

CANADA / JUDGMENT

Christie v. York

2018 BCSC 2035

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 2035 Christie v. York

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Christie v. York,

2018 BCSC 2035

Date: 20181120

Docket: E109136

Registry: Kelowna

Between:

Kalli Breanne Christie

Claimant

And

Flint York aka Flint Montgomery York

Respondent

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

Counsel for the Claimant:

B. Anslow

Counsel for the Respondent:

A. Bayer

Place and Date of Hearing:

Kelowna, B.C.

September 17; November 7, 2018

Place and Date of Judgment:

Kelowna, B.C.

November 20, 2018

[1] At issue on this application is whether joint experts should be appointed with regard to certain financial matters in this family law dispute. Specifically, the respondent seeks the following order:

- c. An order that Don Murdoch and Bob Amsler be appointed as joint experts or as experts for the Court for purposes of establishing and tracing the pre-acquired property of the Respondent; the valuation of the Respondent's stock options and other benefits accrued through employment and the determination of taxes owing or refunds due to the Respondent for the 2010-2015 tax years (pursuant to Rule 13-4(3), (4), 13-5(1),(6), (7), (8), (10);

[2] Mr. York's application is brought pursuant to Supreme Court Family Rule 13-4(3), which provides as follows:

13-4 (3) If the parties do not agree that a joint expert is required or do not agree on any matter relating to the appointment of a joint expert, any party may apply to the court in accordance with Rule 10-5 for an order

- (a) appointing a joint expert, and
- (b) settling any matter relating to the appointment of the joint expert.

Background

[3] The parties began living together in a marriage-like relationship in June 2007 and separated on or about July 28, 2015. They never married. The claimant is currently 35 years of age and the respondent 48. There are two children of the relationship who are approximately 10 and 6 years of age.

[4] The respondent works in the oil business and claims that he brought in excess of \$1,000,000 in assets into the relationship. He claims exclusions based on those pre-owned assets, much or all of which was in an RBC Direct Investment account at the time of commencement of cohabitation. During the relationship assets were acquired and assets were sold. Assets were primarily if not exclusively held in the sole name of Mr. York and included some real properties.

- [5] The claimant was primarily responsible for looking after the children during the relationship and did not work outside of the home.
- [6] The respondent seeks an order appointing Mr. Murdoch and Mr. Amsler as joint experts, both of whom are accountants with designations and work with MNP LLP based in Kelowna, BC. If appointed as joint experts, the division of labour between the two accountants is that Mr. Murdoch would be appointed to prepare a report regarding the tracing of Mr. York's exclusions and Mr. Amsler would provide a valuation of Mr. York's stock options and benefits acquired through his employment and would provide opinions as to Mr. York's tax circumstances.
- [7] MNP was initially retained by Mr. York as he was in significant default of his obligation to report income and file income tax returns. With the assistance of MNP, Mr. York has entered into a voluntary disclosure arrangement with Canada Revenue Agency. His 2017 income tax return is still in process but prior returns have been completed.
- [8] The parties do not agree as to the extent of the claimant's involvement and level of engagement with Mr. Murdoch and Mr. Amsler. It is clear, however, that the parties and their respective lawyers met with Mr. Murdoch in May 2017, for the purpose of reviewing some calculations he had prepared regarding the tracing of Mr. York's exclusions.
- [9] Mr. Murdoch subsequently prepared a written report dated October 30, 2017, which report is addressed solely to counsel for Mr. York. The report was sent to counsel for Ms. Christie on November 2, 2017, by Mr. York's lawyer. On the following day, counsel for Ms. Christie, Mr. Anslow, wrote to Mr. York's counsel as follows:

Further to your correspondence of November 2, 2017, we have not agreed that Mr. Murdoch is a proper expert or that his report could be presented to the Court. By way of separate correspondence, we will be formally objecting to Mr. Murdoch's report.

- [10] The formal objection as contemplated was sent by Mr. Anslow on November 15, 2017, and states the following:

We hereby give you notice that we will be objecting to the admissibility of the report of Don H. Murdoch dated October 30, 2017 in accordance with Rule 13-6(10) of the Supreme Court Family Rules on the following basis:

1. The expert was not retained as a joint expert;
2. The opinions expressed in the report are beyond the scope of expertise of the witness;
3. The report provides no assistance to the trier of fact, as the nature of the facts at issue are not sufficiently technical to require the expert opinion;
4. The report furnishes no esoteric or scientific information outside the ordinary experience and knowledge of the trier of fact;

5. The trier of fact is able to formulate his or her own conclusions based on the evidence;
6. The report consists of testimony as to the conclusions falling within the purview of the trier of fact, and accordingly, will offend the ultimate issue rule;
7. The report is based on presumptions, hearsay or the opinion of the Respondent, which presumptions, hearsay and/or opinions are not within the expert's direct knowledge or control;
8. The report is argumentative and is an advocacy brief for the Respondent rather than the opinion of a dispassionate expert; and
9. The report was not served within the time required by Supreme Court Family Rule 13-6(8).

In accordance with Rule 13-6(8)(a), we request that you promptly provide us with:

- (a) any written statement or statements of facts on which the expert's opinion is based;
- (b) a record of any independent observations made by the expert in relation to the report;
- (c) any data compiled by the expert in relation to the report; and
- (d) the results of any tests conducted by or for the expert, or of any inspection conducted by the expert, if the expert has relied on that test or inspection in forming his or her opinion.

Should the report be found to be admissible, we will require Don H. Murdoch to be made available for cross-examination at the trial of this matter in accordance with Rule 13-9.

Positions of the parties

- [11] Mr. York argues that as a matter of policy, joint experts should be appointed wherever possible as such appointments serve to reduce the cost of litigation and hopefully render matrimonial disputes more suitable for resolution short of trial. He refers to paragraph 35 of this Court's decision in *Aquilini v Aquilini*, 2012 BCSC 1616:
35. Therefore, before the court makes an order relieving the parties of the requirement to present evidence through a joint expert, it should be satisfied that there are circumstances in the individual case that make use of a joint expert inappropriate or impracticable. I make no effort to list what those circumstances might be--that will emerge as the jurisprudence develops.
- [12] The essence of Mr. York's submissions is that Ms. Christie was well aware of the roles of Mr. Murdoch and Mr. Amsler, that she participated in discussions with them, had the opportunity to provide further information or questions, and only objects to the reports as joint reports because she does not like the conclusions reached.

- [13] Mr. York says that the tracing of his exclusions and valuation of his stock options are complex. He says that significant funds have already been expended at MNP and that it would be contrary to the principles of proportionality to require all of MNP's work to be redone by others at great additional expense that the parties cannot afford.
- [14] Ms. Christie says that she never agreed to retain Mr. Murdoch or Mr. Amsler as joint experts. She was aware that MNP was working with Mr. York regarding his taxes, but she says that she believed that Mr. Murdoch was assisting the parties with settlement discussions only. She was not aware of any intention nor was she a party to any agreement that he would subsequently be appointed as a joint expert. She says that instructions and the assumptions for the report were provided by Mr. York and his counsel alone.
- [15] Ms. Christie also says that tracing of exclusions and valuation of stock options are not matters that necessitate expert evidence and she questions the reliability of Mr. Murdoch's opinion in the fact of what she says are errors made.

Preliminary matter

- [16] In its decision in *Bartch v. Bartch*, 2017 BCCA 94, the Court of Appeal indicated a practical concern with regard to the Supreme Court Family Rules when faced with an application to appoint joint expert. The Court held the following at paragraph 44:
- [44] I acknowledge that the wording of Family Rule 13-4(3)(a), which requires a party to apply for a joint expert once the other has applied to be relieved from the "joint expert rule", creates an potential trap for counsel and may limit the relief available if only one party applies. This may be something that the Rules Committee should review. As a matter of practice, when faced with conflicting views as to whether a joint expert should be appointed, the court should insist on applications from both sides before deciding the matter.
- [17] This application brought by Mr. York seeks the appointment of joint experts. Although the application was opposed by Ms. Christie, she did not bring a cross-application for relief from the joint expert provisions.
- [18] While a cross-application would be appropriate in circumstances where one party sought a joint expert and the other preferred that the parties be at liberty to obtain their own experts, it is difficult from a practical perspective to force a party to bring such an application, nor would such an application be appropriate in circumstances as here when the party opposed to the appointment of the joint expert is of the view that an expert is not required.
- [19] At the commencement of his submissions, I asked Ms. Christie's counsel whether she took the position that:
- a) a joint expert should be appointed, but that the court ought to appoint someone other than Mr. Murdoch and Mr. Amsler;
 - b) each party should be at liberty to obtain their own expert; or

c) no expert was required.

[20] Mr. Anslow advised on behalf of Ms. Christie that her position was that the issues sought to be referred to the experts were not of a character that the trial judge would require expertise, but that she was not opposed to Mr. York retaining his own experts if he wished. Ms. Christie also confirmed that if Mr. York wished to have his own expert for trial, she had no objection to him using Mr. Murdoch and Mr. Amsler.

[21] I inquired of Ms. Bayer on behalf of Mr. York as to whether she sought to amend her notice of application to provide for alternative relief that would relieve Mr. York of the obligation to present expert opinion evidence on a financial matter by way of jointly appointed expert in the event that Mr. York was unsuccessful in having Mr. Murdoch and Mr. Amsler appointed as joint experts.

[22] In *Bartch*, the Court of Appeal held at paragraph 43 that the appointment of a joint expert had to fail on procedural grounds as neither party had applied for that relief. Here neither party had applied for relief from the joint expert presumption, and as such, even though Ms. Christie did not oppose Mr. York's using Mr. Murdoch and Mr. Amsler as his expert if he wished, such a possibility was not formally before me.

[23] Mr. York advised that he wished to seek that relief in the alternative, which amendment was not opposed by Ms. Christie.

[24] Based upon that amendment, in addition to either appointing or declining to appoint joint experts, I also have the option of relieving Mr. York from the joint expert requirement.

[25] For the reasons that follow, the application to appoint Mr. Murdoch and Mr. Amsler as joint experts is dismissed, but Mr. York will have leave to retain his own experts.

Analysis

Did Ms. Christie agree to retain Mr. Murdoch and Mr. Amsler as joint experts?

[26] I conclude that Ms. Christie did not expressly or impliedly agree to appoint Mr. Murdoch and Mr. Amsler as joint experts.

[27] The evidence shows that the parties and their counsel met with Mr. Murdoch to review preliminary calculations in May 2017. However, this meeting is equally consistent with Ms. Christie's version of events which was that she understood that Mr. Murdoch was to assist the parties with settlement negotiations.

[28] I have not been referred to any communications between the May 2017 meeting and the first draft of Mr. Murdoch's report dated October 30, 2017, that would lead me to infer that Ms. Christie must have known that a formal report would be forthcoming as opposed to assisting with negotiations. The response from her counsel upon receipt of Mr. Murdoch's report objecting to it was prompt and unequivocal.

[29] As for the report itself, I note that it is addressed solely to Mr. York's counsel and not to Ms. Christie's counsel and appears to confirm that instructions and assumptions were provided solely by the addressee, which is Mr. York's counsel.

[30] I note with interest some changes made to the second version of Mr. Murdoch's report dated November 27, 2017, shortly after Ms. Christie noted her objections, including the paragraph set out below. The underlined portions constitute additions made to the original draft of October 30, 2017:

Further direction has been provided by way of meetings and discussions with yourself and Brian Anslow, representing Ms. Christie. I confirm that yourself and Mr. Anslow attended to my office on May 30, 2017 and at that meeting reviewed my preliminary calculations and documents relating to those calculations with respect to the tracing, the valuation of benefits including stock options which accrued to Mr. York as a result of his employment and the work completed by Mr. Amsler of my office with respect to Mr. York's tax returns for the 2010 to 2015 years. Yourself and Mr. Anslow had the opportunity to ask questions, review documents and provide your input into the calculations and documents produced at that time. From these discussions, you and Mr. Anslow advised that our review of transactions should be focused on financial transactions within the information reviewed in amounts greater than \$500.

[31] These changes appear to be an attempt after the fact to establish that Ms. Christie and her lawyer were active participants in the information that led to the preparation of the report, or had the opportunity to participate but declined to do so, or a combination of the two. Regardless, I am not satisfied that Ms. Christie or her lawyer agreed to use Mr. Murdoch or Mr. Amsler as joint experts.

[32] In the circumstances, I conclude that the reports prepared by Mr. Murdoch and Mr. Amsler were prepared on behalf of Mr. York only and not the parties jointly.

Is an expert required?

[33] This is not a question that can or needs to be answered at this stage of the litigation.

[34] Mr. York refers to a number of authorities, both in British Columbia and elsewhere, in which different methods of tracing are discussed. Mr. York proposes that the tracing be undertaken on a pro-rata basis, but the parties agree that the law is not settled to the extent that there has been a definitive determination as to the appropriate methodology to be adopted for tracing exclusions in claims under the Family Law Act. Mr. York says that Mr. Murdoch's report will assist the trier of fact in tracing his exclusions.

[35] The proper approach for determination of Mr. York's claims for exclusions in the circumstances of this case will be for the trial judge to determine. Similarly, questions of whether reports of experts on the various matters will be admissible and the weight that should be given to those reports are also matters best left for the trial judge, keeping in mind that if reports of Mr. Murdoch and Mr. Amsler are tendered at trial, it does not necessarily follow that those reports will be identical to those in the materials before the court on this

application. I agree with the comments of Skolrood J. in *Stober v. Stober*, 2015 BCSC 2505, at paragraph 44, where he stated the following:

- [44] I want to be clear that, in permitting the question of fair market value to be put to Mr. Spence, I am in no way passing judgment on the ultimate admissibility of whatever opinion he comes up with, assuming again that he is able to produce an opinion. That will be up to the trial judge. However, in my view, it would be far more dangerous and prejudicial to the process for me to make a preliminary determination at this stage that the opinion should not even be sought, and thus potentially deprive the trial judge of important evidence, than it is to permit Mr. Spence to proceed with the necessary work and run the risk that the opinion will ultimately not be accepted.
- [36] In my view, Skolrood J.'s comments are apposite here. While it cannot be said with certainty that expert evidence will be of assistance, the trial judge will be in the best position to evaluate questions of admissibility and weight, and it would be improper to draw conclusions on an interim application.

Should Mr. Murdoch and Mr. Amsler be appointed as joint experts at this time notwithstanding their prior involvement?

- [37] Supreme Court Family Rule 13-5(6) specifically permits appointment of an expert even if that expert has already given a report to one of the parties on an issue. The issue is therefore not whether Mr. Murdoch and Mr. Amsler could be appointed as joint experts but rather whether the court should do so in all of the circumstances. I conclude that it would not be appropriate to appoint them as joint experts, but will relieve Mr. York of the obligation to use joint experts so that he can make use of the work done by Mr. Murdoch and Mr. Amsler.
- [38] Both parties referred to the court's decision in *Aquilini*. In that case, the claimant wife had retained a business valuator prior to the commencement of the litigation to provide her with advice regarding the parties' business assets. Although the expert had been retained by the claimant wife, the respondent husband had paid all or most of the expert's professional fees. The respondent husband applied for an order to appoint the claimant's business valuator as a joint expert.
- [39] After reviewing the underlying principles of the rule, which includes reducing the costs and increasing the efficiency of family litigation (at paragraph 46), the court in *Aquilini* went on to hold that if the wife's business valuator was not appointed as a joint expert, another expert would be required and would then have to duplicate much of the work at significant expense. At paragraphs 34 and 35, the court held as follows:
- [34] The rule creates a mandatory requirement for joint experts, which is then made subject to the parties agreeing or the court ordering otherwise. That structure suggests a legislative intention that joint experts become the norm on financial issues and separate experts the exception.

- [35] Therefore, before the court makes an order relieving the parties of the requirement to present evidence through a joint expert, it should be satisfied that there are circumstances in the individual case that make use of a joint expert inappropriate or impracticable. I make no effort to list what those circumstances might be--that will emerge as the jurisprudence develops. Experience may also identify certain specific issues that will not easily lend themselves to the use of joint experts.
- [40] However, in *Bartch*, the Court of Appeal made the following comment with regard to *Aquilini*:
- [28] Pursuant to Family Rule 13-3(2)(a) the court can make an order relieving a party of the requirement to present evidence through a joint expert. In *Aquilini* it was suggested that before the court makes such an order, it must be satisfied that there are circumstances in the individual case that make use of the joint expert inappropriate or impracticable. I do not believe the court's discretion is so limited. The Family Rules give the court discretion as to whether or not to appoint a joint expert or allow a party to retain its own expert. The Family Rules do not however dictate any particular result and the court should be careful not to unduly fetter its discretion with limitations that are not in the Family Rules.
- [41] It follows that the threshold for relieving parties of the obligation for joint experts is lower than was stated in *Aquilini*, and it is a matter of discretion.
- [42] There are a number of distinguishing features of the *Aquilini* case. In *Aquilini*, the respondent sought to appoint the other party's expert as the joint expert whereas in this case, Mr. York seeks to appoint his own expert. This is an important distinction, particularly in this situation because Mr. Murdoch has already provided a report based solely on the instructions received from Mr. York.
- [43] In *Aquilini*, the expert had been retained but no report had been released, and the applicant had not previously provided him with instructions. When Ms. Christie objected to Mr. Murdoch's report, Mr. York's response was to have Mr. Murdoch edit his report to try to bolster its semblance as a joint report, as opposed to inviting Ms. Christie to contribute to the instructions and underlying assumptions.
- [44] I note that there was also no issue in *Aquilini* that an expert would be required to value the various businesses, whereas the necessity of an expert is in issue here.
- [45] On the question of duplication of work at additional cost to the parties, there is no breakdown between the professional fees associated with the tracing opinion and stock option valuation on the one hand, which costs could theoretically be duplicated, from the preparation of income tax returns and the voluntary disclosure process, which would have been incurred by Mr. York in any event.

- [46] The court's concern in Aquilini regarding the additional costs that would be occasioned by duplication if a different expert were required will not apply in this case if Mr. York is relieved from the joint expert regime because Ms. Christie has agreed that Mr. Murdoch and Mr. Amsler would be at liberty to provide reports to Mr. York. To the extent that significant professional fees may have been incurred, this should be of no concern to Mr. York because he can make use of the work he has already paid for.
- [47] I conclude that it would not be appropriate to appoint Mr. Murdoch and Mr. Amsler as joint experts, but I am prepared to relieve Mr. York of the requirement that expert evidence on a financial issue be presented by way of a joint expert pursuant to Rule 13-3(2), in accordance with the alternative relief sought by way of amendment to the notice of application made at the hearing.

Disposition

- [48] The respondent's application to appoint Mr. Murdoch and Mr. Amsler as joint experts is dismissed.
- [49] The respondent has leave to retain his own experts for the purposes of establishing and tracing the pre-acquired property of the respondent, the valuation of the respondent's stock options and other benefits accrued through employment and the determination of taxes owing or refunds due to the respondent for the 2010-2015 tax years pursuant to Rule 13-3(2).
- [50] In the circumstances, the claimant is entitled to her costs of the application.

"Wilson J."

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