

CANADA / JUDGMENT

He v. Guo

2022 BCCA 355

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 355 He v. Guo

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

He v. Guo,

2022 BCCA 355

Date: 20221024

Docket: CA47148

Between:

Cheng Feng He also known as Benjamin He

Appellant

(Claimant)

And

Xueying Guo also known as Vivian Guo

Respondent

(Respondent)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

November 3, 2020 (He v. Guo, 2020 BCSC 1632,
New Westminster Docket E56359).

Counsel for the Appellant:

G.K. Thomas

Counsel for the Respondent:

R.C. McLeod

Place and Date of Hearing:

Vancouver, British Columbia

November 8, 2021

Place and Date of Judgment:

Vancouver, British Columbia

October 24, 2022

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Butler

Summary:

The appellant appeals from a family law order reappportioning property entirely in the respondent's favour, directing he pay spousal support to the respondent, and dismissing his claims for reappportionment and spousal support. The judge found it would be "significantly unfair" under s. 95 of the Family Law Act to apportion the property equally due to the short duration of the relationship, the appellant's lack of contribution to the property, the appellant's failure to disclose certain assets, and the appellant's conduct in reporting the respondent to immigration officials. Held: Appeal allowed in part. With respect to reappportionment, the judge did not err in considering the length of the relationship. While relative contribution is generally not germane to the analysis, both parties put it in issue. To find that a party of modest income loses the presumptive equal sharing by reason only of having made a small financial contribution is contrary to the intention of the Act. The judge did not err in finding non-disclosure but did err by failing to consider the scale of non-disclosure and its effect on the proceeding when addressing the extent of reappportionment ordered. The judge also erred in considering the appellant's report to immigration authorities, as this conduct did not have any sort of economic impact on the respondent. The order reappportioning assets entirely in favour of the respondent is

set aside and an order reapportioning the assets 80% in favour of the respondent, 20% in favour of the appellant is substituted. With respect to spousal support, the judge erred in failing to conduct an assessment of the relative means and needs of the parties. The order for spousal support is set aside, with the issue remitted to the trial court.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] This appeal is from an order under the Family Law Act, S.B.C. 2011, c. 25, reapportioning property entirely in the respondent's favour, awarding her \$12,000 spousal support payable over 12 months, and dismissing the appellant's claim for reapportionment in his favour and for spousal support.
- [2] The appellant, Mr. He and the respondent Ms. Guo met online in October 2014. They met in person on or about November 17, 2014, commenced cohabitation in Ms. Guo's residence on November 27, 2014, and separated in early 2018.
- [3] The reapportionment order concerns the residence in which the parties cohabited. Ms. Guo purchased the home in August 2014, before the parties met, and intended that she and her son, 10 years of age in 2014, would reside there. Ms. Guo had been admitted to Canada on a visitor visa and her son was on a student visa. The effect of the reapportionment order is to allot the entire appreciation of the residence from the time of commencement of co-residency to the time of trial (\$360,000) entirely to Ms. Guo.
- [4] During the parties' cohabitation, Ms. Guo applied for a work permit and permanent resident status in Canada. Mr. He supported her application by giving a financial undertaking for both Ms. Guo and her son. Ms. Guo obtained a work permit on March 3, 2017, and she and her son obtained permanent resident status on December 12, 2017.
- [5] Throughout the litigation Mr. He had suggested that the grant of permanent residency status in December 2017, followed by separation in early 2018, indicated that Ms. Guo's cohabitation with him was insincere and merely a design to advance her permanent residency status. In the context of that suggestion, Mr. He filed a document he titled "Immigration Marriage Fraud Report" with immigration authorities on April 17, 2018, asserting that the parties' marriage-like relationship was a product of a fraud undertaken by the respondent. In the report, Mr. He also accused Ms. Guo of beating him, threatening a witness, and "dating ... some men for money" contrary to a condition of her work permit.
- [6] The judge rejected the proposition that the parties' cohabitation was part of a design on Ms. Guo's part to advance her immigration status, and found the allegations in the Immigration Marriage Fraud Report were baseless and a malicious attempt to harm Ms. Guo. Further, the judge found that Mr. He had not made full disclosure of property owned by him in Wuhan, China. These instances of Mr. He's post-separation behaviour featured prominently in the judge's analysis.

[7] The issue of reapportionment of property required the judge to consider whether the presumptive equal sharing of family property between cohabiting spouses should not apply because such a division would be significantly unfair within the language of s. 95 of the Family Law Act. That section provides (omitting certain references to debt, which is not in issue in this appeal):

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

(a) equally divide family property or family debt, or both, or

(b) divide family property as required under Part 6.

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

(a) the duration of the relationship between the spouses;

(b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1);

(c) a spouse's contribution to the career or career potential of the other spouse;

...

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

(g) the fact that a spouse, other than a spouse acting in good faith,

(i) substantially reduced the value of family property, or

(ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

...

(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

(3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 have not been met.

[8] The issue of spousal support arose under ss. 161 and 162 of the Family Law Act. Those sections provide (omitting references to child support, which was not claimed):

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;

...

- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[9] On the issue of reapportionment of property, the judge referred to the leading authorities on the application of s. 95, *Jaszczewska v. Kostanski*, 2016 BCCA 286, and *Singh v. Singh*, 2020 BCCA 21. He concluded that it would be "significantly unfair" within the meaning of the statute for Mr. He to share in any of the appreciation of the value of the residence. He gave four reasons for his conclusion:

- 1) the relationship was short;
- 2) Mr. He did not make a significant financial contribution to the relationship or the residence, apart from a contribution of about \$10,000 towards construction of rental units in the residence;
- 3) Mr. He failed to fully disclose his assets by concealing certain assets obtained through his separation agreement with his former wife and by denying his sole ownership interest in an apartment in Wuhan, China; and
- 4) it would be significantly unfair to condone Mr. He's malicious act of filing the baseless Immigration Marriage Fraud Report, which the judge found "was designed to cause [Ms. Guo's] immigration status to be revoked and thereby destroy the economic component which forms part of one's immigration status."

[10] In reaching these conclusions, the judge rejected Mr. He's submission that he had made a relatively significant financial contribution to maintaining the parties' relationship or the residence, other than the contribution of about \$10,000 towards the construction of the rental units. The judge further expressly rejected Mr. He's assertion of contributing \$200,000, noting that Mr. He reported only \$65,000 taxable income for the duration of the

relationship, had existing child and spousal support obligations, and had no apparent source of capital or borrowings for such a sum.

- [11] The judge further rejected Mr. He's argument that his assistance with obtaining domestic student status for Ms. Guo's son should entitle him to 60% of the increase in value of the residence.
- [12] On the issue of spousal support, the judge did not determine the parties' incomes, apart from referring to Mr. He's earnings of \$65,000 over the term of the relationship when addressing his assertion he contributed \$200,000 to the relationship, and a few references to rental income. He said concerning the award of spousal support in favour of Ms. Guo:
- [82] I am satisfied that the respondent is entitled to spousal support she seeks on both a compensatory and non-compensatory basis. It will help promote the respondent's economic sufficiency after the claimant's baseless Immigration Marriage Fraud Report.
- [83] Since September 2019, the respondent has been studying acupuncture at Vancouver at Career College. The course will complete in 2022.
- [84] The respondent currently rents an apartment for herself and her son while earning rental income from the Meadedale residence.
- [85] The spousal support sought is modest and well within the range of reasonableness.
- [86] The claimant's claims are dismissed. The respondent is awarded the spousal support she seeks of \$1,000 per month for 12 months (\$12,000). All other claims by the respondent are dismissed. Each party will be responsible for the debt in their respective names.

Grounds of Appeal

- [13] In respect of the division of property, Mr. He contends that the judge erred:
- 1) in law by basing the division of property on irrelevant considerations; and
 - 2) in fact by inferring malice and non-disclosure without an evidentiary foundation.
- [14] In respect of spousal support, Mr. He contends the judge erred:
- 1) in law by failing to determine the parties' incomes, means and needs;
 - 2) in fact by finding in the absence of an evidentiary foundation that filing the Immigration Marriage Fraud Report hindered Ms. Guo's attainment of economic self-sufficiency; and
 - 3) in law by considering his conduct as relevant to the issue of spousal support.

Standard of Review

- [15] It is important at the outset to acknowledge that our role as an appellate court is a deferential one. To succeed on appeal in a family law matter, an appellant must demonstrate "a material error, a serious misapprehension of the evidence, or an error of law by the trial court": *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12. This standard of review applies equally to all family law matters including issues of property division: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 14; *Jean Louis v. Jean Louis*, 2020 BCCA 220.

Discussion

Reapportionment of Property

- [16] The judge gave four reasons, listed above at para. 9, in support of his conclusion that equal division of the property would be substantially unfair and that the appreciation in the value of the residence should be Ms. Guo's alone. The judge did not accord the first two reasons, being the length of the relationship and Mr. He's lack of significant financial contribution to the relationship or residence, the same prominence he did to his third and fourth reasons, being non-disclosure and malicious intent to harm Ms. Guo. However, the judge, and Mr. He, addressed the reasons independently and I will do the same.
- [17] As noted, the first reason given by the judge for the order is the shortness of the relationship. By s. 95(2)(a), the length of the parties' relationship is a relevant factor. When that relationship is short, that factor by itself may tend to detract from equal sharing and the converse is true when the relationship is lengthy. The judge did not err in considering that this factor weighed against equal division of the property in issue.
- [18] The second reason given by the judge for reapportioning the property in favour of Ms. Guo is the absence of substantial contribution on Mr. He's part to the relationship or the property. Section 81(b) of the Family Law Act provides that a spouse is presumptively entitled to an undivided half interest in family property "regardless of their respective use or contribution". Section 95 then allows for departure from that equal division where it would be significantly unfair not to do so. In making such an assessment, the court may consider the factors enumerated in s. 95(2), as well as "any other factor ... that may lead to significant unfairness" (s. 95(2)(i)). In *Jaszczewska*, Justice Harris recognized the open aspect of s. 95(2)(i) which, in appropriate cases, may make the issue of contribution relevant to reapportionment:
- [44] Having said that, in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the FLA as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much

constrained.

- [19] In *V.J.F. v. S.K.W.*, 2016 BCCA 186, Madam Justice Newbury described the "significant unfairness" threshold for departing from equal division of property as high. In *Khan v. Gilbert*, 2019 BCCA 80, Madam Justice Fenlon observed that "[c]ases in which unequal contribution to family expenses and burdens were found to make it significantly unfair to divide family property equally have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens" (at para. 32). In *Singh*, Madam Justice Garson summarized the proper approach to the contribution issue this way:
- [134] it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczewska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.
- [20] The issue of contribution in this case arose in the context of Mr. He's evidence, rejected by the judge, that he contributed \$200,000 to enhancement of the property. The judge found that Mr. He's contribution was well short of that amount, disqualifying it from meeting the high standard required for reapportionment in Mr. He's favour. That conclusion doomed Mr. He's submission that he should receive more than an equal share.
- [21] There was another side to the reapportionment issue before the judge, however. Ms. Guo claimed reapportionment of Mr. He's presumptive equal share entirely in her favour, and the judge found Mr. He's contribution of \$10,000 supported such an order. With respect, the evidence does not support such a stern conclusion. Applying the high standard discussed in the cases, it seems to me that the financial circumstances relating to this property are not especially unusual. To find that a party of modest income loses the presumptive equal sharing by reason only of having made a small financial contribution is, I consider, contrary to the intention of the Act discussed in the cases cited above, and an error in law.
- [22] I turn to the judge's third stated reason for reapportioning the property in favour of Ms. Guo, a failure by Mr. He to fully disclose his assets. On this issue the judge said:
- [47] Third, the claimant has failed to fully disclose his assets. With respect to RRSPs and TFSAs in his name, these are addressed in the separation agreement dated May 9, 2018 and supplemental agreement dated August 10, 2018 that the claimant executed with his first wife. He attaches the separation agreement (and supplemental agreement) to his January 15, 2020 Form F8 financial statement filed in these proceedings but does not set forth that he has approximately \$29,000 in financial assets for his benefit remaining under his separation agreement (and supplemental agreement) with his first wife.

[48] Similarly, in the claimant's separation agreement (and supplemental agreement) executed with his first wife, a CAD \$400,000 apartment in Wuhan, China is set forth. In his January 15, 2020 Form F8 financial statement, he lists the apartment as having a value of CAD \$300,000 with the following details:

Assets

Details

Date Acquired

Value

...

Apartment in Wuhan China

The real property bought on 21/May/2001 by the Claimant's sister.

My parents have interest on it and they pay the management fees for the property.

The Claimant has sole ownership of the property on or after 12/Jun/2018.

...

...

...

\$300,000

[49] At trial, the claimant also testified that he only recently acquired full ownership of the Wuhan apartment (previously he says he had only a partial interest). According to the claimant, his sister and parents had had interests in the apartment. Other than the claimant's testimony, there was no evidence of the transfer of interests (by gift or otherwise) by the claimant's parents or sister to him or payment by the claimant for such interests. In cross-examination, the claimant agreed that he and his first wife treated the Wuhan apartment as family property. I am also satisfied that if the claimant's parents or sister had given (or sold) their respective interests in the Wuhan apartment to the claimant, the claimant would have caused such to be reflected in his separation agreement with his first wife.

[50] The relevant land registry certificate issued on November 14, 2005 by the Wuhan Dongxihu District People's Government shows the claimant as the sole "land use right holder". In related documents issued on August 11, 2005 by the Wuhan Real Estate Registration and Certificate Issuing Centre, the claimant is shown as the "owner". The space for showing joint ownership is left blank. I reject the claimant's testimony that he was not the sole owner of the Wuhan apartment at all relevant times.

...

- [52] It would be significantly unfair to allow the claimant to share in the appreciation in value of the Meadedale residence where he falsely denies sole ownership of his Wuhan apartment.
- [23] Failure to disclose assets may lead to serious consequences in family litigation. In *Wu v. Sun*, 2011 BCCA 239, Mr. Justice Donald observed:
- [41] I am not the first to observe that non-disclosure is the Achilles heel of family assets litigation. Strong measures are justified in discouraging it. However, one cannot make something out of nothing. The right note of caution was sounded by Madam Justice Baker in *Palanca v. Palanca*, 2005 BCSC 1014:
- [127] Counsel for Mrs. Palanca submitted that the court could draw an adverse inference against Mr. Palanca's estate in relation to the existence of family assets in the Philippines because Mr. Palanca failed to comply with court orders relating to accounting and disclosure. I accept that Mr. Palanca did not meet his obligations in this regard, but an adverse inference is not an adequate substitute for evidence about specific assets, the ownership of those assets, whether the assets were used for a family purpose, or otherwise met the definition of family assets, or the value of the family assets, sufficient to allow for the making of a compensation order that is more than a guess.
- [24] In respect of disclosure relating to the Wuhan apartment, Mr. He submits that the strong evidentiary basis necessary to support the judge's conclusion of non-disclosure is missing. Mr. He refers to his evidence that he attached the agreements made with his former spouse, which refer to the Wuhan apartment and other at issue assets, to his form F8 financial statement filed in these proceedings. That evidence is set out in para. 48 of the judge's reasons, above. He contends that this constituted appropriate disclosure and the judge's reliance on non-disclosure for the purpose of property division is an error in principle that fatally undermines the property reapportionment order.
- [25] In respect of the failure to refer to RRSPs and TFSAs, Mr. He submits that he simply made a mistake in completing his Form F8 Financial Statement. In respect of the Wuhan apartment, Mr. He takes the position that he was not attempting to hide assets but merely pursuing a legitimate, but ultimately unsuccessful, legal argument as to the true owner of the property. In both cases, he notes that the assets were referred to in attachments.
- [26] I can see no error in the judge's recitation of the state of evidence relating to the Wuhan apartment. To it, I would add that Mr. He's January 2020 Form 8 referring to property in Wuhan, China (in which he did not assert the extent of ownership), followed his initial Form 8, sworn in October 2018, that reported his real estate assets as "0". It is significant that Mr. He did not value his interest in the Wuhan property at the times necessary for the judge to determine the extent of appreciation, if any, of that asset during the parties' relationship. There was, in my view, a reasonable evidentiary basis on which to conclude Mr. He had failed in his disclosure obligation. I consider that it was open to the judge to assess the

non-disclosure as coming within s. 95(2)(i) of the Family Law Act and a consideration "that may lead to significant unfairness", providing a proper basis for him to interfere with the presumptive equal sharing of the appreciation of the residence in issue.

[27] However, just because it was a proper consideration in assessing significant unfairness does not mean it mandates an order for complete reapportionment. I will address this consideration below, after discussing the fourth reason given by the judge for reapportioning the property entirely in favour of Ms. Guo.

[28] I turn now to that fourth reason: Mr. He's actions in filing the Immigration Marriage Fraud Report. Like the contribution reason, the judge addressed Mr. He's conduct of filing the Immigration Marriage Fraud Report under s. 95(2)(i) as "any other factor ... that may lead to significant unfairness", and approached the standard of unfairness as incorporating "foundational notions of fairness and justice". The judge adopted Mr. Justice Harris' description of unfairness found at para. 42 of Jaszczewska:

[42] ... one can say that reapportionment will require something objectively unjust, unreasonable or unfair in some important or substantial sense.

He also adopted Madam Justice Garson's description found at para. 134 of Singh:

[134] there must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.

[29] The judge then concluded that Mr. He's actions offended foundational notions of fairness and justice, and allowed for reapportionment in favour of Ms. Guo. He said:

[59] By filing the false Immigration Marriage Fraud Report, the claimant has deliberately attempted to cause financial harm to the respondent and emotional harm to the respondent and her son. There is a close connection to the relief the claimant seeks and his conduct.

[60] The claimant seeks a monetary award related to property division while maliciously trying to harm the respondent financially.

[61] For example, the claimant seeks to justify his claim on the basis that his immigration sponsorship of the respondent and her son has resulted in significant past and future financial savings for the respondent by having her son not classified as an international student. In the past, the result was lower school tuition fees. The claimant then includes his estimate of future tuition savings (\$120,000) as part of his justification for a 60% share of the appreciation in value of the Meadedale residence while, without any basis, having reported to our immigration authorities that the respondent's and her son's permanent residency status had been obtained through fraud. I find that if forced to leave Canada, the respondent would suffer financial harm.

- [62] The claimant's sponsorship of the respondent was an economic characteristic of the parties' relationship which arose during the course of the relationship. The claimant's threats in relation to the respondent's immigration status constitute "family violence": FLA, s. 1(d), "family violence".
- [63] The claimant's filing of the baseless Immigration Marriage Fraud Report was designed to cause the respondent's immigration status to be revoked and thereby destroy the economic component which forms part of one's immigration status.
- [30] Mr. He contends that there was no basis upon which to find the report was motivated by malice, or was intended to cause harm. In my view, the fact of the filing of the report, coupled with its accusatory content which the judge found to be untrue, was sufficient to permit the judge to draw an inference of malicious intent.
- [31] The question remains whether, in the context of the general provision of s. 95(2)(i), Mr. He's filing of the malicious Immigration Marriage Fraud Report was an appropriate consideration in ordering reapportionment in favour of Ms. Guo. In my view, and in the circumstances before us, the answer is no. I read s. 95 as speaking only to reapportionment of property and debt, and addressing factors for consideration on a significant fairness enquiry that relate to those subjects. It is not, in my view, an avenue to obtain compensation for misconduct of parties at large.
- [32] This constraint on s. 95(2)(i) was described by Madam Justice Garson in *Singh*, applying the limited class rule:
- [136] Section 95(2)(i) is a general term, allowing consideration of "any other factor that may lead to significant unfairness." As a general term preceded by a list of specific items, the rule of statutory interpretation known as *ejusdem generis* ("of the same kind"), or the limited class rule, may apply.
- [137] Ruth Sullivan, in *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis Canada: 2014) at pp. 235-236, sets out three requirements for this rule of statutory construction to apply: first, the specific items in the list must belong to a single identifiable class; second, this class must be narrower in scope than the general words that follow the list; and third, the rule cannot be invoked if the specific class inferred from the list has nothing, apart from those items, to apply to.
- [138] Applying these requirements to the provision at issue, if the rule applies, the class cannot be any factor "that may lead to significant unfairness" as this would violate the second requirement as set out by Sullivan. The other factors enumerated in s. 95(2) suggest consideration of aspects of the relationship between the spouses, including its duration, the terms of any agreement, as well as the characteristics of family assets and debt and how the spouses have influenced their value. One of the considerations in s. 95(2)(g) includes an analysis of a spouse's good faith or motive. These factors are broad. Nevertheless, in my view, they all relate to a limited class, namely, the economic characteristics of a spousal

relationship.

- [139] The economic characteristics of a spousal relationship is a broad class, but one that is narrower than the general term in s. 95(2)(i). With regard to Sullivan's third requirement, there are clearly other factors relevant to the class that are not enumerated in s. 95(2)(a)-(h). For example, this limited class would allow for the consideration of the relative contribution of spouses to the acquisition, preservation, maintenance, or improvement of family property during the relationship, as suggested by Jaszczewska at para. 44.
- [33] She went on to consider the application of s. 95(2)(i) as a means to compensate for misconduct. Singh involved a bad faith petition filed in bankruptcy so as to avoid paying the claimant's costs in respect of a property in issue, as well as non-disclosure of assets. In a passage also applicable to Mr. He's non-disclosure, discussed above, Justice Garson said:
- [140] Accordingly, I find that the limited class rule is applicable and I must consider whether the factors the judge relied upon are properly the subject of s. 95(2)(i). In my view, they are. The economic characteristics of a spousal relationship would clearly encompass the existence of undisclosed assets. This class would also permit consideration of the costs of bankruptcy, and a party's motivations for entering bankruptcy, as the trial judge did in the case at bar, and the consequent impact on the value of the asset. ...
- [34] It is worth noting that the misconduct here, unlike in Singh, was characterized by the judge as "family violence" as defined in s. 1. While I would not interfere with that finding, there is nothing in s. 95 that indicates family violence should be awarded special consideration absent impact on (to use the words of Singh) the economic characteristics of a spousal relationship. An unfulfilled intention does not meet that standard, and while Ms. Guo testified that the filing of the Immigration Marriage Fraud Report had a psychological and emotional impact on her, there was no evidence before the court that it had any negative financial consequence or otherwise hindered Ms. Guo in attaining economic self-sufficiency. There was, for example, no evidence she lost opportunity, was delayed in her education, incurred extra expenses, or suffered reduced or lost employment as a result of the report's filing.
- [35] This approach, in my view, accords with the approach of the legislative assembly, which opted to include references to family violence elsewhere in the Family Law Act - for example, s. 37(2)(g) and (h) explicitly require family violence to be considered when assessing the best interests of a child. To interpret s. 95(2)(i) as including family violence when the conduct at issue lacks any sort of economic impact would be contrary to the balance struck by the legislature.

- [36] Importantly, the property provisions of the Family Law Act are not intended to facilitate a free-ranging enquiry into the conduct of the parties. Such a result would expand litigation, creating trials within trials on collateral issues unrelated to the property and financial support claims properly brought under the legislation. It would expand, not streamline, litigation.
- [37] In these circumstances, reliance on the malicious filing of a baseless report to reapportion property amounts to an award akin to damages for misconduct or, at a further extreme, punitive damages for misconduct. Neither, in my view, is contemplated by the applicable provisions, and is contrary to the determined attempt to eradicate general enquiries on the relative conduct of parties as a feature of family litigation, absent conduct relevant to the particular relief claimed in the proceeding. On the evidentiary record, it is my respectful view that the judge erred in his fourth reason for reapportionment in favour of Ms. Guo.
- [38] Given these various conclusions, the question is whether we should interfere with the order.
- [39] Non-disclosure fouls family litigation and calls for strong court response: Wu. This does not mean, however, that the court should move immediately to the greatest consequence - complete reapportionment. Any order for reapportionment necessarily engages the exercise of judicial discretion in determining the appropriate response in the circumstances. Here the judge did not engage this question, leaving it open to us to consider whether the order should stand for this reason alone.
- [40] While there was non-disclosure to a degree, and that is a serious matter, I do not consider the scale of the non-disclosure and its effect upon the proceeding as being so great as to deny Mr. He any share in the property; the order reapportioning assets entirely in favour of Ms. Guo must be set aside. Given the lengthy proceedings that have already been conducted between the parties, I would substitute for the order appealed, an order reapportioning the appreciation in the property in issue 80% to Ms. Guo and 20% to Mr. He. Such an order recognizes the shortness of the relationship and Mr. He's non-disclosure, while still giving weight to the presumption of sharing of family assets.

The Award of Spousal Support

- [41] I turn to the question of spousal support. Mr. He contends that the judge erred in failing to assess the relative income, means and needs of the parties prior to making an order he pay spousal support to Ms. Guo.
- [42] I agree. While the reasons refer to rental income being received by Ms. Guo from the residence, and her studies in acupuncture, the judge does not address her income, means and needs. Nor does he address Mr. He's income, means and needs, other than describing Mr. He as earning the modest amount of \$65,000 during the entire relationship. In order to make an award of spousal support, whether compensatory or non-compensatory, it is necessary, at a minimum, that the judge determine the incomes of the parties and in some fashion consider their means and needs.

[43] In my view, the order for spousal support must be set aside. Rather than grapple with this issue on the evidentiary record before us, I would remit the question of spousal support to the trial court.

Conclusion

[44] In conclusion, I would allow the appeal by setting aside paragraphs 2 and 3 of the order appealed and substituting: a term allowing the respondent Ms. Guo's counter-claim only to the extent of reapportioning the appreciation in value of the family residence from the commencement of cohabitation to the time of trial (\$360,000) as 80% in favour of the respondent, 20% in favour of the appellant; and a term remitting the respondent's claim for spousal support to the Supreme Court of British Columbia for determination.

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Butler"

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