2.

[60] The starting point for determining the amount of child support under the *Federal Child Support Guidelines*, SOR/97-175 (“Guidelines”) is section 3, which established the following presumptive rule respecting the amount of child support:

- 3.** (1) Unless otherwise provided under these guidelines, the amount of an order for the support of a child for children under the age of majority is,
 - (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the parent or spouse against whom the order is sought; and
 - (b) the amount, if any, determined under section 7. O. Reg. 391/97, s. 3 (1).

[61] Section 19(1) of the Guidelines states:

Imputing income

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required

by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[62] The general principles guiding the exercise of the court's discretion when dealing with support pending trial were summarized by Penny J. in *Knowles v. Lindstrom*²,

It is well-established that interim support motions are not intended to involve a detailed examination of the merits of the case. Nor is the court required to determine the extent to which either party suffered economic advantage or disadvantage as a result of the relationship or its breakdown. These tasks are for the trial judge. Orders for interim support are based on a triable or *prima facie* case. An order for interim support is in the nature of a "holding order" for the purpose of *maintaining the accustomed lifestyle pending trial*, *Jarzebinski v. Jarzebinski*, 2004 CarswellOnt 4600 (ONSC) at para. 36; *Damaschin-Zamfirescu v. Damaschin-Zamfirescu*, 2012 ONSC 6689 (CanLII), 2012 CarswellOnt 14841 (ONSC) at para. 24.

[63] The Applicant claims both compensatory and non-compensatory spousal support.

[64] Compensatory support arises from career dislocation; an economic disadvantage as a result of the roles adopted in the marriage; or when a spouse conferred a substantial career enhancement opportunity on the other spouse. The ultimate purpose of spousal

² *Knowles v. Lindstrom*, 2015 ONSC 1408 (CanLII)

support is to relieve any economic hardship that results from the marriage or its breakdown.

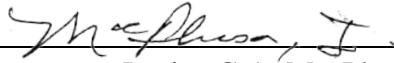
- [65] The Respondent claims that as a result of the roles assumed during marriage she suffered economically.
- [66] Non-compensatory support arises whenever a lower income spouse experiences a significant drop in standard of living after the marriage breakdown resulting from the loss of access to the higher paying spouse's income.
- [67] The Respondent claims that as a result of the breakdown of the marriage she suffered economically.
- [68] It bears repeating that the parties were married for 32 years.
- [69] During the marriage the Respondent remained primarily in the home looking after the household and the children while the Respondent was the income earner.
- [70] The Applicant, as income earner, ran a very successful company.
- [71] The Respondent has established, to my satisfaction, a *prima facie* case for entitlement to spousal support based on the length of the marriage, the roles adopted during the marriage, the Respondent's lack of marketable skills and the Applicant's successful business.
- [72] In determining the Respondent's income for the purpose of a temporary Order, I have considered the valuation reports.
- [73] I have also considered the parties' sworn Financial Statements. In assessing the Respondent's need, regard must be made to not just necessities but to the lifestyle enjoyed during the relationship. There is no question in my mind that the Applicant has the ability to pay support.
- [74] In obtaining 'rough justice', for a temporary award, I am mindful that the Applicant has, based on his expert report, underpaid child and spousal support in 2015, 2016, 2017, 2018 and 2019.
- [75] I am also mindful that there are fluctuations in income.
- [76] The Applicant requests an Order that ongoing support be based on the 2020 projected income from the Kalex Report. I disagree. The valuation provided by Kalex is an outlier compared to the company's average earnings. I am not persuaded the company has done as poorly in 2020 as the Applicant suggests. Although 2020 was an anomaly, many companies did extremely well while others suffered.

- [77] The Applicant should be in the best position to accurately estimate his annual income. Based on the evidence before me the Applicant entered into past support Orders (albeit temporary ones) based on income levels that have been significantly lower than the actual income. The Respondent makes a compelling and persuasive argument that the Applicant has underpaid his support in 2015, 2016, 2017, 2018, and 2019 to the tune of \$610,233.
- [78] While I have not made a determination as to the underpayment, it is clear on the evidence before me that it is significant. The trial judge will, ultimately, be in the position to complete an accounting, upwards or downwards, as a result of this and the other temporary Orders.
- [79] I have determined that the Respondent's submission that an average of the past three years (2017, 2018 and 2019) is the best indicator of an appropriate income from which to determine support. Naturally, as with any temporary support order, adjustments will be made, up or down, following a determination of income at trial.
- [80] It is puzzling why there has not been a retroactive adjustment to the support payments owed. It is the only outstanding issue.
- [81] The parties have the benefit of counsel. The parties have the benefit of expert reports. The Mandela and Weinstein reports are very close in determining income in 2017, 2018 and 2019. Despite this, the support has not been adjusted.

Order

1. The matrimonial home, known municipally as 197 Garden Avenue, Richmond Hill, Ontario shall be listed for sale forthwith.
2. The list price shall be \$1,850,000 and any offer within 5% shall be accepted. The parties may agree on an alternate list price with the assistance of the real estate agent provided it is on consent and in writing.
3. The listing agent shall be Mr. Hadida. The parties may agree on an alternate agent provided it is on consent and in writing.
4. There shall be a lockbox at the home and showings may take place on three hours notice.
5. The parties shall not accept any offer with a closing date less than 90 days from acceptance, unless the parties agree to do otherwise in writing.
6. The Respondent shall cooperate in facilitating access to the property and keep the home in a showable state.

7. The net proceeds from the sale of the property, municipally known as, 197 Garden Avenue, Richmond Hill, Ontario shall remain in the vendor real estate lawyer's trust account pending further Order of this court or written agreement of the parties.
8. If there are issues with any of the detail of the sale, the parties may schedule a brief appearance before me for directions.
9. The divorce is severed from the corollary relief.
10. Commencing January 1, 2021 and on the first of every month thereafter, the Applicant shall pay to the Respondent temporary child support in the amount of \$5,300.
11. Commencing January 1, 2021 and on the first of every month thereafter, the Applicant shall pay to the Respondent temporary spousal support in the amount of \$14,000.
12. The parties should be able to determine the appropriate apportionment of section 7 expenses and, if they are unable to do so, the parties may schedule a brief appearance before me for directions.
13. SDO to issue.
14. If the parties cannot agree on the issue of costs, I shall consider the request for costs. The Respondent shall serve on the Applicant, and file electronically, her written submissions, limited to three pages, exclusive of the Bill of Costs and Offers to Settle within 20 days of the date of this decision. The Applicant shall serve on the Respondent, and file electronically, his written submissions, limited to three pages, exclusive of the Bill of Costs and Offers to Settle within 15 days thereafter. There shall be no right of Reply. If no submissions are received within the time period set out herein, an Order will be made that there will be no costs.


Justice G.A. MacPherson

Released Date: December 18, 2020