

CANADA / JUDGMENT

Ke v. Zhang

2025 BCCA 245

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 245 Ke v. Zhang

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ke v. Zhang,

2025 BCCA 245

Date: 20250711

Docket: CA50125

Between:

Xuehui Ke

Appellant

(Respondent)

And

Junyan Zhang

Respondent

(Claimant)

Corrected Judgment: The text of the judgment was corrected on the cover page on September 10, 2025.

Before:

The Honourable Madam Justice Horsman

The Honourable Justice Riley

The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated
June 13, 2024 (Zhang v. Ke, Vancouver Docket E220944).

The Appellant, appearing in person:

X. Ke

Counsel for the Respondent:

E.M. Witzman

Place and Date of Hearing:

Vancouver, British Columbia

May 26, 2025

Place and Date of Judgment:

Vancouver, British Columbia

July 11, 2025

Written Reasons by:

The Honourable Justice Riley

Concurred in by:

The Honourable Madam Justice Horsman

The Honourable Justice MacNaughton

Summary:

In this family law matter, Mr. Ke appeals each and every aspect of the trial judge's order, except for the divorce. His principal argument is that his trial counsel took various positions without proper instructions, or contrary to his instructions. He also argues that the trial judge erred in failing to accept his position at trial on certain matters, including property division and child support. Held: Appeal allowed in part. This is not one of the "rarest of cases" where the appeal court will give effect to a claim of ineffective assistance of counsel in a civil matter. This conclusion is dispositive of the bulk of Mr. Ke's grounds of appeal. With regard to the remaining grounds: (i) the trial judge erred in his determination of Ms. Zhang's guideline income for the purposes of child support, and the appeal is allowed to the limited extent of increasing the quantum of Ms. Zhang's retroactive and prospective child support obligations, and (ii) Mr. Ke has failed to show any other error in the trial judge's decision.

Reasons for Judgment of the Honourable Justice Riley:

Introduction

- [1] After a four-day trial in the Supreme Court of British Columbia, the trial judge gave a decision dealing with all aspects of this family law case between the appellant Mr. Ke and his former spouse Ms. Zhang, including child support, spousal support, property division, and a divorce order. With the exception of the divorce, Mr. Ke now appeals every other aspect of the final order.
- [2] Many of Mr. Ke's arguments rest on the contention that his trial counsel acted contrary to his instructions and did not effectively represent his interests. For reasons explained below, I would not give effect to any of these submissions. Among other things, it would be unfair to Ms. Zhang to allow Mr. Ke to resile from the positions he took at trial. Nor can it be said that the trial judge erred in making orders based on the positions taken by Mr. Ke, through his counsel. Mr. Ke's principal complaint would appear to be with his trial counsel, not with the trial judge's decision.
- [3] With respect to the grounds of appeal that are not entirely dependent on Mr. Ke's complaints about improper representation at trial, I conclude, for the reasons set out below, that all but one of them lack merit. The sole exception is the trial judge's determination of Ms. Zhang's income for child support purposes. On that issue, I would vary the trial judge's order, resulting in a slight increase in the quantum of both retroactive and prospective child support payable by Ms. Zhang.

Facts

- [4] Mr. Ke and Ms. Zhang had an 11- or 12-year relationship beginning in or about 2008, when both of them were living in Singapore, and ending with their separation in June 2020, by which time they had two children, and had relocated to Canada. Given the breadth and scope of the issues raised on appeal, it is necessary to set out, at least in skeletal form, the key events in the relationship:
- i) The parties met in 2008 or 2009, in Singapore. Mr. Ke had a degree in engineering and worked in the field of information technology ("IT"). Ms. Zhang worked as a nurse.
 - ii) The parties began cohabiting in or about October 2009, and married on 1 August 2010, in Singapore.
 - iii) On or about 1 August 2010, the parties acquired their first home, a condominium in Singapore (the "Singapore property").
 - iv) In 2012, Mr. Ke obtained an IT job with a Singaporean firm called Micro Focus.
 - v) In 2013, while the parties were still in Singapore, the parties had their first child.

- vi) In 2014, Mr. Ke started a new IT position with Micro Focus in Toronto and the parties relocated. Ms. Zhang left her nursing job in Singapore, incurring a debt of \$19,000 for breaking her employment contract with the National University Hospital ("NUH"). Ms. Zhang's plan was to obtain certification to work as a nurse in Canada.
- vii) In 2017, the parties had their second child, who was born in Toronto.
- viii) In 2018, Mr. Ke took an IT position with Micro Focus in Vancouver. The family relocated to British Columbia. Up to this point, Ms. Zhang had not been successful in obtaining certification to work as a nurse in Canada.
- ix) Later in 2018, the parties purchased a house in Langley (the "Langley property").
- x) On 1 June 2020, Mr. Ke and Ms. Zhang separated. Ms. Zhang continued to live in the Langley property with the children. Mr. Ke rented an apartment nearby. Mr. Ke's parents, who by this time had relocated from Singapore to Canada, lived in the Langley property, and assisted with childcare.
- xi) On 26 January 2021, still unsuccessful in obtaining certification to work as a nurse in Canada, Ms. Zhang returned to Singapore to resume her nursing career. She took up residence in the Singapore property, which the parties still owned.
- xii) On 1 February 2021, Mr. Ke moved back into the Langley property and assumed primary parenting responsibility for the children. His parents continued to live in the residence and assisted with child care.
- [5] The four-day trial commenced on 18 December 2023. Both parties were represented by counsel.

The Trial Judge's Decision

- [6] The trial judge gave oral reasons for judgment on 13 June 2024 ("Reasons").

Parenting Orders

- [7] The trial judge ordered that the two children were to be primarily resident with Mr. Ke. Ms. Zhang was to have parenting time for one month every summer, and liberal communication with the children via the Internet. The judge also ordered that Ms. Zhang would have a right to review the parenting arrangement upon returning to full-time residence in Canada.

Division of Family Property and Debt

- [8] The trial judge ordered equal division of all family property and debt, with one exception which I will discuss below.
- [9] The trial judge rejected Mr. Ke's claim that certain funds given to him by his parents were excluded property, finding that, on the available evidence, the funds were simply movements of money between Mr. Ke and his parents and not gifts to Mr. Ke.

- [10] The sole exception to the judge's decision to order equal division of family property and debt related to Mr. Ke's reduction of the principal amount of the mortgage on the Langley property, arising from Mr. Ke's payment of the mortgage from the date of separation to the date of trial. The judge rejected Mr. Ke's broader argument that he should receive credit for all of the property's carrying costs (mortgage payments, property taxes, and insurance) from the date of separation to the trial date, taking into account that Mr. Ke had been living in the property from February 2021 onward, that he had been collecting rent for the basement suite, and that his parents also lived in the property rent-free.
- [11] The trial judge rejected Ms. Zhang's argument that there should be unequal division of property in her favour based on non-disclosure of documents by Mr. Ke. The judge found that although Mr. Ke did not meet his obligation to make timely disclosure of all relevant documents, it was a case of delayed disclosure rather than non-disclosure. The judge further found that Ms. Zhang's case was not impaired by the dilatoriness of Mr. Ke's disclosure. Nor was the judge satisfied that Mr. Ke had substantial undisclosed assets.
- [12] In the result, the trial judge made the following orders or directions with respect to the various categories of family property in issue:
- i) Accounts and Investments. The trial judge ordered equal division of the Canadian accounts and investments. With respect to the Singaporean accounts and investments, the trial judge directed that the parties were to arrange between themselves for equal division, with a right to seek further orders if the details could not be resolved.
 - ii) Singapore Property. The trial judge directed that the parties arrange for the transfer of the property into Ms. Zhang's name under Singapore law, with Mr. Ke to receive a compensation payment for his share of the total net value, being \$700,000 less the outstanding mortgage of \$298,600. Either party would have the right to seek further orders if they were unable to resolve the details.
 - iii) Langley Property. The trial judge ordered that Mr. Ke was to account to Ms. Zhang for her one-half share in total net value of the property, being \$1,449,000, less the outstanding mortgage of \$593,200, with Mr. Ke also receiving credit for one-half of the reduction in the principal amount of the mortgage from 1 February 2021 (the date Mr. Ke moved back into the Langley property) to 31 December 2023 (the end of the month when the trial took place).
 - iv) Personal Property. The trial judge accepted Ms. Zhang's evidence as to the value of an upright piano (\$10,000), Mr. Ke's vehicle (\$15,000), and the difference in value between the furniture in the Langley property retained by Mr. Ke and furniture in the Singapore property retained by Ms. Zhang (\$7,000). The judge ordered Mr. Ke to pay compensation of \$16,000 to equalize the interests of the parties in this personal property.

Child Support

- [13] The trial judge held that Mr. Ke was required to pay Ms. Zhang retroactive child support of \$1,522 per month from the date of separation (1 June 2020) to the date that Ms. Zhang ceased to have primary parenting responsibility (31 January 2021), for a total retroactive child support obligation of \$12,176.
- [14] The trial judge held that, although Mr. Ke became the primary caregiver from 1 February 2021 onward, Ms. Zhang was "not in a position to pay child support immediately", because she had no job for her first six months in Singapore, and she was "dealing with joint debts": Reasons at para. 45. The judge held that Ms. Zhang was required to pay retroactive child support of \$1,155 per month from 1 January 2022 to 31 December 2022, totalling \$13,872 for the 2022 calendar year.
- [15] With respect to 2023, although Ms. Zhang's reported income was \$76,331, the trial judge found that it would be unfair to use this figure to determine her child support obligation, because she had to incur costs to travel back to Canada for the trial. The judge fixed Ms. Zhang's income at \$72,000 per year, which resulted in a monthly child support obligation of \$1,117 commencing 1 January 2023, and payable until further order of the court.
- [16] The trial judge directed that the parties were to review their child support obligations annually, commencing on 1 July 2025.

Spousal Support

- [17] Both parties agreed (through submissions of counsel) that Ms. Zhang was entitled to spousal support on a compensatory basis. The judge endorsed that position, citing *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 for the proposition that "compensatory support is intended to provide redress to a spouse for economic disadvantages arising from the marriage or from an economic advantage [flowing] to the other spouse". In the judge's view, this reasoning applied because of "a number of economic disadvantages" borne by Ms. Zhang as a result of the joint decisions the parties made over the course of the marriage: Reasons at paras. 48-49.
- [18] The trial judge took into account that, based on the length of the relationship, the minimum duration of Ms. Zhang's entitlement to support as suggested by the Spousal Support Advisory Guidelines ("SSAGs") was five years. The trial judge also reasoned that it would take Ms. Zhang until the middle of 2027 (six years and one month from the date of separation) to realize her plan to upgrade her education to fully qualify for work as a nurse in Canada. This would allow Ms. Zhang to achieve an "earning power" that was "close to equal" with Mr. Ke's, in order to ameliorate her "economic disadvantage": Reasons at para. 51.
- [19] With regard to the quantum of support, the trial judge determined that, based on the incomes of the parties, and taking into account the suggested ranges of support set out in the SSAGs, Ms. Zhang should receive spousal support of \$400 to \$450 per month.

- [20] Rather than ordering periodic ongoing spousal support, the trial judge agreed with Ms. Zhang's submission that this was an appropriate case for an award of lump sum spousal support. After taking into account the tax implications of a lump sum award for both parties, the judge fixed the amount of the lump sum at \$28,000: Reasons at para. 54.

The State of the Record on Appeal

- [21] Mr. Ke, who is self-represented on appeal, prepared his own appeal book. The contents came from his own "file", and not from the court below. Some of the documents correspond with the record in the court below, but others were never before the trial court in any form whatsoever. This is highly irregular. However, no objection was taken by the respondent, and the inadequacy of the appeal book did not come to the Court's attention until it was raised by the division during the hearing of the appeal. In the circumstances, the division heard the appeal notwithstanding the irregularity. Regardless of the contents of the appeal book, the appeal must be decided based solely on a consideration of the pleadings, the transcript of trial proceedings, documents that were marked in evidence or otherwise filed with the trial court, the trial judge's reasons for judgment, and the entered order.

Mr. Ke's Arguments on Appeal

- [22] The grounds of appeal listed in the "Errors in Judgment" section of Mr. Ke's factum do not line up with the points raised in the "Argument" section, although there is some overlap between the two. I find it most convenient to first address Ground A in Mr. Ke's "Errors in Judgment" -- that the trial judge erred by basing his judgment on "false submissions and presentation" from Mr. Ke's trial counsel -- as this was an overarching theme of Mr. Ke's appeal. I will then go on to discuss each of the points raised in the "Argument" section of Mr. Ke's factum.

Complaints About the Conduct of Trial Counsel

- [23] Mr. Ke argues that the trial judge erred in basing his decision on positions that were stated by his trial counsel without Mr. Ke's agreement or consent, or contrary to Mr. Ke's express instructions. Among other things, Mr. Ke says his trial counsel disregarded his instructions: (i) to advance certain arguments in favour of unequal division of family property and debt; (ii) to oppose Ms. Zhang's entitlement to spousal support; (iii) to seek occupation rent or compensation for rental costs during the time he lived away from the Langley property; and (iv) not to concede his obligation to pay child support during the time that the children resided primarily with Ms. Zhang.

- [24] This Court has consistently held that, in civil appeals, arguments relating to ineffective assistance of counsel "will succeed only in extraordinary circumstances": *Jagpal v. Samra*, 2024 BCCA 384 at para. 46; *Nguyen v. 1108911 B.C. Ltd.*, 2024 BCCA 48 at para. 37, citing *D.W. v. White* (2004), 189 O.A.C. 256 at para. 55 [leave ref'd [2004] S.C.C.A. No. 486]. There are several reasons for this.
- [25] First, any grievance about the performance of the appellant's own trial counsel will generally be a matter between the appellant and the lawyer. The proper avenue of redress for such a grievance is generally a civil claim against the lawyer: *Jagpal* at para. 46; *Nguyen* at para. 34.
- [26] Second, complaints about the performance of an appellant's own trial counsel will almost invariably have nothing to do with the respondent. It is generally unfair to visit the consequences of the appellant's alleged improper representation at trial upon an innocent respondent: *Jagpal* at para. 46; *Nguyen* at para. 33.
- [27] Third, civil cases generally do not involve intrusions upon liberty, state-imposed sanctions, or the determination of Charter-protected interests giving rise to an overarching concern about the conduct of counsel and its impact on the integrity of the justice system: *Nguyen* at paras. 30, 32.
- [28] Fourth, the proper litigation of an appeal alleging ineffective assistance of counsel often requires additional procedural steps, including fresh evidence, and possible determinations as to the scope of waiver over solicitor-client privilege. Where these steps are not taken, the appeal court will only have a "partial picture" of what transpired between trial counsel and the appellant: *Nguyen* at paras. 30-31.
- [29] To sum all of this up, "the nature of the interests engaged, finality, issues of process and evidence, the role of a respondent in a civil appeal, fairness to the respondent in a civil appeal, and the availability of an alternative remedy that can provide an appellant with redress", all weigh heavily against a successful appeal based on ineffective assistance of trial counsel in a civil matter: *Nguyen* at para. 35.
- [30] Civil appeals based on ineffective assistance of counsel will only be viable in "the rarest of cases" or in "extraordinary circumstances": *Nguyen* at paras. 36-37, citing *D.W.* at para. 55; *Mediatube Corp. v. Bell Canada*, 2018 FCA 127 at para. 41. Such extraordinary circumstances might arise where there is "some overriding public interest", where "the interests of vulnerable persons like children or persons under mental disability" are at stake, or where "one party to the litigation is somehow complicit in the failure of counsel opposite to attain a reasonable standard of representation": *D.W.* at para. 55.
- [31] I would not characterize the present appeal as extraordinary. The interests at stake are purely financial. There is no fresh evidence application, so the Court has only a "partial picture" of the conduct that is the subject of Mr. Ke's complaints. Furthermore, in my view, it would be unfair to Ms. Zhang to revisit the trial results based on issues that have nothing to

do with her. Indeed, the appellant is now seeking to resile from positions taken in the court below, which is objectionable because it creates unfairness and undermines the principle of finality: *Deissner v. Boorsma*, 2023 BCCA 476 at paras. 19, 24. For all of these reasons, I would not give effect to any of Mr. Ke's arguments about the conduct of his trial counsel.

Appellant's Challenges to the Trial Judge's Findings

(i) Langley Property Division

- [32] Mr. Ke seeks to overturn the trial judge's ruling ordering equal division of the Langley property, subject only to Mr. Ke receiving credit for the reduction in the principal value of the mortgage from the date of separation to the trial date. Mr. Ke argues that, for a number of reasons, equal division of the Langley property would be significantly unfair within the meaning of s. 95(2) of the Family Law Act, S.B.C. 2011, c. 25. He says that to address the unfairness, he ought to receive 80% of the property's net value. However, at trial, Mr. Ke's counsel conceded that the Langley property ought to be divided equally, subject only to Mr. Ke receiving credit for the post-separation carrying costs. For the reasons given above, I would not allow Mr. Ke to resile from this position on appeal based on alleged ineffective assistance of counsel.
- [33] What remains for consideration under this heading is whether the trial judge erred in failing to find significant unfairness based on the fact that Mr. Ke covered all of the carrying costs -- specifically the mortgage, property taxes, and insurance payments -- from the date of separation to the trial date. The respondent submits that it is not open to Mr. Ke to argue this point on appeal because he did not argue for "unequal division" at trial. I do not agree. Although Mr. Ke's trial counsel did not use the terms "significant unfairness" or "unequal division" in his submission, he did argue that Mr. Ke ought to receive credit for all of the carrying costs between separation and trial. The presumption of equal division of family property applies to post-separation increases in the value of property, regardless of contribution: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 39; *Storey v. Terry*, 2020 BCCA 30 at paras. 22-26. Thus, the argument that Mr. Ke should receive credit for all of his post-separation contributions to the Langley property was, in effect, a plea for unequal division based on significant unfairness, despite the fact that his counsel did not couch it in those terms.
- [34] Turning to the merits of Mr. Ke's argument, he says it is significantly unfair that he paid carrying costs that according to him total some \$157,635, but was only given credit for the reduction in the mortgage which amounts to \$59,120. He also argues that it is significantly unfair for Ms. Zhang to share in the increase in the value of the property by hundreds of thousands of dollars over a time frame when he was covering the entirety of the carrying costs.

- [35] The standard of review in family law matters, including issues of property division, is highly deferential: *Poon v. Yuen*, 2024 BCCA 374 at para. 24. A decision concerning a claim for reapportionment under s. 95(2) of the Family Law Act is discretionary, and will only be revisited on appeal where there has been a clear misdirection, or where the decision is so clearly wrong as to be unjust: *Storey* at para. 18.
- [36] Mr. Ke has not shown that the trial judge's decision is tainted by any misdirection, or is so clearly wrong as to be unjust. While it is true that Mr. Ke paid all the post-separation carrying costs, he also received the proceeds from the rental of the basement suite, and he and his parents resided in the property from 1 February 2021 onward. The trial judge took all of this into account, concluding that Mr. Ke should receive credit for the reduction in the mortgage principal, but nothing else. Mr. Ke may disagree with the outcome, but he has not shown any reviewable error in the judge's analysis, or that the outcome is unjust. Finally, while the value of the property increased substantially from the date of separation to the date of the trial, that increase was due entirely to market forces, and Mr. Ke received credit for his reduction of the mortgage principal.

(ii) Child Support

- [37] Mr. Ke argues that the trial judge erred in finding that he was obliged to pay child support from the date of separation on 1 June 2020 until the date that Ms. Zhang ceased to have primary parenting responsibility at the end of January 2021. Mr. Ke's counsel conceded this point at trial,[1] and for the reasons given above I would not allow Mr. Ke to resile from this position on appeal. I therefore reject this argument.
- [38] Mr. Ke advances three arguments with respect to the trial judge's determination of Ms. Zhang's child support obligations. In particular, he argues that:
- i) The trial judge erred in holding that Ms. Zhang was not required to pay child support from January 2021 to December 2021. Mr. Ke says Ms. Zhang ought to have been required to pay retroactive support based on her 2021 guideline income.
 - ii) The trial judge erred in the determination of Ms. Zhang's guideline income for 2022, and 2023 onward. More specifically, he says the judge erred in failing to include Ms. Zhang's income from all sources, including proceeds from renting part of the Singapore property to a roommate, income from cash jobs, and amounts received on a regular basis from her new partner.
 - iii) The trial judge erred in directing that the parties were to review their child support obligations annually, commencing on 1 July 2025. Mr. Ke says the judge ought to have made an order for annual reviews commencing on 1 July 2024.

- [39] The standard of review governing an appeal from a support order attracts even greater deference than other decisions in family law matters: *Goldman v. Goldman*, 2024 BCCA 388 at para. 23. Absent an error in principle, a significant misapprehension of the evidence, or an error of law, the appeal court will not intervene: *Chandler v. Chandler*, 2024 BCCA 325 at para. 29; *Goldman* at para. 23; *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 103.
- [40] The trial judge's analysis of Ms. Zhang's child support obligations is found at paras. 45-46 of the reasons:
- [45] From February 2021, the children were in Mr. Ke's care. He seeks child support from Ms. Zhang since that time. However, Ms. Zhang, in returning to Singapore, was dealing with joint debts and was not in a position to pay child support immediately. I direct that Ms. Zhang is to pay child support for the two children retroactively, commencing on January 1, 2022. Based on her disclosed income, that would be \$1,155 a month; for the 12 months [it] would be \$13,872.
- [46] In 2023, it is argued, based on disclosure paystubs, that Ms. Zhang's income would be \$76,331. It is argued there should be an increase over her earned income for some cash jobs that she periodically does. However, she did return to Canada for trial and, as such, a strict calculation of her income would not be fair and it would be less. For 2023, I fix her income for support at \$72,000, and require her to pay, based on the Federal Child Support Guidelines [Guidelines], \$1,117 per month, commencing on January 1, 2023, payable until further order of this court on a monthly basis.
- [41] Dealing with the first of Mr. Ke's arguments, the basis for the trial judge's determination that Ms. Zhang was not obliged to pay child support for the last 11 months of 2021 was that she was dealing with joint debts and therefore unable to pay support immediately. Although the judge did not say so explicitly, it would appear that he acceded to Ms. Zhang's argument that requiring her to pay child support during this time frame would pose an "undue hardship" as contemplated in s. 10(1) of the Federal Child Support Guidelines [Guidelines], because she had to repay the \$19,000 NUH debt arising from the breaking of her employment contract in Singapore after the parties made a joint decision to relocate to Canada for Mr. Ke's career.
- [42] There are several problems with the trial judge's approach.
- [43] First, there is nothing in the reasons to indicate that the trial judge considered and applied the "two-step" undue hardship analysis contemplated in s. 10 of the Guidelines, as discussed in *Kelly v. Kelly*, 2011 BCCA 173 at paras. 33-34. Although the judge is presumed to know the law, in this particular case it is not possible to discern that the judge took into account and applied the "stringent threshold" of hardship that must be met at the first step of the test: *Kelly* at para. 36. Perhaps more importantly, there is no indication that the judge undertook the comparative "standard of living" analysis comprising the second step of the test, per s. 10(3) of the Guidelines.

- [44] Second, the judge's analysis overlooked the fact that this was a retroactive claim, which in the particular circumstances of this case sheds important light on the question of hardship. Neither Mr. Ke nor Ms. Zhang paid any child support prior to the trial, and the trial judge was asked to consider lump sum awards for the unpaid amounts. This point is particularly significant because the NUH debt that Ms. Zhang had to pay upon her return to Singapore in 2021 was accounted for as part of the trial judge's division of family property and debt. It therefore made little sense for the judge to use it as a basis for declining to make a lump sum award covering Ms. Zhang's past child support obligations. Further, although it is clear that Ms. Zhang did not, in fact, work for the first few months that she returned to Singapore, that was a short-lived situation and Ms. Zhang's retroactive child support obligation fell to be determined on her annualized guideline income.
- [45] Having ordered a lump sum award for the child support Mr. Ke did not pay over the eight months that the children were primarily resident with Ms. Zhang, in my respectful view the trial judge erred in principle in failing to follow the same approach for determining a lump sum award for the support that Ms. Zhang did not pay over the first 11 months that the children were primarily resident with Mr. Ke. Based upon a guideline income of \$35,845,[2] Ms. Zhang was required to pay child support of \$575 per month for the final 11 months of 2021, leading to a \$6,325 increase in Ms. Zhang's retroactive child support obligation.
- [46] I move to Mr. Ke's second point, namely his argument that the trial judge erred in determining Ms. Zhang's guideline income for 2022 and 2023. Mr. Ke argues that the trial judge erred in failing to include all sources of income in the determination of Ms. Zhang's guideline income as required under s. 16 of the Guidelines.
- [47] The figures in the last sentence of para. 45 of the reasons indicate that the judge found Ms. Zhang's 2022 guideline income to be \$74,503, which was the guideline income actually contended for by Mr. Ke's trial counsel.[3] Again, I would hold Mr. Ke to this figure, despite his argument on appeal that Ms. Zhang's 2022 guideline income was \$85,755. I therefore see no reviewable error in the trial judge's conclusion with respect to Ms. Zhang's 2022 income and the corresponding calculation of retroactive support.
- [48] For 2023 and following, the trial judge decided to "fix" Ms. Zhang's guideline income at \$72,000, when her "paystubs" reflected a 2023 income of \$76,331, which was the income amount Mr. Ke argued for at trial: Reasons at para. 46.[4] The trial judge opted for this lower figure based on a finding that Ms. Zhang had to incur expenses to travel back to Canada for the trial. While the reasons do not include any explicit finding of undue hardship, I infer that this was the basis on which the trial judge set Ms. Zhang's income below the amount required under s. 16 of the Guidelines. The fact that a parent has incurred "unusually high expenses in relation to exercising parenting time with a child" is a circumstance that can cause undue hardship, per s. 10(2)(b) of the Guidelines. However, once again, the trial judge's reasons do not indicate that the two-step undue hardship analysis required under s. 10 of the Guidelines was applied. More specifically, there is nothing to indicate that the trial judge applied the "stringent standard" of undue hardship contemplated in the Guidelines,

nor is there any indication that the judge conducted the requisite "standard of living" analysis under the second step of the test.

- [49] I conclude that the trial judge erred in "setting" Ms. Zhang's 2023 guideline income below the amount of her stated income as contemplated in s. 16 of the Guidelines, without any articulated basis for doing so. The error is of some significance because the judge used Ms. Zhang's 2023 guideline income to determine her prospective child support obligations. It seems hard to justify a reduction of Ms. Zhang's guideline income by \$4,331 per year, based on a return trip from Singapore to Canada once per year, particularly without a comparative standard of living analysis as required under ss. 10(3) and (4) of the Guidelines.
- [50] I would remedy the judge's error by varying the final order to provide that Ms. Zhang's guideline income for 2023 is \$76,331, such that, commencing on 1 January 2023, and until further order of the court, Ms. Zhang must pay Mr. Ke child support of \$1,184 per month.
- [51] This brings me to Mr. Ke's third point, namely his argument that the trial judge erred in directing that the quantum of Ms. Zhang's support obligation was to be reviewed every year commencing on 1 July 2025. Mr. Ke says the judge should have directed the first review to take place on 1 July 2024.
- [52] There is no reviewable error in this aspect of the trial judge's decision. The determination of a review date was within the discretion of the trial judge, who was in the best position to ascertain the most suitable date. The trial concluded on 21 December 2023, and judgment was given on 13 June 2024. Given the timing, it made eminent sense for the judge to set the first review for 1 July 2025. The alternate review date now proposed by Mr. Ke would have been a mere six months after the trial concluded, and less than one month after the delivery of judgment. There would have been little to no benefit in requiring a review of support obligations on this timeline, and the judge made no reviewable error in declining to do so.

(iii) The NUH Debt

- [53] Mr. Ke argues that the trial judge erred in requiring him to compensate Ms. Zhang for one-half of the \$19,000 NUH debt. Mr. Ke contends that the NUH debt was not a family debt, because it was a financial obligation incurred by Ms. Zhang before the marriage-like relationship. This submission is inconsistent with the position Mr. Ke took at trial through his counsel, who conceded that Mr. Ke should bear responsibility for one-half of the NUH debt.[5] For the reasons given above, I would not allow Mr. Ke to resile from this position. I should add that trial counsel's position certainly fit with the evidence at trial, as Ms. Zhang testified that she incurred the NUH debt as a result of a decision to break her employment contract when the parties decided to relocate from Singapore to Canada, all of which occurred several years into the relationship.

(iv) Spousal Support

[54] Mr. Ke argues that the trial judge erred in finding that Ms. Zhang was entitled to spousal support. However, once again, his counsel conceded this issue at trial,[6] and it is not appropriate to allow Mr. Ke to reverse this position on appeal.

(v) Chattels

[55] Mr. Ke argues on appeal that the trial judge erred in accepting Ms. Zhang's testimony concerning the value of Mr. Ke's vehicle, the piano, and the furniture. To explain, the trial judge accepted Ms. Zhang's evidence that: (a) Mr. Ke's vehicle had a value of \$15,000; (b) a piano retained by Mr. Ke had a value of \$10,000; and (c) the value of the remainder of the furniture in the Langley property (retained by Mr. Ke) exceeded the value of the furniture in the Singapore property (retained by Ms. Zhang) by a further \$7,000. All of this factored into the trial judge's conclusion that Mr. Ke was to make a compensation payment of \$16,000 to equalize the division of the family's personal property.

[56] It is not uncommon, particularly in family trials, for parties to provide informal estimates of the value of furniture and other items of personal property, in circumstances where the cost of a formal appraisal would be out of proportion to the value of the property itself. Often the best that a trial judge can do in such circumstances is to value the property based on the most reliable evidence.

[57] In the absence of palpable or overriding error in the assessment of the evidence, the appeal court ought not to revisit such determinations. Some support for this approach can be found in *Russell v. Russell*, [2000] 1 W.W.R. 619 at para. 68 (Sask. C.A.), wherein Justice Jackson, albeit in a much more technical context, stated the following:

[68] a trial judge's conclusion that a particular type of evidence represents the best evidence of value will be a finding of fact. An appeal court will only interfere with a trial judge's finding of fact if it discovers a palpable and overriding error. In the absence of error of this magnitude, an appellate court is unlikely to interfere with such a decision.

[58] In this case, both parties testified as to the value of the personal property, and neither party raised any objection to the admissibility of the other's testimony. They presented the best evidence that they were in a position to provide as to the value of the personal property, and asked the judge to make a decision. Although Mr. Ke takes issue with the trial judge's factual findings, he has not identified any palpable and overriding error in the trial judge's assessment of the evidence. I would not therefore give effect to Mr. Ke's argument on this point.

(vi) Occupation Rent

[59] Mr. Ke argues that the trial judge erred in failing to award him occupation rent for Ms. Zhang's occupation of the Langley property from 1 June 2020 until or about 31 January 2021, during which time Mr. Ke bore sole responsibility for paying the mortgage and other carrying charges. Mr. Ke acknowledges that his trial counsel did not seek occupation rent, but alleges that his counsel acted without proper instructions. This is yet another argument

that rests entirely on Mr. Ke's ineffective assistance of counsel claim, which must fail for the reasons given above.

(vii) Singapore Property Division

[60] Mr. Ke says the trial judge ought to have made an order for the sale of the Singapore property, rather than simply directing the parties to divide their interests in it through a private arrangement based on the terms of the judge's order. This submission is once again inconsistent with the position advanced by Mr. Ke through his trial counsel, who told the trial judge that Mr. Ke was agreeable to transferring his interest in the Singapore property to Ms. Zhang upon receiving compensation for his half of the equity.[7] For the reasons given above, I would not permit Mr. Ke to resile from this position based on his allegation of ineffective assistance of counsel.

Conclusion

[61] I would allow Mr. Ke's appeal in part, by varying terms 14 to 16 of the final order to read as follows:

14. Ms. Zhang's total child support arrears for the Children, based on a monthly child support obligation of (i) \$575 per month from 1 February 2021 to 31 December 2021, and (ii) \$1,155 per month from 1 January 2022 to 31 December 2022, is \$20,185.
15. For child support purposes, Ms. Zhang's guideline income for 2023 is fixed at \$76,331.
16. Ms. Zhang will pay Mr. Ke the sum of \$1,184 per month for the support of the Children, commencing on 1 January 2023, and continuing on the 1st day of each and every month thereafter, for as long as the Children are eligible for support under the Family Law Act or until further agreement of the parties or Court order.

[62] I would dismiss all other grounds of appeal.

"The Honourable Justice Riley"

I AGREE:

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice MacNaughton"

[1] Ts. p. 283, l. 24-28.

[2] Mr. Ke's trial counsel argued that Ms. Zhang's 2021 guideline income ought to be calculated as \$7,056 in Canadian income, plus \$27,630 in employment income and \$1,159 in supplemental income from Singapore, for a total of \$35,845: Ts. p. 284, l. 33-46.

[3] Ts. p. 285, l. 10-14.

[4] Ts. p. 285, l. 33-42.

[5] Ts. p. 287, l. 45-47.

[6] Ts. p. 288, l. 2-6.

[7] Ts. p. 297, l. 20-23.

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