

CANADA / JUDGMENT

K.S. v. C.W.K.

2024 BCSC 2244

COURT

Supreme Court of British Columbia

DECIDED

11 December 2024

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2024 BCSC 2244 K.S. v. C.W.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.S. v. C.W.K.,

2024 BCSC 2244

Date: 20241211

Docket: E11158

Registry: Prince Rupert

Between:

K.S.

Claimant

And

C.W.K.

Respondent

Before: The Honourable Justice K. Loo

Reasons for Judgment: Application to reopen trial

Counsel for the claimant:

W. MacGregor

Appearing on his own behalf:

C.W.K.

Written materials filed:

Prince Rupert, B.C.

October 1 and

November 6, 14 and 18, 2024

Place and Date of Judgment:

Prince Rupert, B.C.

December 11, 2024

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Introduction and background

- [1] I heard the trial of this family law proceeding during the course of three days between July 16-18, 2024, and I issued reasons for judgment on August 12, 2024, indexed as 2024 BCSC 1459 (the "Trial Reasons"). The Trial Reasons dealt with property division, parenting arrangements, and support obligations, among other issues.
- [2] Subsequent to trial, the respondent filed materials in which he asked the Court to reconsider its decision in two respects. He submits that:
- a) the quantum payable by him in relation to two pieces of real property found to be family assets should be reduced on account of capital gains tax and a realtor's commission;
 - b) an error was made with respect to the quantum of support owed by him, caused by the fact that a page was missing from a table appended to his affidavit.

Procedural issues

- [3] The claimant observes, correctly, that the respondent's materials are not in the proper form. The respondent ought to have filed a notice of application seeking an order reopening the trial and a reconsideration of the Court's original decision. Instead, the respondent has filed a petition.
- [4] However, the respondent is self-represented, and, in my view, it is appropriate to consider the submissions made by the respondent on their merits, rather than requiring him to remake his materials in the proper form. The petition and affidavit that he has filed set out his argument, the relief sought, and some evidence in support. I will regard his materials as a notice of application, with affidavit material in support.
- [5] Upon receiving and reviewing the materials, I have also considered whether it is necessary to hear oral argument from the parties in relation to the issues raised. I have concluded that it is not. The claimant has filed a response to petition that clearly sets out her position, together with argument on both of the points raised by the respondent.
- [6] As is well known, Rule 1-3 states that the object of the Supreme Court Civil Rules, B.C. Reg. 168/2009, is to secure the just, speedy, and inexpensive determination of every proceeding on its merits. I have concluded that a just and fair decision on these subsidiary issues can be made without oral submissions. In those circumstances, it is my view that the object of the Rules is best met by determining the issues on the basis of the written materials without using any further court time.

Discussion

Legal principles regarding the reopening of a trial

- [7] Before this Court may reconsider the issues raised by the respondent, the trial must be reopened. In *Moradkhan v. Mofidi*, 2013 BCCA 132 at para 31, the Court of Appeal set out the principles applicable to an application to reopen a trial as follows:
- it is generally speaking in the interests of justice to consider that a trial is complete when each side has closed their case and the judge has delivered his or her judgment
 - a judge's unfettered discretion to reopen a trial should be exercised with restraint;
 - a party may not use the rule to re-argue, re-cast, or re-state his or her case, rather the rule is available to remedy what might otherwise be a substantial injustice;
 - it is not intended that a party should be able to lead substantial new evidence, nor does the rule generally permit the leading of new expert evidence;
 - the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision; and

· the discretion should only be exercised if the reception of the new evidence would probably change the result of the trial.

[8] Further, at para 31 of Moradkhan, the Court of Appeal held:

I would add to this list that a judge may reasonably exercise such discretion where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. Finally, the overarching consideration is whether it is in the interests of justice that the court reopen the case. (See also Brown v. Douglas, 2011 BCCA 521, 314 B.C.A.C. 143.)

[9] In light of these principles, I will consider each of the issues raised by the respondent.

Issue #1: tax consequences of a property division order

[10] At trial, the claimant sought, among other relief, declarations that the respondent beneficially owned half-interests in a property in Prince Rupert and two properties in Mission, British Columbia.

[11] In the Trial Reasons, I held that the respondent was the beneficial owner of a half-interest in each of the Mission properties, but not the Prince Rupert property. I held that the claimant is entitled, in respect of each of the Mission properties, to one quarter of the amount by which those properties increased in value during the parties' relationship - that is, one half of the respondent's interest, which itself is a one-half interest in each property: Trial Reasons, paras 24 and 26.

[12] I concluded that the amount payable to the claimant by the respondent on account of the increase in the value of the two Mission properties is \$264,250: Trial Reasons, para 28.

[13] The respondent now argues that he will be required to pay capital gains tax and a realtor's commission on the sale of the two Mission properties and that these amounts should be deducted from the amount owed by him to the claimant. In support of his position, he relies on a letter from an author described as a "tax professional at H&R Block."

[14] The claimant argues that the trial ought not to be reopened to hear the respondent in respect of this issue. I agree that, with respect to this first issue, the respondent does not meet the criteria in Moradkhan.

[15] The letter from the tax preparation provider is inadmissible for a variety of reasons - including that it is hearsay and that it does not comply with the rules regarding expert reports. Even if it were otherwise admissible, it would be new expert evidence, which is generally impermissible based on the fourth principle set out in Moradkhan.

[16] Most importantly, even if the trial were reopened, the respondent's claim in respect of this issue would, in my view, fail on its merits. As stated in Moradkhan, the discretion to reopen a trial should only be exercised if the reception of new evidence would probably change the result of the trial.

- [17] The respondent's argument on this issue is answered by the decision of the Court of Appeal in *Maguire v. Maguire*, 2016 BCCA 431. In *Maguire*, the Court of Appeal held:
- [30] In my view, there is nothing in the FLA that suggests or entails that the meaning of "fair market value" is anything other than its ordinary meaning. The business valuator's definition and the Black's Law Dictionary definition are consistent. Fair market value is the price at which a transaction would occur, in an open and unrestricted market between informed and prudent parties acting at arm's length, where neither party is acting under compulsion. Thus, if the sale of an investment property would trigger a capital gain, and capital gains tax payable by a vendor, the fair market value of the property is not reduced by the taxes payable by the vendor. It follows that the use of "fair market value" in s. 87 does not entail that the fair market value of family property is reduced by taxes payable.
- [Emphasis added]
- [18] This passage from *Maguire* was cited with approval and applied by this Court in *Gavriel v. Gavriel*, 2017 BCSC 1653 at para 70.
- [19] Section 87 of the Family Law Act, S.B.C. 2011, c. 25, provides that unless an agreement or order provides otherwise, "the value of family property must be based on its fair market value." As a result of *Maguire* and *Gavriel*, if the sale of an investment property would trigger a capital gain, and capital gains tax therefore would be payable by a vendor, the fair market value of the property for the purposes of a property division order is not reduced by the taxes payable by the vendor.
- [20] In my view, there is no reason why the realtor's commission ought to be treated differently than the capital gains tax in determining fair market value.
- [21] The respondent cites the decision in *Aldewood v. Aldewood*, 2024 BCSC 1568 in support of his position on this issue. In that case, the Court held:
- [74] To the extent a capital gain must be paid by Best Tech in relation to the sale of the Kennard Property, I find that such capital gain is a liability of the company. To the extent Mr. Aldewood and Ms. Aldewood may be found personally liable for this debt of the company, the capital gain is a family debt.
- [22] However, in *Aldewood*, the property had been sold and the tax paid before trial. As a result, the tax was a family debt that was in existence at the trial date. Those are very different circumstances than in this case, in which the Mission properties have not been sold and no tax has been paid.
- [23] For these reasons, I am not prepared to reopen the trial in respect of the first issue raised by the respondent.

Issue #2: amount paid to date by way of support

- [24] At the trial, the respondent sought, among other relief, a reassessment of his child and spousal support obligations that were the subject of an order made by another justice of this Court in 2020.
- [25] In the course of the Trial Reasons, I reassessed his support obligations between 2020 and the date of trial. I retroactively reduced the amount of support payable by him, and held that his past support obligations ought to have totalled \$54,592: Trial Reasons, para 68. At paras 69-70 of the Trial Reasons, I held:
- [69] As against these obligations, the respondent has made significant payments. A chart made by the Family Maintenance Enforcement Program shows that, in total, the respondent has paid \$79,727.16 in spousal and child support to the claimant.
- [70] The past amount paid in support by the respondent exceeds his obligations, as they have been reassessed, by \$25,135. This difference shall be credited to the respondent as an offset against the property award set out earlier in these reasons.
- [26] As is evident from para 69 of the Trial Reasons set out above, I calculated the overpayment of the respondent's support obligations based on a chart made by the Family Maintenance Enforcement Program, which was exhibited to an affidavit filed by the respondent. At the time, I understood that this chart set out all of the amounts paid by way of support by the respondent to the date of trial.
- [27] It was discovered by the respondent, subsequent to the issuance of the Trial Reasons, that the copy of the FMEP chart in the respondent's affidavit was missing a page. As a result, my conclusion regarding the total past amount paid by the respondent was understated by \$6,280.
- [28] In my view, the application of the Moradkhan factors in respect of this issue supports the reopening on the trial. As stated by the Court of Appeal in that case at para 31, a judge may reasonably exercise his or her discretion to reopen a trial "where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error."
- [29] In this case, no party is seeking to adduce substantial new evidence. The reason that the correct evidence was not led at trial is clear: a page was omitted, by inadvertence, from the respondent's affidavit.
- [30] The Court's intention in the Trial Reasons was to give the respondent credit for the past amount of support that he actually paid. In my view, a substantial injustice would result if that intention were not achieved because of a copying error in an affidavit.

[31] For these reasons, I have concluded that the trial ought to be reopened with respect to the amount of support paid by the respondent. The amount paid by him was \$86,007.16 and not \$79,727.16. The amount that ought to be credited to him and offset against the other amounts owed by him as a result of the Trial Reasons is increased by \$6,280 from \$25,135 to \$31,415.

Conclusions

[32] The respondent's application to reopen the trial so that the Court may reconsider whether capital gains tax and real estate commission ought to be deducted from the value of the two Mission properties is dismissed.

[33] As against the property award made against the respondent in the Trial Reasons, the respondent shall be credited with the sum of \$31,415 (instead of the sum of \$25,135) arising from the overpayment of support, as reassessed.

"The Honourable Justice Loo"

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