

CANADA / JUDGMENT

Kennedy v. Kennedy

2025 BCSC 1165

COURT

Supreme Court of British Columbia

DECIDED

23 June 2025

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2025 BCSC 1165 Kennedy v. Kennedy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kennedy v. Kennedy,

2025 BCSC 1165

Date: 20250623

Docket: E61917

Registry: Kamloops

Between:

Susan Kennedy

Claimant

And

Craig Edward Kennedy, Joan Smallwood, Sonya Maren Campbell, King Campbell and KenCam Consulting Limited

Respondents

Before: The Honourable Justice B. Smith

Reasons for Judgment

Counsel for the Claimant:

R. Lammers

Counsel for the Respondents:

K. Wheelhouse

Place and Date of Hearing:

Kamloops, B.C.

April 28, 2025

Place and Date of Judgment:

Kamloops, B.C.

June 23, 2025

Introduction

- [1] This application involves the unsettled question of what, if any, is the appropriate role for conspiracy claims in family law proceedings.

Background

- [2] The applicants apply pursuant to Rule 11-2(2) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules] for an order "that the Claimant's claims against the Respondents for conspiracy and/or damages for fraudulent conduct be struck as disclosing no reasonable claim".
- [3] The claimant, Susan Kennedy ("Susan"), and the respondent, Craig Kennedy ("Craig"), are married and seeking orders concerning divorce, child and spousal support and division of property. A trial was scheduled for eight days commencing the week of July 7, 2025. That trial was recently adjourned.
- [4] The applicants are the four other respondents: Joan Smallwood ("Joan"); Sonya Maren Campbell ("Sonya"); King Campbell ("King"); and KenCam Consulting Limited ("KenCam"), (collectively the "Non-Spouse Respondents"). Joan and Sonya are shareholders of KenCam. King is married to Sonya.
- [5] On February 2, 2024, I heard Susan's application to be permitted to amend her notice of family claim and add the Non-Spouse Respondents as parties (the "First Application"). On February 23, 2024, I issued written reasons for judgment granting the First Application, indexed as *Kennedy v. Kennedy*, 2024 BCSC 310 [Kennedy].
- [6] On April 9, 2024, Susan filed an amended notice of family claim seeking among other things:
1. As against the respondents [Joan], [Sonya], [King] the claimant [seeks] a finding and declaration that these respondents hold money and assets in trust for the respondent [Craig], and that these money and assets constitute family property as between the claimant and [Craig] and/or constitute income earned by [Craig] for the purposes of calculating child and/or spousal support.

2. As against the respondents [Craig], [Joan], [Sonya], [King] the claimant seeks a finding and declaration that [the applicants] conspired together to hide money, income and assets from the claimant in the course of these proceedings, so as to shield the respondent [Craig] from the claims herein for property division, child support and spousal support, and in so doing intended to deceive the claimant and commit a fraud upon this Court.
3. As against the respondent [KenCam], the claimant seeks a finding and declaration that:
 - a. [Craig] is the sole directing mind of [KenCam] and that he is defacto its only director;
 - b. the shares of [KenCam] are the sole beneficial property of the respondent, [Craig]; and
 - c. the income produced by [KenCam] is solely attributable to the respondent [Craig].
- [7] On April 28, 2025, Susan successfully applied to be permitted to file a further amended notice of family claim.
- [8] On May 16, 2025, Susan filed a further amended notice of family claim seeking among other things:
 1. As against the respondents [Joan], [Sonya], [King] the claimant [seeks] a finding and declaration that these respondents hold money and assets in trust for the respondent [Craig], and that these money and assets constitute family property as between the claimant and [Craig], or alternatively, constitute income earned by [Craig] for the purposes of calculating child and/or spousal support.
 2. As against the respondents [Craig], [Joan], [Sonya], [King] the claimant seeks a finding and declaration that each of these respondents conspired together to hide money, income and assets from the claimant in the course of these proceedings, so as to shield the respondent [Craig] from the claims herein for property division, child support and spousal support, and in so doing, intended to deceive the claimant and mislead the Court, and in so doing, caused the claimant to suffer loss and damages as a result.
 3. As against the respondent [KenCam], the claimant seeks a finding and declaration that:
 - a. [Craig] is the sole directing mind of [KenCam] and is defacto its only director;
 - b. the shares of [KenCam] are the sole beneficial property of the respondent, [Craig]; and
 - c. the income produced by [KenCam] is solely attributable to the respondent [Craig].

Discussion

- [9] Rule 11-2 of the Rules provides that at any stage of a family law case, the court may order to be struck out or amended the whole or any part of a pleading on the ground that it discloses no reasonable claim.

- [10] The test on an application to strike out pleadings is set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 36. Only if it is plain and obvious that the notice of claim discloses no reasonable cause of action and is bound to fail should the pleadings be struck. For the purposes of the application, the facts, as stated in the notice of claim, are assumed to be true.
- [11] The applicants frame the issue as whether the claimant's pleading alleging that they conspired together to frustrate the proper calculation of child support and spousal support discloses a reasonable claim. According to the applicants, the claimant's conspiracy claim should be struck, based on principles articulated by the Supreme Court of Canada in *Frame v. Smith*, [1987] 2 S.C.R. 99 [Frame] and the British Columbia Court of Appeal in *Waters v. Mitchie*, 2011 BCCA 364 [Waters].
- [12] In *Waters*, Justice Levine for the Court summarized the ratio of *Frame* as follows:
- [22] In *Frame v. Smith*, the Supreme Court of Canada considered whether a parent had a cause of action against his former spouse and her present husband for interfering with his right of access to the children of the marriage. The chambers judge struck the claim as disclosing no reasonable claim, a decision affirmed by the Ontario Court of Appeal. Justice La Forest, writing for the majority of the Court, dismissed the appeal. While he considered there were good policy reasons why no cause of action should lie in such circumstances, La Forest J. ultimately disposed of the appeal on the basis that the legislative scheme governing custody and access was comprehensive. By providing remedies to enforce custody and access obligations and failing to include recourse by civil action to the courts, the legislation precluded a civil action for damages for breach of access rights. Justice Wilson, dissenting, would have permitted a claim for breach of fiduciary duty to proceed to trial.
- [13] In *Waters*, the Court dismissed the claimant's claim for conspiracy for the alleged transfer of assets and property to the respondent's new partner, in which the claimant claimed the respondent and his new partner made the alleged transfers with the intention of frustrating the claimant's claim for child support. In upholding the decision of the chambers judge to strike the conspiracy claim against the new partner, the Court concluded the comprehensive child support legislation in place allowed the claimant to pursue her claim for proper child support without resorting to the tort of conspiracy:
- [41] The appellant's claim in conspiracy seeks damages in respect of two kinds of injury: the frustration of the proper calculation of child support, and her inability to enforce monetary judgments against Mr. Michie (at para. 36.19).
- [42] The appellant rightly does not dispute that her conspiracy claim to recover losses for injury caused by the frustration of the proper calculation of child support adds nothing to the statutory scheme under the *Divorce Act*, R.S.B.C. 1985, c. 3 (2d Supp.) and the *Federal Child Support Guidelines*. That legislation empowers the court to impute income to a parent and make an order in respect of a parent's retroactive and prospective child support liability. As in *Frame v. Smith*, no claim for damages for the frustration of the proper calculation of child

support can proceed in the face of the comprehensive statutory scheme.

- [14] The Ontario the Court of Appeal decision in *Leitch v. Novac*, 2020 ONCA 257 [Leitch] took a different approach.
- [15] In Justice Hardwick's very recent decision in *Barnes-Morrison v. Kolas*, 2025 BCSC 715 [Barnes-Morrison], she said this about Leitch:
- [38] In Leitch, the spouses, who are referred to as the "husband" and the "wife" in the reasons for judgment, were both sophisticated. The wife was a former litigation lawyer and the husband a successful entrepreneur in the casino/gaming industry. After separation, the husband's father incorporated a management company to manage a casino in Alberta. There was an informal agreement that the husband would act as project manager and receive 40% of the management fees payable to the company. Approximately two years later, the owner of the casino bought out the management contract, with all the proceeds being paid to the husband's father. The wife amended her divorce application to seek damages based upon the tort of conspiracy from the husband, his parents, certain family trusts and a related corporation. The conspiracy allegations included temporarily diverting a portion of the sale proceeds and concealing management fees to reduce the husband's support obligation to the wife.
- [39] Upon an application for partial summary judgment, the motions judge concluded that there was no unlawful conspiracy and that the wife did not establish damages, but did order that the wife could still pursue her claim to impute additional income to the husband for the purpose of determining support at trial.
- [40] The appeal was allowed by the ONCA on the basis that it was not an appropriate case for partial summary judgment. The ONCA also concluded that the motions judge erred in her analysis of the tort of conspiracy.
- [41] Writing for the court, Justice Hourigan addressed what he referred to as the problem with "invisible litigants" in family law proceedings. Specifically, Hourigan J.A. commented as follows:
- [45] The problem is what I will call "invisible litigants". These are family members or friends of a family law litigant who insert themselves into the litigation process. They go beyond providing emotional support during a difficult time to become active participants in the litigation. Usually, their intentions are good, and their interference makes no difference in the ultimate result. However, sometimes they introduce or reinforce a win-at-all-costs litigation mentality. These invisible litigants are willing to break both the spirit and letter of the family law legislation to achieve their desired result, including by facilitating the deliberate hiding of assets or income.

- [42] In Leitch, the ONCA concluded that the wife should be permitted the opportunity to pursue her claims for damages based on the tort of conspiracy on their merits for two reasons: deterrence and enforceability. In this regard, Hourigan J.A. stated as follows:
- [46] If we were to accept the analysis of the motion judge, co-conspirators who engage in such behaviour could do so with impunity. Contrary to the observation of the motion judge, [page599] conspiracy is not a "blunt instrument" to respond to this misconduct. It is a valuable tool in the judicial toolbox to ensure fairness in the process and achieve justice. If the tort of conspiracy is not available, then co-conspirators have no skin in the game. Their participation in hiding income or assets is a no-risk proposition. If their conduct is exposed, all that happens is that the payor will be forced to pay what is appropriately owing. If there is to be deterrence, there must be consequences for co-conspirators who are prepared to facilitate nondisclosure.
- [47] There is a further practical reason for permitting the use of the tort of conspiracy in family law claims. Where income or assets have been hidden with the assistance of a co-conspirator, often the family law litigant will be effectively judgment-proof. That, after all, is the whole purpose of the conspiracy. In those circumstances, the imputation of income or the inclusion of hidden assets into the net family property calculation will be a futile exercise, as the recipient cannot collect on what is owing. A judgment against a co-conspirator will often be the only means by which a recipient will be able to satisfy a judgment.
- [16] At para. 43 of Barnes-Morrison, Hardwick J. noted that Leitch did not refer to or consider Waters, and has not, to date, been followed in British Columbia, although it has been followed very recently by the Alberta Court of King's Bench in Lavoie v. Lavoie, 2025 ABKB 79 [Lavoie].
- [17] Concerning Lavoie, Hardwick J. noted at para. 48 that it does not consider Waters or attempt to wrestle with what appears to be at least some degree of conflict between the ratios in Leitch and Waters, both of which constitute persuasive appellate authority on the issue.
- [18] Concerning Kennedy, Hardwick J. said:
- [78] Upon a review of the decision and the supporting materials, I conclude that Kennedy is distinguishable on the basis that the amendment primarily centers upon allegations of fraud and conspiracy to shield the respondent husband from a claim for an interest in family property as opposed to a conspiracy to fraudulently swear false affidavits to support a fictional Guideline income for interim support purposes.
- [79] Further, it does not appear that fulsome legal arguments about the appropriate role of the tort of conspiracy in family law proceedings, including the apparent discrepancy between the ratios in Waters and Leitch, were put before Justice B. Smith.

- [19] Justice Hardwick's observations concerning the lack of fulsome legal arguments in Kennedy about the appropriate role of the tort of conspiracy in family law proceedings are quite correct, and I would simply add that in Kennedy there were no submissions at all about the appropriate role of the tort of conspiracy in family law proceedings, or about Frame and the different judicial approaches in Waters and Leitch.
- [20] In the claimant's amended notice of family claim at paragraphs 1-3, she claims the following:
- a. The Applicants hold money and assets in trust which constitute family property for the purposes of calculating child support and spousal support.
 - b. The Applicants conspired together to hide money, income and assets from the claimant in the course of these proceedings, so as to shield the Respondent Craig Kennedy from the claims for property division, child support and spousal support and in doing so, intended to deceive the Claimant and commit fraud.
 - c. The income of KenKam Consulting Limited is solely attributable to the respondent Craig Kennedy.
- [21] The claimant submits this is a novel case which can be distinguished from Frame and Waters on the basis that it includes trust and property claims. The Non-Spouse Respondents submit there is no proper basis upon which this case can be distinguished from Frame and Waters.
- [22] It is useful to identify what Frame actually stands for. At para. 28 of Waters, Levine J.A. said this about the holding in Frame:

While both the majority and Wilson J. (in dissent) questioned whether the tort of conspiracy ought to be permitted in the family law context for policy reasons, the case was not decided on that point.

[23] Justice Levine went on to say:

- [31] In light of these comments, Frame v. Smith does not stand for the proposition that a conspiracy claim pleaded in the family law context must be struck, as a matter of policy, as disclosing no reasonable claim. If, as the appellant argued, the chambers judge struck the appellant's claim on that basis, I would disagree.
- [32] Having said that, it is my view that the obiter comments of both the majority and Wilson J. concerning the policy reasons for not extending the tort of conspiracy to family law disputes, which were echoed by the chambers judge (at paras. 37-38), were intended for guidance and should be accepted as authoritative".
- [33] Thus, in considering whether the appellant's claim of conspiracy discloses a reasonable claim, the Court must give authoritative weight to the policy implications that would preclude such a claim from proceeding. That is what the chambers judge did in this case.

- [24] What is binding from Frame and Waters is that when considering whether to strike a claim of conspiracy in family law proceedings, a judge must give authoritative weight to the policy implications that would preclude such a claim from proceeding.
- [25] In Waters, Levine J.A. held that a claim of conspiracy to recover losses caused by the frustration of proper calculation of child support adds nothing to the statutory scheme under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Federal Child Support Guidelines, SOR/97-175. Although Waters did not involve spousal support, by parity of reasoning the Court's conclusion concerning child support would extend to a claim of conspiracy to recover losses caused by the frustration of proper spousal support under the Divorce Act, such as the one brought by the claimant in this case.
- [26] Waters is binding authority to support the Non-Spouse Respondents' position that the portion of the claimant's pleading alleging conspiracy to shield Craig from child support must be struck out or amended as disclosing no reasonable claim. I would hold that the same outcome applies concerning spousal support.
- [27] Concerning the trust and property claims, however, a question remains as to whether these claims are comprehensively covered by the property division scheme under the Family Law Act, S.B.C. 2011, c. 25 [FLA]. This involves two subsidiary questions: does the FLA provide a comprehensive scheme for property division; and if not, do policy implications justify preventing the claim of conspiracy to frustrate property division from proceeding?

Does the FLA provide a comprehensive scheme for property division?

- [28] The answer to this question was unclear until the British Columbia Court of Appeal's decision in V.J.F. v. S.K.W., 2016 BCCA 186, leave to appeal ref'd, [2016] S.C.C.A. No. 295, a case dealing with the presumption of advancement, in which Justice Newbury said that the FLA is not a complete code with respect to property division. In Namdarpour v. Vahman, 2019 BCCA 153, Justice Savage summarized the situation before and after V.J.F. on this point:
- [26] Prior to this Court's decision in V.J.F. v. S.K.W., 2016 BCCA 186, leave to appeal ref'd, [2016] S.C.C.A. No. 295, discussed below, there were conflicting lines of authority in the lower court concerning whether the FLA is a complete code with respect to property division or whether common law and equitable principles such as the presumption of advancement continue to apply.
- [...]
- [29] In V.J.F., this Court addressed the two conflicting lines of authority and held that the FLA is not a complete code and that common law concepts such as gifts and evidentiary presumptions continue to operate under the statute. Madam Justice Newbury wrote:

[74] With all due respect to the contrary view, I conclude that the new FLA scheme does not constitute a "complete code" that "descends as between the spouses" and eliminates common law and equitable principles relating to property. Rather, the scheme builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses. ...

[Emphasis in original.]

[30] In general, the common law plays a role in the interpretation of legislation unless common law concepts are expressly abolished by the legislature. Statutory law and common law are necessarily intertwined: *Cabezas v. Maxim*, 2016 BCCA 82 at para. 36; *Poulin v. Serge Morency et Associés Inc.*, 1999 CanLII 662 (SCC), [1999] 3 S.C.R. 351 at para. 33. Absent clear legislative intent, a statute should not be interpreted as substantially changing the law: *R. v. D.L.W.*, 2016 SCC 22 at para. 21.

[31] In *V.J.F.*, this Court reviewed the family legislation of other provinces and noted that other jurisdictions had expressly abolished the presumption of advancement to various degrees: see *Matrimonial Property Act*, R.S.A. 2000, c. M-8, s. 36; *The Family Property Act*, S.S. 1997, c. F-6.3, s. 50; *Family Law Act*, R.S.O. 1990, c. F.3, s. 14. In contrast, in British Columbia, the FLA does not abolish the presumption of advancement, but instead states in s. 104(2) that the rights arising under the division of property provisions "are in addition to and not in substitution for rights under equity or any other law."

[29] Although *V.J.F.* concerned the evidentiary presumption of advancement, I can discern no reason why the reasoning in *V.J.F.* should not apply in the context of a conspiracy claim concerning property division. As stated in *Namdarpour* at para. 31, s. 104(2) of the FLA provides that the property division scheme in the FLA builds on common law and equitable concepts.

[30] Justice Levine described the principles of the tort of conspiracy at paras. 37-40 of *Waters*:

[37] The leading case on civil conspiracy in Canada is *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, where Estey J. said (at 471-72):

Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
- (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

In situation (2) it is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

[38] See also *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 96 B.C.L.R. (2d) 156 at para. 5, (sub nom. *Can-Dive Services Ltd. et al. v. Pacific Coast Energy Corp. et al.* (No. 2)) 28 B.C.A.C. 157, leave to appeal refused, [1993] 3 S.C.R. viii, where this Court described the elements of the tort:

1. an agreement between two or more persons;
2. concerted action taken pursuant to the agreement;
3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
(ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
4. actual damage suffered by the plaintiff.

[39] The tort of conspiracy has been much criticized. As Estey J. said in *Cement LaFarge* (at 473):

The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in *[Lonrho Ltd. v. Shell Petroleum Co. Ltd., [1982] A.C. 173, [1981] 2 All E.R. 456]* at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

[40] Both the majority and Wilson J. referred to this criticism in *Frame v. Smith* (at 109 and 124).

[31] I conclude from the foregoing that the tort of conspiracy is a common law concept which remains part of the common law of Canada. This conclusion, and what Savage J.A. said at para. 31 of *Namdarpour* (that s. 104(2) of the FLA provides that the property division scheme in the FLA builds on common law and equitable concepts), leads me to further conclude that the FLA does not provide a comprehensive scheme of property division, so as to preclude a claim of conspiracy to frustrate property division.

Do policy implications justify preventing the claim of conspiracy to frustrate property division from proceeding?

- [32] What I take from what Levine J.A. said at paras. 31-33 of Waters is that there may be some circumstances in which the tort of conspiracy could extend to family law cases, but they must be considered giving authoritative weight to the policy implications that would preclude such a claim. In other words, in this case I must consider the question of whether to allow the claim of conspiracy in regards to property division giving authoritative weight to the policy implications that would preclude such a claim.
- [33] The majority and Wilson J. in Frame at pp. 109-112 and 124-127 set out in detail policy implications favouring restricting the extension of the tort of conspiracy in family law proceedings, which can be summarized as:
- a) it rests on a shaky foundation;
 - b) it is an anachronism which has lost much of its usefulness;
 - c) it can result in a party's conduct in combination with others being actionable, when the same conduct, if done without others, would not be actionable;
 - d) of paramount importance, it is contrary to the best interests of children, for various reasons which are aggravated by the fact that if it were introduced in the family law context, it would be difficult to restrict to issues involving children.
- [34] Policy implications favouring allowing conspiracy claims relating to property division to proceed include deterrence, and enforceability against "invisible litigants" who may conspire to conceal assets to benefit one of the parties, as set out in Leitch, and described by Hardwick J. in Barnes-Morrison at para. 42.
- [35] Another consideration favouring allowing the conspiracy claim relating to property division in this case, is the general proposition, identified by Levine J.A. at para. 30 of Waters, that "controversial claims ought not to be struck at the pleadings stage, and, in particular, the issue of whether a conspiracy claim can succeed in a new context ought to be left to the trial judge".
- [36] Justice Levine's comments apply in this case.
- [37] In conclusion, I am of the view that while there are compelling policy arguments on both sides of the issue, in the circumstances of this case, the conspiracy claim relating to property division should not be struck.

Disposition

- [38] The application is granted, in part.
- [39] Pursuant to Rule 11-2(2) of the Rules, I order that the claimant's pleading is amended by removing reference to the alleged conspiracy concerning child and spousal support obligations. The claimant's pleading in regards to the alleged conspiracy concerning property division is allowed to stand.

Costs

[40] The parties have had mixed success on this application. If they are unable to agree as to costs, they may provide written submissions through Supreme Court Scheduling within 30 days of the date of this order.

"B. Smith J."

B. SMITH J.

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