

CANADA / JUDGMENT

Holt v. Holt

2023 BCCA 253

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 253 Holt v. Holt

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Holt v. Holt,

2023 BCCA 253

Date: 20230619

Docket: CA47591

Between:

Jay Clayton John Holt

Appellant

(Claimant)

And

Melissa Jane Holt and JaM Bakery Inc.

Respondents

(Respondents)

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Fitch

The Honourable Justice Griffin

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

dated June 11, 2021 (Holt v. Holt, 2021 BCSC 1145, Vancouver Docket E181014).

Counsel for the Appellant:

L. Spencer

Counsel for the Respondents:

N. Radac

Place and Date of Hearing:

Vancouver, British Columbia

April 18, 2023

Place and Date of Judgment:

Vancouver, British Columbia

June 19, 2023

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Justice Griffin

Summary:

The appellant challenges the amount of compensation ordered to be paid to him by the respondent to buy out his shares in the business owned by the two parties. The appellant argues the judge erred by characterizing \$175,000 that he received in post-separation monthly payments from the business as an advance on his share of the division of family property and deducting this amount from the compensation owed. The appellant argues that this amount as well as an equal amount received by the respondent are profits of the business and family property, to be divided equally.

Held: Appeal dismissed. It was open to the judge to find that the pre-separation payments to both parties were salary and continued to be such for the respondent post-separation. Similarly, as the appellant did not continue working in the business, it was open to the judge to find that the post-separation payments to him were an advance on his share of the family property. The judge made no error of law and her findings of fact are owed deference on appeal.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I.

Overview

- [1] At the heart of this appeal is a simple question: are monies received by Mr. Holt from the parties' bakery business (the "Bakery") since the date of separation properly characterized as a partial advance to him of his equal share in the family's property?
- [2] The trial judge made a finding of fact to the effect that this indeed was the proper characterization of the payments and that accordingly they were to be deducted from the amount Mrs. Holt would pay in her buyout of Mr. Holt's interest in the Bakery.
- [3] Mr. Holt says, on the contrary, the monies were profits of the family business and to be credited to him on an equal division of the family property. He argues the judge erred in fact and in law by finding otherwise.
- [4] I recall once again the reasons of the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, for calibrating the standard of review of a trial judge's findings of fact at "palpable and overriding error". There the imperative for deference was supported by three considerations (at paras. 16-18): (1) the scarcity of judicial resources calls for such limits on judicial review; (2) the deference paid promotes the autonomy and integrity of trial proceedings; (3) the principle recognizes the expertise of trial judges and their advantageous position to make factual findings.
- [5] All three considerations apply here.
- [6] The trial judge had the benefit of the parties' evidence, her findings of credibility (adverse to the appellant on primary pieces thereof) and expert evidence that was not in any way impeached. No palpable and overriding error in the judge's findings of fact has been demonstrated by Mr. Holt. Further, no error of law has been demonstrated. In my view the appeal must fail.

II.

Background

- [7] The parties married in 1999 and have three children.
- [8] During the parties' marriage, they jointly owned and operated the respondent company, JaM Bakery Inc., through which they operated a COBS Bakery franchise. The respondent had begun working part-time at the COBS store in 2008, and over the years built up her skills and training until she was able to purchase the store as a COBS franchise. At that point, both parties worked full-time at the Bakery and initially paid themselves an hourly rate for their work. In late 2015, they began drawing equal monthly payments of \$3,500. The parties separated in 2017, although the exact date was disputed at trial.

- [9] As early as November 2016, the respondent was sleeping on the couch and had told Mr. Holt she wanted to separate. In February 2017, Mr. Holt unilaterally divided the parties' personal bank accounts, and withdrew \$40,000 from the Bakery's corporate banking account, along with several other unilateral financial transactions. The respondent asked him to return these funds but he did not.
- [10] Around April 2017, Mr. Holt stopped working at the Bakery at the respondent's request, but he continued to receive the \$3,500 per month draw.
- [11] In 2018, the appellant filed a notice of family claim in the Supreme Court of British Columbia. The family trial took place between February and April 2021 and the main issues that were disputed were: (1) the parties' separation date; (2) the division of assets; and (3) child support.

III.

Trial Judgment

- [12] No issue is taken with many of the issues initially contested at trial so my review of the reasons for judgment of Justice Jackson will be abbreviated. Of initial importance is the judge's assessment of the credibility and reliability of the parties' evidence. While stating that an overall assessment of the parties' credibility was not required to enable her to find the necessary facts, the judge concluded so:
- [6] In any event, I prefer the respondent's evidence on the three primary points where the parties' evidence conflicts. I find the claimant's testimony in all three areas lacks credibility.
- [13] The judge instructed herself on the legal framework to be applied in apportioning family property under the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [14] The judge then advanced to a critical issue at trial, the valuation of the family property and in particular the COBS Bread bakery franchise, the corporate shares of which were held equally by the parties.
- [15] The parties jointly retained a Chartered Public Accountant and Chartered Business Valuator to undertake an assessment of the fair market value of the shares in the Bakery. That valuator adopted a "capitalization of indicated discretionary after tax cashflow", or CCF, methodology for the valuation.
- [16] In simple terms, this methodology looks at after-tax earnings or "discretionary cash flows" from past years to estimate future discretionary cash flows. This is done by multiplying the company's cashflow by a valuation multiple and then adjusting for various factors (depreciable assets, loss carry forward, interest bearing debt and redundant assets or liabilities) (at para. 13). No issue is taken with the appropriateness of this methodology in the circumstances.

- [17] The valuator's conclusion put the value of the shares at \$500,000 on the date of trial (the actual valuation date was earlier but no objection was taken to considering it applicable at the date of trial).
- [18] The judge proceeded to consider whether an equal division of the family property was significantly unfair. The judge declined to make that finding (at para. 23). No issue was taken with this on appeal.
- [19] The judge concluded that it was fair and just to allow the respondent to pay compensation to Mr. Holt for his half interest in the shares of the Bakery. Ultimately, no issue was taken with this aspect of the resulting order on appeal.
- [20] This brought the judge to effecting the equal division of the family's property and in particular calculating the "Bakery Buy-Out Amount" (at paras. 28 and following).
- [21] Applying the methodology accepted in *Brody v. Brody*, 2019 BCSC 1950, and in order to compensate for various sums received by the parties after separation, the judge adopted this calculation (at paras. 29 and 30):
- A. Determine what amount, if any, the respondent has taken out of the Bakery and converted to personal assets;
 - B. Adjust the fair market value of the Bakery for the amounts in (A) and divide the adjusted fair market value of the Bakery equally between the parties, to arrive at the initial buy-out amount;
 - C. Determine the capital amounts the claimant has already received; and
 - D. Adjust the initial buy-out amount by deducting the capital amounts in (C) to arrive at the final Bakery buy-out amount.
- [30] I will lastly consider the issue of division of the life insurance surrender payout and set-off that amount against the final Bakery buy-out amount.
- [22] Under "A", the judge determined the post-separation draws on the Bakery's assets by the respondent, including a \$40,000 loan to the Bakery and \$46,000 for legal fees, and then added these to the fair market value of the Bakery to arrive at the adjusted fair market value found under "B", for a total of \$586,000. On equal division, that resulted in a sum of \$293,000 to each party. The appellant does not take issue with these findings on appeal.
- [23] The judge turned to the calculation under "C". The judge first determined that the sum of \$40,000 taken by Mr. Holt from the Bakery's corporate bank account was taken after separation and represented "an advance to the claimant toward his share of the family property" (para. 41). The appellant does not take issue with the judge's finding with respect to this \$40,000.

- [24] This brought the judge to the monthly payments received by Mr. Holt from the Bakery after separation. The issue reduces to determining whether these amounts and similar amounts received by the respondent were indeed dividends (as characterized in the books of the Bakery for tax purposes) or wages for work in the Bakery.
- [25] The judge found that the parties initially paid themselves an hourly rate for their work in the Bakery but in late 2015 began draws in an equal amount. At that time both parties were working full-time in the Bakery. Mr. Holt stopped working in the Bakery in April 2017, but he continued to receive a \$3,500 per month draw. This arrangement was most recently reflected in the consent order pronounced by Justice Punnett on 3 July 2020. That order makes clear the nature of those payments was to be determined at trial.
- [26] The judge then reached this critical conclusion (at para. 43):
- [43] Relying on *Brody*, the claimant argues the post-separation monthly advances, which both parties received, were dividends to which both parties were equally entitled as shareholders, and that they should not be considered part of his share of the divided family property. I disagree. The draw amounts were predetermined and did not vary as the Bakery's net income fluctuated. In *Brody*, the company's valuation was based on the net value of its underlying asset, rather than an ongoing operation. But where a spouse who has not worked in an operating family business post-separation has continued to receive funds from the company, the compensation paid by the other spouse to acquire the spouse's share of the family business has been adjusted: *Bartch v. Bartch*, 2019 BCSC 1643 at paras. 343, 383, and 487; *Namdarpour* at paras. 104-107.
- [27] The judge expressly found that Mr. Holt was not "locked out of the jointly owned business, post separation" (at para. 44). The judge further found that the classification of the \$3,500 per month payments as dividends or bonuses in the Bakery's financial statements by the Bakery's accountant was not determinative. That accountant testified that the allocation was based on what was most tax advantageous for the Bakery.
- [28] The respondent has continued to work in the Bakery since separation. She works, on the finding of the trial judge, long hours, particularly since the COVID-19 pandemic. The \$3,500 per month payments she has continued to receive are, on the finding of the trial judge, as they were before separation, compensation for her ongoing role in the Bakery. The respondent is now not only responsible for one aspect of the Bakery's business but is also now fully responsible for the financial side of the Bakery which Mr. Holt dealt with previously. The judge found that the additional wage the respondent has received starting in the 2018 fiscal year reflects her additional responsibility. The fact that this is documented as a "baker wage" does not mean that Mrs. Holt is compensating herself twice for the baking tasks she was also completing previously; the judge found that it was clear that Mrs. Holt has had greater responsibility since separation and her additional wage reflects this.

- [29] Having determined the nature of the payments to the respondent, the judge turned to the characterization of the same payments to the appellant, who had not continued to work in the Bakery. While the judge agreed that the respondent's efforts in the family business post-separation were not a basis for unequal division of family property in this case, she stated that unequal division is different from making deductions from the appellant's half share to account for his receiving advances on that family property post-separation (at para. 48).
- [30] The judge concluded (at para. 49):
- [49] I find the \$3,500 per month payments the claimant received beginning May 2017, and which I understand he would have received through to June 2021 and therefore total \$175,000, were advances towards his share of the family property. That amount will be deducted from the compensation funds he is to receive from the respondent.
- [31] The judge made certain other adjustments to the Bakery Buy-Out Amount but the treatment of the \$175,000 paid to Mr. Holt after separation is a central issue on appeal.

IV.

Analysis and Disposition

- [32] Mr. Holt's case on appeal reduces to this: the \$175,000 he received after separation was his share of the profits of the company and he is entitled thereto as he would be to an increase in the value of the family property post-separation to the date of trial, irrespective of contribution: among others *Lin v. Wang*, 2019 BCSC 1169; *Jean Louis v. Jean Louis*, 2020 BCCA 220 at paras. 32-35; *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 39.
- [33] Mr. Holt maintains that to deny him his share of the profits in the Bakery post-separation is to effectively result in an unequal distribution of the family property when all are agreed that this is a case for equality. He submits that this amounts to an error of law.
- [34] But the premise of this submission founders on the finding of fact by the trial judge. The monthly draws to the parties of \$3,500 were not, on the finding of the judge, a distribution of profits. They may be called "dividends" in the books of the company but that is not dispositive. They can be characterized as in fact salary to Mrs. Holt (*Namdarpour v. Vahman*, 2017 BCSC 1189, 2019 BCCA 153 [*Namdarpour* 2019]) and hence, in the absence of an earned salary by Mr. Holt, as an advance on his share of the family property. As I have said, Mr. Holt stresses a spouse's entitlement to share in property value increases, or business profits post-separation, but here the \$175,000 he received cannot be so characterized as found by the judge.
- [35] As part of his argument, the appellant takes issue with the judge's finding that Mr. Holt was not locked out of the Bakery post-separation. He argues that, following *Namdarpour* 2019 at para. 68, a spouse should not be "rewarded" for locking the other spouse out of involvement in a family business by receiving effectively a reapportionment of the post-separation increase in value. Mr. Holt submits that the judge implicitly placed a burden on him to

establish why he did not force his way back into the Bakery when the respondent asked him to stop working there.

- [36] Determinations of whether a spouse has been "locked out" or prevented from continuing to work in a family business post-separation, and how best to address any resulting inequity, are highly fact-specific. In *Namdarpour*, the respondent had similarly taken full carriage of the family business after having demanded the keys from the appellant. Prior to separation, the parties had operated two kiosks each at ferry terminals, two in Tsawwassen and two in Nanaimo.
- [37] The trial judge found it would be significantly unfair to value the property at the presumptive date of trial under s. 87(b)(ii) of the FLA, reasoning that any increase in post-separation value was attributable to increased sales due to the efforts of the respondent. On appeal, Justice Savage for this Court disagreed, noting that under the FLA, equal division is not tied to contribution.
- [38] Savage J.A. found that there was no evidence to show that increased sales were the main factor in the increase in the company's value in the relevant period. In addition, that period was the first full year that the company had operated four kiosks instead of two, the appellant having operated the two new kiosks in Tsawwassen. Thus, the evidence did not show that any increase in value was due primarily to the respondent's efforts, and therefore valuation at trial would not be significantly unfair to the respondent.
- [39] It is clear that the Court's comment in *Namdarpour* 2019 that the respondent should not be rewarded for locking out the appellant is in response to the trial judge's departure from the presumptive valuation date of trial in favour of the date of separation. Inequity in this regard will most often be addressed by adhering to the date of trial, ensuring that post-separation increases in family property are shared: *Jaszczewska* at para. 39. Here, the judge did not depart from the presumptive date of trial and therefore no similar inequity arises.
- [40] Mr. Holt argues that the judge's characterization of the payments to him as an advance effectively divided family property at the date of separation. I disagree. As I have said, the judge made a factual finding that the payments to both parties up until April 2017 were in fact compensation for their work in the Bakery. This is consistent with the Court's reasoning in *Namdarpour* 2019 at paras. 84, 91-91, and 106-107.
- [41] Significantly, the appellant in *Namdarpour* did not receive further payments from the company after she surrendered the keys, other than a \$35,000 interim distribution payment by the order of a judge. This is altogether different from the present situation in which the appellant continued to receive monthly payments post-separation identical to those received prior to separation.

- [42] I note, however, the trial judge's comment at para. 44 that "if [the appellant] had wanted to continue working in the Bakery, he could have done so" does not necessarily reflect the reality of a separation where both spouses work in a family business. In my view, there can be no substantive difference between a forcible lockout in which physical or digital access to the business is surrendered, and a request by one spouse that the other cease working with which the other in good faith complies.
- [43] However, as I have explained, the remedy for any unfairness resulting from either situation will most often be to adhere to the statutory presumptive date of trial for the division of family property, so here the result does not turn on the judge's finding that the appellant was not "locked out".
- [44] As a result, no error of law or palpable and overriding error has been established.
- [45] Mr. Holt indeed has fully enjoyed the actual profits of the company post-separation to the date of trial because those actual profits are reflected in the methodology applied to value the shares in the company at \$500,000: as discussed, the CCF method is based on multiplying a company's discretionary cashflow by a valuation multiple and then undertaking certain adjustments.
- [46] In my view there is no merit to Mr. Holt's submission that he has been denied an equal distribution of the family asset represented by the Bakery by being denied, in effect, receipt of his share of the profits post-separation to the date of trial.
- [47] I would dismiss the appeal.
- "The Honourable Chief Justice Bauman"
- I agree:
- "The Honourable Mr. Justice Fitch"
- I agree:
- "The Honourable Justice Griffin"

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