
CANADA / JUDGMENT

Gatien v. Avini

2015 BCCA 383

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 383 Gatien v. Avini

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gatien v. Avini,

2015 BCCA 383

Date: 20150915

Dockets: CA41310; CA41952; CA42341

Between:

Ghyslaine Marie Gatien also known

as Ghyslaine Marie Avini

Respondent

(Claimant)

And

Mehran Avini

Appellant

(Respondent)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Chiasson

The Honourable Mr. Justice Frankel

On appeal from: Orders of the Supreme Court of British Columbia, dated October 7, 2013; June 9, 2014; November 4, 2014 (G.G. v. M.A., 2013 BCSC 1834; 2014 BCSC 1023; 2014 BCSC 2074, Vancouver Docket E111901).

Counsel for the Appellant:

P. Daltrop and N. Allen

The Respondent appearing in person

Place and Date of Hearing:

Vancouver, British Columbia

May 22, 2015

Place and Date of Judgment:

Vancouver, British Columbia

September 15, 2015

Written Reasons by:

The Honourable Mr. Justice Chiasson

Concurred in by:

The Honourable Madam Justice Saunders (on CA41310 and CA41952)

The Honourable Mr. Justice Frankel (on CA41310, CA41952 and CA42341)

Dissenting Reasons by:

The Honourable Madam Justice Saunders (on CA42341) (page 21, para. 62)

Summary:

These three appeals by the husband are from orders made in a matrimonial proceeding: the judge allowed the wife to amend her response to counterclaim to seek reapportionment of family assets pursuant to s. 65 of the Family Relations Act; he reapportioned family assets; the judge awarded the wife costs throughout the proceeding. Held: appeals of the orders amending the pleadings (CA41310) and reapportioning family assets (CA41952) dismissed per Chiasson J.A.; Saunders J.A. and Frankel J.A. concurring. Appeal of the costs order (CA42341) dismissed per Chiasson J.A., Frankel J.A. concurring; Saunders J.A. dissenting.

The judge's decision to allow the wife to apply to amend her pleadings and his order allowing her to do so did not result in an unfair trial. The judge's conclusion that a marriage agreement was unfair was based on his careful analysis of the facts and applicable law. The judge undertook a detailed analysis of the factors relevant to a costs award. There was no error of principle and the judge's decision on costs was not manifestly wrong. This Court should not interfere with his exercise of discretion.

Per Saunders J.A. dissenting on the costs appeal: the judge erred in principle only in respect to allowing the wife costs of her application, made at trial and on the judge's invitation, to amend her pleadings, absent out of the ordinary circumstances. The wife was obliged to have her pleadings in order at the commencement of the trial; one cannot say the amendment to correct her dilatory preparation is one which should be to the account of the other party. The judge, not having considered this aspect, did not fully exercise his discretion.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] These three appeals, which have been ordered to be heard together, are brought from orders made in a matrimonial proceeding. Although the parties are divorced, for clarity I shall refer to the appellant as the husband and the respondent as the wife. The orders are as follows:

Appeal CA041310; order made October 7, 2013 (2013 BCSC 1834) -

The judge allowed the wife to amend her response to counterclaim to seek a reapportionment of family assets pursuant to s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128. I shall refer to this as the "amendment appeal".

Appeal CA041952; order made June 9, 2014 (2014 BCSC 1023) -

The judge reapportioned family assets in accordance with s. 65. I shall refer to this as the "merits appeal".

Appeal CA042341; order made November 4, 2014 (2014 BCSC 2074) -

The judge confirmed his previous determination that the wife was "entitled to costs throughout at Scale B" because she had been substantially successful. I shall refer to this as the "costs appeal".

Background

[2] The trial judge set out the background of the marriage agreement in his merits order reasons:

- [2] The parties met in 2001 and dated for some time. They commenced cohabitation in June 2004 and were married in California in September of that year. A few days before an earlier scheduled date for the wedding, the [husband] presented the [wife] with a marriage agreement and asked her to sign it. She was not prepared to do so and the wedding was postponed. Ultimately, she obtained legal advice and signed a revised version of the agreement (the "Marriage Agreement") a few days before the wedding.
- [3] At the time of the wedding, the [wife] was 30 years old, had no assets and a student loan debt. She had a modest income (\$35,000) but was hoping to work her way up in the insurance brokerage business. The [husband] was 42 years old, had a number of financial assets and owned two homes on the North Shore. He had a good job with a salary which was more than twice what the [wife] earned. He had a personal corporation through which he provided consulting services overseas to supplement his income. The Marriage Agreement provided that each party was financially independent. Each agreed to retain their own assets and to contribute equal amounts from their personal income towards their joint household expenses. In the event the marriage broke down, the Marriage Agreement provided that no spousal support would be paid by either party to the other. The [husband] had previously been married. He was unhappy with the settlement he arrived at with his former wife. He wanted to avoid being placed in a position, for a second time, where he might have to give up assets or provide support to a former spouse. The Marriage Agreement made no reference to children or to the possibility the parties would have children.
- [3] The judge also found that at the time the marriage agreement was entered into, "the parties were operating under a shared assumption they would not have children": at para. 27.
- [4] Shortly after the marriage, the wife became pregnant. The parties had two children: at the time of trial their son was eight years old and their daughter six.
- [5] Serious disagreement arose between the parties, centered mainly on the upbringing of the children and personal finances. They separated in June 2011. The wife filed a notice of family claim on June 22, 2011. The judge stated that "[i]t is an understatement to describe the litigation as high conflict": at para. 5.
- [6] In her notice, the wife claimed "equal division of family assets, under the Family Relations Act". The husband filed a response and counterclaim in which he resisted equal division relying on the marriage agreement. The wife filed a response to counterclaim. She addressed the marriage agreement as follows:

SCHEDULE 3: SPOUSAL SUPPORT

The parties entered into a Marriage Agreement (pre-nuptial agreement) dated September 2, 2004 which waived the [wife's] right to spousal claims, however, the agreement did not contemplate the prospect of Children, nor did the agreement contemplate the prospect of the Parties' agreement of either parent to leave the work force to care for the child(ren) of the marriage.

SCHEDULE 4: PROPERTY

The Parties entered into a marriage agreement (pre-nuptial agreement) dated September 2, 2004.

- a) Significant changes have taken place since the Parties signed the agreement. The agreement did not contemplate the prospect of children or predict children in any way. The agreement did not contemplate where there is an agreement between parties that one parent leave the work force to care [for] the child(ren) of the marriage.
 - b) The agreement was repudiated/set aside by both Parties at its inception. The operation/intent of many of the clauses within the agreement were not maintained by either of the Parties.
 - c) Complete financial disclosure was not given by the [husband] at the time the agreement was executed. There are some questions whether the [husband's] Exhibit "A" Assets and Liabilities is accurate. In addition to the missing assets and liabilities not reported by the [husband], there is some question as to whether complete disclosure of [the] financial condition of each party occurred sufficient to complete the agreement as neither party reported their annual salary or employment income, including the [husband] omitting his income/earnings from Ameron Consulting Inc.
- [7] The wife did not plead s. 65 of the Family Relations Act, but she did confirm that she sought an equal division of family assets under the Act.
- [8] In the amendment appeal, the judge allowed the wife to amend her response to counterclaim. He outlined the background of the wife's application to amend.
- [1] The [wife] applies to amend her response to counterclaim to add two new allegations. I have set out her proposed amendments in Schedule A to this ruling. In short, the proposed amendments seek to raise the following claims:
- a) that the marriage agreement entered into by the parties on September 2, 2004 (the "Marriage Agreement"), be set aside in whole or in part pursuant to s. 93(3) and (5) of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"); and
 - b) a judicial reapportionment of certain assets on the basis of fairness pursuant to s. 65(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA").
- [2] The circumstances giving rise to this application are unusual. The trial process was somewhat tortuous. It took much longer than scheduled and was broken up by three adjournments. The trial began on January 28, 2013 and, after 20 days of evidence and argument, concluded on August 27, 2013. The [wife] is self-represented. The [husband] has been represented by counsel throughout. This application was brought after the parties presented all of their evidence and closed their cases. The trial proceeded to argument on August 26 and 27, 2013. On August 27, after the [wife] had concluded her argument, and after I had the opportunity to review the written argument of the [husband], it became apparent to me that the [wife] had not sought reapportionment on the basis of s. 65(1). It was also

apparent to me the case put forward by the [wife] might require consideration of that section. Quite simply, it appeared to me that such an allegation might be necessary for the purpose of determining the real issues raised by the pleadings and evidence in the case.

- [3] When I raised my concern with the parties, the [wife] indicated that she wished to make such an amendment. The [husband] said he would suffer severe prejudice if such an amendment was allowed and indicated he would oppose her application. In the circumstances, I ruled that if the [wife] wished to amend her response to counterclaim, she would have to make a formal application to do so. I set out a schedule for the delivery of the notice of application and response. After I made that ruling, the argument in the case concluded based on the existing allegations in the pleadings and the evidence at trial.
- [4] The [wife] delivered a notice of application and an affidavit in support of the proposed amendment. That application did not contain the proposed amendment. The [husband] filed written submissions but did not file a response to the notice of application and filed no affidavit material. The [wife] filed a reply to those submissions which included the proposed amended response to counterclaim. The [husband] then filed a sur-reply, which I permitted given that the initial notice of application had not attached the proposed amendment. The [husband] did not submit any affidavit evidence with the sur-reply.
- [5] The issue on this application is whether the [wife's] proposed amended response to counterclaim should be allowed, and if so, on what terms.
- [9] The judge dismissed the wife's application to amend the claim to set aside the marriage agreement pursuant to s. 93 of the Family Law Act, S.B.C. 2011, c. 25, because that legislation was not applicable in the circumstances of this case. He allowed her to amend to seek reapportionment pursuant to s. 65 on the following terms:
- [33] I am satisfied that the [husband] should be given the opportunity to present any further evidence he wishes to place before the court on the issues arising from the amendment. I expect that the evidence will not be extensive. The evidence can be in the form of read-ins from the discovery evidence, documentary evidence or viva voce evidence. I will not permit the [wife] to present any further evidence on the issue. She indicated to the court that she does not wish to adduce further evidence. If she has failed to prove any material fact needed to advance the claim, she must suffer the consequence of that failure. She will of course be permitted to cross-examine the [husband] or any witnesses he calls.
- [10] The judge directed the husband's counsel to advise the amount of time required to present further evidence. He cautioned that the evidence should not repeat previous evidence and "must be directly related to the new pleading": at para. 34. The parties were permitted to "advance further argument based on the amended pleading": at para. 35.
- [11] In the merits appeal, the judge refused to set aside the marriage agreement on common law principles, but he reapportioned family assets in accordance with s. 65 of the Family Relations Act: at paras. 103, 134.

Position of the Husband

- [12] In the amendment appeal, the husband asserts that the judge erred in suggesting that the wife amend her pleading and that this resulted in an unfair trial. He states that the judge erred in granting the wife leave to amend her response to counterclaim and in fixing the terms of his order without hearing from the parties.
- [13] In the merits appeal, the husband contends that the judge erred in finding that the marriage agreement operated unfairly at the time of distribution of the family assets. He takes exception to the wife receiving 100% of a Dodge Caravan motor vehicle and the judge's order that the husband transfer his interest in the vehicle to the wife.
- [14] As to the costs appeal, the husband states that the judge "erred in finding that the [wife] was substantially successful at trial and failing to consider the amendment to the [wife's] Pleadings after trial in the decision to award costs".

Discussion

- [15] I shall address each appeal separately.

The Amendment Appeal

- [16] The husband asserts in his factum (para. 7):

It is respectfully submitted that the [husband] was deprived of a fair opportunity to meet the claims made against him when the learned Trial Judge suggested to the [wife] that she amend her Pleadings to seek a new cause of action and in crafting the terms of the amendment for the [wife]. The [husband] respectfully submits that these actions amount to advocacy on the part of the learned Trial Judge resulting in a reasonable apprehension of bias.

- [17] On January 30, 2013, the third day of the trial, counsel for the husband addressed the marriage agreement. He quoted from the husband's counterclaim: "[t]he [husband] intends to rely on the marriage agreement in relation to any and all property and spousal support claims" and stated that the wife had not responded to this position. He added: "I don't know what her case is in regard to property other than what the pleading says." He then stated:

And what I am going to propose to Your Lordship is that after [the wife's] evidence is completed but before she closes her case, she gets some advice. And then she will be in a position to advise Your Lordship and to me what exactly her claim is.

- [18] The judge told the wife that she should obtain advice and file a response to the counterclaim. A response was filed on February 4, 2013. As noted above, it addressed the marriage agreement and repeated the wife's claim for an equal division of the family assets.

- [19] On the 18th day of trial, July 5, 2013, the wife sought further amendments to her pleadings, including: "The marriage agreement was not properly entered into by the parties and does not satisfy basic legal principles of contract law." Counsel for the husband objected to this amendment, stating that he did not know what it meant. The judge refused the amendment, stating it would "not be allowed at this stage. It may be that the arguments will raise basic legal principles of contract law, but I am not quite sure what you mean by that "
- [20] Closing submissions took place on August 27, 2013. I repeat the comments of the judge in his amendment reasons:
- [2] after the [wife] had concluded her argument, and after I had the opportunity to review the written argument of the [husband], it became apparent to me that the [wife] had not sought reapportionment on the basis of s. 65(1). It was also apparent to me the case put forward by the [wife] might require consideration of that section. Quite simply, it appeared to me that such an allegation might be necessary for the purpose of determining the real issues raised by the pleadings and evidence in the case.
- [21] On August 27, 2013, the judge first raised the issue with counsel for the husband. He asked whether counsel intended to address s. 65 of the Family Relations Act because, in his view, the wife indirectly had raised reapportionment: she asked for an equal apportionment of family assets and for the marriage agreement to be set aside. Counsel stated that he would not be addressing s. 65 because the wife had not pleaded it.
- [22] The judge asked counsel what different evidence would have been led had s. 65 been pleaded. Counsel referred to the wife's economic circumstances and her self-sufficiency. The judge observed that evidence on those issues had already been adduced. The judge was concerned that, based on the case presented by the wife, he would be obliged to consider the factors relevant to a claim for reapportionment under s. 65.
- [23] The discussion with counsel continued at length. It concluded with the judge stating that he would hear from the wife and might "give her an opportunity to apply to amend". Counsel advised that he might apply to re-open the trial. The judge stated:
- I guess I'm not convinced that -- that there is a significant difference to what she has pled and concerning that issue under section 65, but I'll hear whether she wishes to make that application or whether she doesn't.
- [24] In her oral reply submissions, the wife noted that she had raised s. 65 in her written closing submission. The judge observed that she had not pleaded the section. The wife stated that was an oversight. She confirmed that she was proceeding on the basis that the marriage agreement was unfair.
- [25] The judge told the wife she should obtain legal advice and permitted her to file an application to amend. He established a schedule for the exchange of submissions on the application.

[26] The husband asserts that the judge's conduct raises a reasonable apprehension of bias. On appeal, the parties were given leave to file submissions on the recent decision of the Supreme Court of Canada in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25. In that case, the Court reaffirmed the test for reasonable apprehension of bias:

[37] But whether dealing with judicial conduct in the course of a proceeding or with "extra-judicial" issues like a judge's identity, experiences or affiliations, the test remains

whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias. . . . [T]he assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties. [Citations omitted; *Miglin v. Miglin*, 2003 SCC 24], at para. 26.]

[27] In his amendment reasons, the judge addressed the issues discussed in *Yukon Francophone*:

[14] I commence my analysis by rejecting the [husband's] suggestion that the process by which the application came before the court was inappropriate and is a reason to dismiss the application. The court's obligation to an unrepresented litigant is described in a criminal context in [*R. v. Martin*, 2010 BCCA 526] at para. 15:

This duty is well-known and most trial judges do their utmost to assist unrepresented litigants. The law, however, does not require the judge to step into the shoes left empty by the absence of defence counsel. He or she is not expected to formulate the accused's defence or, in all circumstances, to cross-examine witnesses. To do so would result in the judge becoming an advocate for a party rather than an impartial arbiter. The judge must do what is reasonable in the circumstances within the exercise of his or her discretion.

[15] The [husband] submitted that by inviting the [wife] to make the application to amend, I became an advocate for her. He did not argue that any other steps taken by me in the course of the trial amounted to advocacy on the part of the [wife]. He has not brought an application for recusal or sought a mistrial. In other words, he relies on one judicial step or intervention over the course of a hotly contested and acrimonious four-week matrimonial trial as the basis of this submission.

[16] It is perhaps a trite observation, but judicial impartiality is the keystone of our court system. In *J.P. v. British Columbia (Director of Child, Family and Community Services)*, 2013 BCSC 515, Walker J. noted at para. 7 that:

impartiality is the fundamental qualification of a judge and the core attribute of the judiciary. Allegations that a judgment may be tainted by bias or by a reasonable apprehension of bias are "most serious", as they call into question the impartiality of the Court and its members and raise doubt on the public's perception of the Court's ability to render justice according to law

- [17] When I examine my reasoning which led to the invitation to the [wife] to consider an application for an amendment, I am confident that I did not lose my necessary impartiality and did not become an advocate. Rather, I invited the [wife] to consider the application, as I was concerned that the evidence before the court raised an issue that could only be examined if the response to counterclaim included the claim for a reapportionment pursuant to s. 65. In other words, it appeared to me that the amendment might be necessary in order to determine the real issues between the parties based on the evidence before the court. In those circumstances, I was bound to raise the issue of a possible amendment in fairness to both parties. By inviting a formal application to be brought, I preserved the rights of both parties: the [wife's] right to plead a remedy that might be available to her on the evidence and the [husband's] right to oppose the amendment and put before the court, evidence regarding prejudice he would suffer if such an amendment is granted.
- [28] It is apparent from the pleadings and the transcript that disposition of the family assets always was an issue. The wife sought an equal distribution; the husband resisted this on the basis of the marriage agreement. The husband sought clarification of the wife's position on the marriage agreement and was given it on February 4, 2013. After hearing the evidence and considering the written submissions of the parties, the judge was concerned that the battle lines drawn by the parties required him to consider s. 65. He first raised that concern with the husband and listened to counsel's position. He then considered the remarks of the wife. This led him to permit the wife to apply to amend.
- [29] I do not think that the judge went into the arena and became an advocate for the wife. The judge was concerned with his ability to do his job. I reject the proposition that allowing the wife to apply to amend her pleadings resulted in a reasonable apprehension of bias.
- [30] In his factum, the husband asserts that the judge erred in his application of the factors relevant to allowing a pleading amendment. In his reasons, the judge set out the applicable law:
- [12] Pursuant to Rule 6-1(1), a pleading may be amended after the issuance of a notice of trial only with leave of the court or by consent. The jurisprudence which developed under the former rule remains applicable to the current rule. Amendments should be allowed if they disclose a reasonable cause of action or defence unless reason exists for exclusion such as undue prejudice or delay: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.) at 27. Amendments should be granted liberally in order to enable the real issues to be determined and tried, unless actual prejudice can be demonstrated or the amendment would be useless: *Langret Investments S.A. v. McDonnell* (1996), 21 B.C.L.R. (3d) 145 (C.A.).
- [13] While it is unusual for amendments to be sought after the close of the evidence, there is no doubt that amendments may be granted at any time. In *Lam v. Chiu*, 2012 BCSC 677 at para. 10, Gray J. allowed an application to amend at the conclusion of the evidence following consideration of the five principles set out in *Macdonald v. Macdonald Estate* (1996), 21 B.C.L.R. (3d) 379 (S.C.):

- (a) is [the amendment] inconsistent with the pleadings already filed on behalf of the party seeking the amendment;
 - (b) is it inconsistent with evidence already tendered by that party and his witnesses at trial and on discovery;
 - (c) if it had been asked for at the outset of the trial, would it have changed the whole course of the trial;
 - (d) would it be unfair to the opposite party;
 - (e) is it necessary for the purpose of determining the real issues raised or depending upon the pleadings?
- [31] The judge expressly addressed each of these factors. I see no error in his analysis, which largely is an exercise of discretion.
- [32] The husband complains about the terms for the amendment. The husband was entitled to adduce "any further evidence he wishes in the form of read-ins from the discovery evidence, documentary evidence or viva voce evidence". The wife was not entitled to adduce further evidence.
- [33] The husband complains that he was not allowed to obtain further examination for discovery. He did not ask for it relative to the s. 65 issue.
- [34] In his Further Reply Submissions in the court below he stated:
- In the event the [wife] is permitted to amend her claim in relation to s. 93(3) and (5), there will have to be further evidence adduced at trial and examination for discovery.
- [35] The s. 93 amendment was not allowed. There was no similar reference to discovery related to the s. 65 issue.
- [36] Comments of the judge in his merits reasons also are relevant to any possible prejudice to the husband by the amendment order:
- [43] At the close of the trial, the [wife] sought to amend her response to counterclaim to formally seek a judicial reapportionment of assets on the basis of fairness pursuant to s. 65(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"). In a ruling reported at 2013 BCSC 1834, I permitted the [wife] to amend her pleading over the objection of the [husband]. He argued that because no such plea was contained in the pleadings which had been before the court, he was severely prejudiced. He said that if the trial had proceeded on the amended pleadings, he would have presented considerable additional evidence to the court. In order to alleviate any such concern, I permitted him to re-open to present further evidence on the factors set out in s. 65(1) of the FRA. Pursuant to my ruling, the trial was re-opened and the [husband] presented further evidence in December 2013. However, none of that evidence involved proof of events or circumstances that had taken place prior to the conclusion of the trial in August 2013. The evidence presented was restricted to an expert opinion from a

vocational consultant (Mr. John Lawless) as to what the [husband] would likely earn in the future given his age and qualifications, and the [husband's] own evidence regarding the loss of his job. The [wife] was recalled for cross-examination to establish that she recently obtained a job.

[44] it is surprising the [husband] called no evidence regarding factual matters that took place prior to the conclusion of the trial in August 2013 in relation to the factors set out in s. 65(1) of the FRA

[37] In my view, the judge's decision to allow the wife to apply to amend her pleadings and his order allowing her to do so did not result in an unfair trial.

The Merits Appeal

[38] The judge carefully examined the credibility of the parties. He found fault with both, but concluded that the wife was somewhat more credible than the husband.

[39] The judge refused to set aside the marriage agreement on common law principles. He then turned to s. 65. After setting out the section, the judge referred to the applicable law:

[115] The leading decision on the application of s. 65(1) of the FRA is *Hartshorne v. Hartshorne*, 2004 SCC 22. A succinct summary of the proper approach to division of assets as explained in *Hartshorne* is set out at paras. 119-121 of *Hanan v. Anderson*, 2014 BCSC 96:

In *Hartshorne*, the Supreme Court of Canada stated that fairness is the primary policy objective guiding the court's role respecting the division of assets upon marriage breakdown. Fairness may be achieved by reviewing the presumptive division under the FRA or the marriage agreement, in light of the factors governing reapportionment (para. 8).

The majority accepted the proposition that courts should respect private agreements that parties make for the division of their property on the breakdown of their relationship, particularly if they negotiated the agreement with independent legal advice, but only so long as the agreements are fair (paras. 8, 9). The fact that such agreements lead to a different result than the statutory regime does not, by itself, constitute unfairness (para. 9). Fairness within the context of the regime also requires, however, that the agreement operate fairly at the time of distribution (para. 9). See also paras. 34-36.

Fairness is determined in two stages. First, the court applies the agreement in order to determine what financial entitlements would be provided to each spouse under the agreement. In the second stage, the court applies the factors from s. 65 of the FRA to determine whether the contract operates unfairly (para. 47). In doing so, the court must consider the way in which the parties' personal and financial circumstances evolved over the course of the relationship and determine whether the current circumstances were within the parties' contemplation when the agreement was signed. If they were, the burden to establish unfairness is heavier. Where the agreement is found to operate unfairly, the court may then reapportion the family assets, again by reference to the factors in s. 65(1).

[40] The judge concluded that, in the circumstances, he:

[119] should give due respect to the private arrangements made by spouses for the division of their property on the breakdown of their relationship subject to the analysis required by s. 65.

He continued:

[120] As noted in Hartshorne at para. 43, when deciding whether an agreement operates unfairly, the essential question is "whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the agreement was formed, and if so, whether at that time the parties made adequate arrangements in response to these anticipated circumstances." This determination cannot be made without regard to the parties' perspectives. The court in Hartshorne describes how this is to be approached at para. 44:

If the parties' lives unfold in precisely the manner they had contemplated at the time of contract formation, then a finding that the contract operates unfairly at the time of distribution constitutes, in essence, a substitution of the parties' notion of fairness with the court's notion of fairness, providing that nothing else would suggest that the parties did not really consider the impact of their decision in a rational and comprehensive way. Thus, central to any analysis under s. 65(1) of the FRA is consideration of how accurately the parties predicted, at the time of contract formation, their actual circumstances at the time of distribution, whether they truly considered the impact of their decision and whether they adjusted their agreement during the marriage to meet the demands of a situation different from the one expected, either because the circumstances were different or simply because implications were inadequately addressed or proved to be unrealistic.

[41] As noted previously, the judge held that at the time the marriage agreement was entered into, "the parties were operating under a shared assumption they would not have children". He reviewed the financial positions of the parties, the wife's financial expectations based on the parties not having children and the consequences of them doing so. The judge stated:

[133] ...The need of each spouse to remain or become economically independent or self-sufficient is the most significant factor in the analysis at this first stage. As I have explained, the difference in how the parties' lives evolved dramatically impacted the [wife]. Her economic status has not developed in a way that was consistent with the intent of the Marriage Agreement: her ability to build a career and acquire assets has been delayed. The agreement has worked in a way which has been substantively unfair to her.

[134] The unfairness is obvious and dramatic. The Marriage Agreement was premised on the concept that each party was and would remain financially independent and self-supporting. When they decided to have children, their lives unfolded very differently from what they anticipated. At the time of distribution, the [wife] was left with no personal assets, no share of the family assets, no interest in a matrimonial home, no income and no

right to spousal support. In contrast, the [husband] retained all of his personal assets and all of the family assets. He was employed with a substantial income and has no obligation to pay spousal support. I have no difficulty in concluding that the Marriage Agreement operated unfairly at the time of distribution.

- [42] In my view, the judge clearly understood the applicable law and undertook a careful analysis based on it. I would not interfere with his conclusion that the marriage agreement was unfair.
- [43] In the facts portion of his factum, the husband asserts the judge's decision concerning property at 312 East 17th Street, North Vancouver, British Columbia, and a Dodge Caravan "is the subject of the within Appeal". There is no reference to the real estate in the husband's notice of appeal or in the error and argument sections of his factum. He provides a submission only with respect to the Dodge Caravan. In the relief section of his factum, he seeks an order setting aside reapportionment of the property and that the property be retained in his sole name.
- [44] The North Vancouver property is the family home. The judge reapportioned it and provided that the wife should have a 30% interest in the home, an interest that he valued at \$243,000. He ordered the husband to make a compensation payment in that amount to the wife. In his notice of appeal, the husband sought to vacate that order. In her factum, the wife seeks an order for payment of the \$219,848, representing the husband's compensation payment less some offsets. The money presently is in the trust account of a law firm. On August 12, 2014, the judge stayed payment pending the determination of this appeal. In the relief section of his factum, the husband seeks repayment of these funds.
- [45] As noted, the husband did not pursue the issue of the North Vancouver property in argument in his factum or at the hearing of the appeal. There is no basis on which this Court can deal with the reapportionment of that asset. In my view, the disposition of the \$243,000 should be addressed by the trial court, not this Court. I turn to the Dodge Caravan.
- [46] The judge stated:
- [142] The other family asset which will be reapportioned is the Dodge Caravan. I order that asset to be reapportioned 100% in favour of the [wife]. The [husband] shall transfer that vehicle to the [wife] forthwith.
- [47] The husband asserts that the judge provided no legal basis for reapportioning the Dodge Caravan to the wife. The judge addressed the vehicle, stating:

[128] A particular source of friction was the fact the [wife] did not have and could not afford to buy a car. She had difficulty transporting the children to school, activities and appointments. The [husband] was able to arrange for a friend to give him an older van. The van was registered in his name and used by the [wife] for transportation. Pursuant to the Marriage Agreement, the [husband] has maintained that all expenses associated with the vehicle should be paid by the [wife].

[48] In my view, these facts amply support the judge's reapportionment decision. I agree with the wife that this Court should not interfere.

Costs Appeal

[49] Costs orders are discretionary. It is well established that this Court will interfere with them only if there is an error of principle or they are manifestly wrong.

[50] The judge stated the position of the husband:

[11] The [husband] seeks the costs of these proceedings. In the alternative, he seeks costs up to the date of the court order which permitted the [wife] to amend pleadings. In the further alternative, the [husband] seeks an order for costs for at least part of the proceeding.

[12] The [husband's] arguments are based in part, on an offer to settle he made on August 31, 2012 (the "Offer"). The husband contends the Offer was one that ought to have been accepted by the [wife]. The [wife] argued that the Offer is not proper insofar as it does not contain the language specified in Rule 11-1(1)(c) of the Supreme Court Family Rules. In response to this argument, the [husband] says the letter contained sufficient information for the [wife] to appreciate it might have cost consequences.

[13] The [husband] also argues he was substantially successful in these proceedings, because:

1. the [wife] initially sought sole guardianship and custody of the children, but the result at trial was a shared parenting arrangement;
2. the [wife] sought half of the family assets which she said should include all of his assets. At trial, she was granted only a 30% interest in the family home and her claim to his financial assets was dismissed;
3. the incomes imputed to the [wife] and the [husband] were similar to those set out in the Offer; and
4. the spousal support ordered at trial was similar to the amount proposed in the Offer.

[14] In the alternative, the [husband] argues he should be entitled to costs accrued until October 7, 2013 when I granted the [wife's] application to amend her pleadings. He says that until that order was made, there was no claim before the Court to have the Marriage Agreement set aside pursuant to s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128.

- [15] The [husband] also argues the litigation was prolonged because of the [wife's] difficult behaviour. He says costs should be awarded to him as a result of this behaviour. In essence, he says the [wife] acted improperly and adopted unnecessarily adversarial positions which prolonged the trial. The [husband] also maintains he attempted alternative dispute resolution to avoid the need for a trial, but that the [wife] refused to participate. He says this is a factor I should take into account in awarding costs.
- [51] The judge discussed the applicable law:
- [20] As set out in Rule 16-1(7), "costs of a family law case must be awarded to the successful party unless the court otherwise orders." The decision in *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.), sets out the proper approach to cost awards in family litigation. That approach should be the same as in civil cases; costs should be awarded to the successful party, unless the court otherwise orders. In considering whether to make a contrary order the court should take into account factors such as hardship, earning capacity, the purpose of the award, the conduct of the parties in the litigation, and the importance of maintaining the balance achieved by the award itself: *Gold* at paras. 19-20. In *Gold*, the Court of Appeal concluded the plaintiff was "substantially successful" and so should not have been deprived of her costs.
- [21] Many cases have considered what amounts to substantial success. The four-step approach to determine whether a party achieved substantial success suggested by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321, is often applied in family law cases. This approach is summarized at para. 46:
1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
 2. Second, by assessing the weight or importance of those "matters" to the parties.
 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
 4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.
- [52] The judge concluded that the husband's offer did not meet the requirements of the applicable court rule to be taken into account in considering costs. I do not understand the husband to challenge this conclusion.
- [53] The judge reviewed the credibility of the parties and each of the important issues in the case. He concluded that the wife was substantially successful, while acknowledging mixed success on a couple of issues.
- [54] The husband argues that the judge erred in assessing the importance and weight to issues. That clearly is a matter within the discretion of a trial judge.

[55] The judge also considered whether he should deprive the wife of costs associated with the late amendment of her pleadings. He stated:

[47] The broad discretion retained by the Court with respect to cost awards includes the ability to award costs for part of a case. This discretion is expressed in Rule 16-1(14):

(14) The court may award costs

- (a) of a family law case,
- (b) that relate to some particular application, step or matter in or related to the family law case, or
- (c) except so far as they relate to some particular application, step or matter in or related to the family law case

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

[48] While the Court has discretion to award a portion of costs to a party, applications to apportion costs should not be a regular part of litigation but should be confined to relatively rare cases: *Sutherland v. Attorney General of Canada*, 2008 BCCA 27.

[49] In my view, this is not one of those relatively rare cases. While the [wife] did not plead a claim for reapportionment based on s. 65 of the Family Relations Act until very late in the day, I permitted the amendment for the reasons set out in my ruling indexed at G.G. v. M.A., 2013 BCSC 1834. I found that the amendment was not inconsistent with the existing pleadings and evidence, would not have changed the course of the trial, and would not be prejudicial, provided the [husband] was permitted to adduce further evidence. I also found that the amendment was necessary to consider the real issues before the Court. I permitted the [husband] to adduce further evidence, but the only new evidence he presented related to changes in the parties' employment status since the conclusion of the trial. In other words, the trial proceeded exactly as it would have whether or not the new pleading had been advanced earlier. This is not surprising as the [wife] sought, at all times, to have the Marriage Agreement set aside and a 50% interest in all of the family assets.

[50] There is no reason to apportion costs or decline to award costs to the [wife] because of the late amendment to her pleadings, and I decline to do so.

[56] I would not interfere with the judge's exercise of discretion on this point.

[57] The judge turned to misconduct and quoted from the decision of Mr. Justice Voith in *LeClair v. Mibrella Inc.*, 2011 BCSC 533 at para. 11:

Rule 14-1(9) is not intended to provide an unsuccessful party with an opportunity to parse through the litigation conduct of the opposing party searching for behaviour that might be criticized. I do not say that the discretion which is conferred in Rule 14-1(9) is limited to exceptional cases. The Rule is not, however, intended to address imperfect or less than optimal

conduct. It is generally not intended to address questionable judgment. Instead it provides the court with an objective means of communicating its censure in relation to conduct that manifestly warrants rebuke.

[58] The judge continued:

[52] The [wife's] conduct in the course of the litigation was far from that which a court expects. In the Reasons, I set out some of the difficulties which arose with her evidence and approach to this litigation which prolonged every aspect of the trial. She had difficulty taking guidance from the Court. She treated the [husband] with outright contempt. Some of this behaviour, but certainly not all of it, might be explained by the fact she was self-represented. Much of her behaviour falls into the category of "less than optimal conduct" which was caused by her "questionable judgment". In other words, her behaviour is the kind which LeClair suggests the discretion conferred by Rule 14-1(9) (the equivalent of 16-1(7)) was not intended to address. The [husband] is attempting to parse through the [wife's] litigation conduct in a way that should not be encouraged. In high conflict family litigation the conduct of both parties is often imperfect. Any interpretation of the Rules which would allow the Court and the parties to parse through the poor behaviour a second time on the question of costs is to be discouraged. Such an approach would be detrimental to the interests of the parties and would be an inefficient use of court time.

[53] Although I have concluded that this is not an appropriate circumstance to sanction the [wife] with a costs award, any doubt I might have had about that decision is removed when I consider the [husband's] conduct in the litigation. I concluded the [husband] was also guilty of misconduct in the course of the proceedings. While his improper conduct was, unlike the [wife's], not persistent it was more serious. I concluded he intentionally misled this Court regarding the existence of a family debt. When I released the Reasons, I concluded he was less than forthright about his employment status. In the course of subsequent applications, I have learned that my conclusion was justified, as it is apparent he continued to work for his employer long after the termination date set forth in the evidence and argument presented to the Court.

[59] The judge observed that the husband's conduct might have supported an award of special costs against him, but because no such order was sought he would not examine the husband's conduct further.

[60] It is clear from the costs reasons that the judge was alive to the applicable legal principles. He undertook a careful analysis of the issues at trial and the conduct of the parties. I see no basis on which this Court could interfere with the judge's exercise of discretion.

Conclusion

[61] I would dismiss all of these appeals.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Mr. Justice Frankel"

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [62] I have had the benefit of reading in draft the reasons for judgment of Mr. Justice Chiasson and agree with him that the amendment appeal and the merits appeal should be dismissed, for the reasons he has given. I also agree with his reasons for judgment on the costs appeal, except for a small corner. I would allow that appeal only to the extent of denying the wife her costs of her application to amend her pleadings.
- [63] The application to amend the wife's pleadings was, as my colleague describes, brought late in the trial at the invitation of the trial judge. On this I would make the following observations. First, it was the wife's obligation to have her pleadings in final shape by at least the commencement of trial, thereby to permit a complete adjudication of the case. Second, the wife did not have her pleadings in the required shape at the beginning of the trial, at no fault of the husband. Third, it is implicit in an award of costs that the preparation necessary and proper for advancement of the winning party's case be to the account of the person against whom costs are awarded; such is the premise of Rule 16-1 of the Supreme Court Family Rules (see sub-rule (2)).
- [64] The question then arises whether the losing party against whom costs are ordered, who in any case will be assessed the costs of the other party's notice of family claim, is also responsible for costs of an application required only because that party was dilatory, or failed in the obligation to be prepared for trial. In my respectful view, barring a matter arising that could not have been anticipated or other out of the ordinary circumstance, the answer to that question is no.
- [65] It seems to me to be unjust not just to deny the husband his costs of responding to a motion which should never have had to be brought, but also to penalize him by requiring him to pay, in addition to the wife's costs of the basic pleading, her costs incurred only because she failed to plead that which was necessary in order to obtain the relief she sought.
- [66] It is true that a trial judge has considerable discretion in awarding costs. Yet, in my respectful view, the exercise of discretion must take into account the necessity for the taxable item. In this case, the only given reason for including costs of the amendment application in the award of costs was the absence of any evidence called by the husband in response to the amendment. This seems to me to be unrelated to the wife's entitlement to costs of the application itself and does not address the principle that, in general, a party is not entitled to costs unnecessarily incurred.
- [67] Accordingly, I would amend the order of costs to exclude costs referable to the wife's application at trial to amend her pleadings.

"The Honourable Madam Justice Saunders"

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