
CANADA / JUDGMENT

Li v. Zhu

2018 BCSC 2182

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 2182 Li v. Zhu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Li v. Zhu,

2018 BCSC 2182

Date: 20181207

Docket: E181830

Registry: Vancouver

Between:

Qiang Li

Claimant

And

Ling Zhu

Respondent

Before: The Honourable Justice Winteringham

Reasons for Judgment

Counsel for the Claimant:

J. Ling

Counsel for the Respondent:

T. Bell

C. Baltazar, A/S

Place and Date of Hearing:

Vancouver, B.C.

November 9, 2018

Place and Date of Judgment:

Vancouver, B.C.

December 07, 2018

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I. INTRODUCTION

- [1] The claimant, Qiang Li and the respondent, Ling Zhu, began living in a marriage-like relationship in April 2005, and were married on June 16, 2011, in Beijing, China. The respondent sponsored the claimant to come to Canada and he arrived in Vancouver on June 14, 2013. During the time the parties were in Canada, they amassed considerable real estate valued at approximately \$24 million. The parties disagree about the amount of contribution to the properties and whether the real estate ever constituted family property. The parties were divorced in China on June 23, 2017. On November 24, 2017, the parties signed a separation agreement dated November 7, 2017 ("Separation Agreement"), purporting to deal with the B.C. real estate and spousal support.
- [2] Pursuant to the Separation Agreement, the claimant received nothing from the division of property and he released the respondent from all claims of spousal support. The claimant now seeks to set aside the Separation Agreement alleging, among other factors, duress, undue influence and unconscionability. The claimant alleges he signed the Separation Agreement because of threats to him and his family and because he was pressured to do so by his former spouse, who is 24 years his senior. The respondent denies the allegations.
- [3] On this application, the respondent raised a procedural objection to the manner in which the claimant commenced the proceeding. That is the sole issue to be determined on this application.

- [4] Pursuant to Rule 2-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Family Rules] and the B.C. Court of Appeal decision of *Halliday v. Halliday*, 2015 BCCA 82 [Halliday], the claimant commenced this proceeding by filing a requisition attaching the Separation Agreement. The respondent says a claim seeking to set aside a final agreement affecting property division under s. 93 of the Family Law Act, S.B.C. 2011 ("FLA") must proceed by way of notice of family claim. In short, the respondent says Halliday does not govern because the B.C. Court of Appeal was dealing with spousal support agreements and not property agreements and there is a fundamental distinction between the two. The respondent submits the requisition should be struck, a notice of family claim filed and the parties proceed to trial, allowing access to demands for particulars, notices to admit and other litigation tools provided for in the Family Rules.

II. NOTICE OF APPLICATION

- [5] On July 5, 2018, the claimant commenced this proceeding by filing a requisition and attaching the Separation Agreement. On July 13, 2018, the claimant filed a Notice of Application pursuant to Rule 10-5(1) and 10-5(2). In the Notice of Application, the claimant sought various forms of relief including certificates of pending litigation with respect to four properties, an order setting aside the Separation Agreement and orders preventing the respondent's disposition of real property, bank accounts, stocks, shares and other personal property.
- [6] The Notice of Application was scheduled for hearing on August 14, 2018. The claimant was unable to serve the respondent with the application materials and sought an alternate service order on August 1, 2018. On that date, Master Dick granted an order allowing for alternate service of the materials on the respondent.
- [7] On August 14, 2018, the respondent did not attend court, though she was apparently served in accordance with the order of Master Dick. Despite commencing submissions on August 14, the claimant decided to adjourn the Notice of Application pending a further attempt to notify the respondent. The claimant appeared before me on August 14, and I adjourned the application to September 25, 2018.
- [8] Both parties appeared, with counsel, on September 25, 2018. On that date, the respondent indicated her intention to object to the form of proceeding.
- [9] In response, the claimant filed an Amended Notice of Application and a hearing date was scheduled to determine the respondent's procedural objection.
- [10] These Reasons deal with that procedural objection.

III. POSITION OF THE PARTIES

[11] The claimant takes the position that he filed the Separation Agreement in accordance with the Family Rules and as such, he has properly commenced a family law case. In addition to the provisions and authorities set out in more detail below, the claimant argues that his position is consistent with the Halliday case annotation found in Dillon & Turriff, 2019 British Columbia Annual Practice, (Toronto, Thomson Reuters, 2019), which provides:

3-1(4.1) Filing Agreements under the Family Law Act

Halliday at paras 58-59 - The filing of a requisition under Rule 3-1(4.1) commences a family case. A party seeking to set aside or vary a separation agreement must then do so by application. It is not necessary to issue a notice of family claim and to do so is to commence parallel proceedings concerning the same subject matter. Given the usual circumstances at play in a contested application to set aside or replace an agreement filed under Rule 2-1, it is unlikely to be determined by way of summary application.

[12] The respondent takes the position that Halliday does not govern this family law case. She bases her submission on the fact that the principle issue between the parties is property division and not spousal support. The respondent frames her objection this way:

The Court of appeal in Halliday did not address the issue of property agreements. That case fell strictly in the context of spousal support agreements. The law has, for decades, recognized a fundamental distinction between the two.

[13] The respondent contends that Rule 2-1 does not contemplate the filing of agreements in respect of property disputes because s. 93 is not included in the list of provisions enumerated in Rule 2-1. The respondent submits that the purpose of Rule 2-1 is to permit certain types of agreements to be filed, enforced and varied efficiently and speedily and that property agreements have always been treated differently from support or parenting agreements. She states that property agreements "are not subject to the material change in circumstances test and never subject to review in the way that support and parenting are. They are final, subject only to modification by the principles of contract law as modified specifically to fit the family law context." She says that the Court of Appeal "muddled the waters" in its reference to "separation agreements" and by failing to distinguish property agreements from the types of agreements enumerated in Rule 2-1. Lastly, the respondent submits that she is prejudiced by this procedural approach because she does not have recourse to certain tools available to her had the proceeding commenced by way of notice of family claim.

IV. PROCEDURAL PROVISIONS and CASE AUTHORITIES

[14] Here, I set out the relevant statutory provisions. I then turn to Halliday and the Court of Appeal's consideration of the statutory provisions.

[15] Section 93 of the FLA provides the basis on which an agreement for property and debt division may be set aside or replaced with an order. Section 93 provides:

93 (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

(3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

(a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;

(b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;

(c) a spouse did not understand the nature or consequences of the agreement;

(d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

(4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.

(5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

(a) the length of time that has passed since the agreement was made;

(b) the intention of the spouses, in making the agreement, to achieve certainty;

(c) the degree to which the spouses relied on the terms of the agreement;

[16] Section 164 of the FLA sets out the factors that must be considered when a spouse seeks to set aside or replace a spousal support agreement. Section 164 provides:

164 (1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.

...

(3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would under the common law cause all or part of a contract to be voidable.
- (4) The court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.
- (5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
- (a) the length of time that has passed since the agreement was made;
 - (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
 - (c) the intention of the spouses, in making the agreement, to achieve certainty;
 - (d) the degree to which the spouses relied on the terms of the agreement;
 - (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].
- [17] The Family Rules govern procedure in family law cases. By definition, a family law case includes proceedings in which court orders are sought under the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.), or the FLA. The object of the Family Rules is to help parties resolve legal issues in a family law case fairly and in a way that will secure the just, speedy and inexpensive determination of every family law case on its merits: see Halliday, para. 48.
- [18] Rule 2-1 of the Family Rules provides for the filing of written agreements. Rule 2-1 provides:
- (1) A copy of a written agreement referred to in section 15, 44(3), 58(3), 148(2) or 163(3) of the Family Law Act may be filed.
 - (2) To file an agreement under subrule (1), a copy of the agreement must be attached to a requisition in Form F17.1 and the requisition must be filed.
- [19] Rule 2-1 does not specify agreements in respect of property disputes and does not include s. 93 of the FLA in the list of enumerated provisions.

[20] Rule 3-1 of the Family Rules is entitled "choosing the correct form of proceeding" and provides:

- (1) Except for those special situations referred to in subrules (2.1) to (2.4), (4.1), (4.4) and (4.5) of this rule, every family law case must be started by filing a notice of family claim under Rule 4-1.

(4.1) If a person files under Rule 2-1 (2) a requisition to which an agreement is attached and there is no existing family law case within which it is appropriate to file the requisition, the filing of the requisition under that rule starts a family law case.

[21] Rule 10-5 governs applications when seeking an order other than at trial. Rule 10-5 provides:

How applications are to be brought

- (1) To apply for an order referred to in subrule (2), a party must do the following, and to apply for an order to enforce an agreement filed under Rule 2-1 (2), to enforce an order, to enforce compliance with a determination of a parenting coordinator filed under Rule 2-1.1 (1) or to enforce an arbitration award filed under Rule 2-1.2 (1), a party may do the following:
 - (a) in the case of an application not referred to in paragraph (b), (c), (d) or (e) of this subrule, apply in accordance with Rule 10-6;

Applications brought under this Part

- (2) Subrule (1) applies to applications for the following orders:
 - (c) to set aside or replace the whole or any part of an agreement filed under Rule 2-1;

[22] Having set out the relevant provisions, I turn to the decision from the Court of Appeal in Halliday.

[23] Briefly, the circumstances presented in Halliday arose out of a separation agreement entered into in July 2009. In late 2012, the wife learned that she may have reason to challenge the agreement and she commenced proceedings. She did so by filing a requisition attaching a copy of the agreement. The husband argued the proceedings were brought out of time and he sought to have it dismissed. On hearing the husband's application, the chambers judge advised the wife that she could not obtain the relief she sought unless she issued a notice of family claim. The wife did so and the husband took the same position in response. Before a second chambers judge, the husband's application was dismissed.

[24] The Court of Appeal allowed the appeal and remitted the matter back to the trial court for resolution. In so doing, the Court addressed similar procedural issues as those raised here. Mr. Justice Goepel commenced the decision with a cautionary note at paras. 1 and 2:

1. Family law cases contain many traps for the unwary. The Supreme Court Family Rules (the "Family Rules") and the different legislative regimes are complex. Litigants must select with care the appropriate procedures under Family Rules. They must be mindful in seeking relief

of the distinctions within and differences between federal and provincial legislation. While the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"), and the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"), to the extent that it still applies, contain many similar provisions, they are not identical.

2. Particular care must be taken with regard to the procedures and time limits to bring proceedings to set aside provisions of a separation agreement. The fact that many family law litigants are unrepresented compounds the problem. The fine distinctions in procedure and in the legislation are often understandingly lost to the legally untrained and, I might add, to those that are legally trained. Recognizing the distinctions can be the difference between success and failure. This proceeding, to date, is a cautionary tale as to what can go wrong.

[25] In examining the relief sought in Halliday, the court noted, at para. 31:

31. From the outset the Wife has sought spousal support and a division of assets. She does so in the context of a Separation Agreement signed on July 23, 2009 and a divorce pronounced on March 7, 2011. She seeks to have the Separation Agreement either varied or set aside with regard to spousal support and the division of property.

[Underlining added.]

[26] Mr. Justice Goepel determined that certain procedural errors compelled the Court of Appeal to remit the case back to the trial court. In so doing, Goepel J.A. wrote:

58. This proceeding has regrettably been marred by a series of procedural errors and missteps. The proceeding was commenced when the Wife filed by requisition the parties' Separation Agreement. Pursuant to R. 3-1(4.1), the filing of the requisition commenced the family law case.
59. A party seeking an order to set aside or vary a separation agreement must do so by way of application: see Rules 10-5(1) and 10-5(2). Accordingly, the Wife was correct to bring an application to set aside the whole or part of the Separation Agreement.
60. The original application was brought before Madam Justice Dorgan. Unfortunately, the relevant Family Rules do not appear to have been brought to her attention. She erred when she advised the Wife that she could not obtain the relief she sought unless she issued a notice of family claim seeking spousal support. I note that the Husband's counsel did not suggest otherwise.
61. Madam Justice Dorgan was correct in noting that on the material before her it would be impossible to find the facts necessary to determine if the Separation Agreement should be set aside. Given the numerous factual issues that will almost always be in play on such applications, it is most difficult to envision many circumstances in which a contested application to set aside or replace an agreement filed under R. 2-1 could be determined by way of a summary application.

62. As a result of the comments of Madam Justice Dorgan, a notice of family claim was subsequently issued. The subsequent proceedings up to and including the hearing before Mr. Justice Mackenzie all followed. A notice of family claim is an originating document. As this litigation had already been commenced by the filing of the Separation Agreement there was no authority in the Family Rules for issuing the notice of family claim, which initiated a parallel action concerning the same subject matter.
63. Whether the notice of family claim and subsequent steps are nullities or mere irregularities, I need not decide. They clearly did not comply with the Family Rules and should be set aside: R. 21-5(1)(c). The matter never should have come before Justice Mackenzie in the form that it did. I note that none of the aforementioned procedural deficiencies were brought to his attention. In the circumstances, the order that he made cannot stand and must be set aside.
- [27] In returning the case back to the trial court, the court recognized that the object of the Family Rules is to secure the just, speedy and inexpensive determination of every family law case on its merits. To assist that mandate, Mr. Justice Goepel directed the parties to attend a Judicial Case Conference ("JCC").
- [28] In *Kler v. Kang*, 2018 BCSC 1136 [Kler], Mr. Justice Mayer was asked to determine a similar issue as that presented here and to distinguish the application of *Halliday*. In *Kler*, the wife commenced a family law case by filing a requisition and attaching the separation agreement. After the wife commenced the family law case, the husband filed a notice of family claim seeking, among other orders, an order setting aside or varying a separation agreement and other relief, including the division of family property and debt. Relying on *Halliday*, the wife sought to strike the notice of family claim on the basis that she had already commenced a proceeding by filing the separation agreement and there was no authority under the Family Rules for the husband to commence a parallel action concerning the same subject matter.
- [29] Mr. Justice Mayer agreed with the wife and concluded that a notice of family claim should not have been filed. In reaching this conclusion, he stated:
7. I will now set out the relevant rules and their application to the case at bar. Ms. Kang filed the separation agreement attached to a requisition pursuant to Rule 2-1. Rule 3-1(1) makes it mandatory for every family law case to be commenced by filing a notice of family claim under Rule 4-1 unless any of subrules 3-1 (2.1) to (2.4), (4.1), (4.4) and (4.5) apply. Subrule (4.1) provides that filing of a requisition to which a separation agreement is attached, where there is no existing family law case starts a family law case. Accordingly, by filing the separation agreement, Ms. Kang started a new family law case under action number E162516.
8. Where a litigation has already been commenced by the filing of a separation agreement, there is no authority under the rules for issuing a notice of family claim: *Halliday*, at para. 62.

9. By filing a notice of family claim (E180416) rather than seeking relief under the existing action (E162516), Mr. Kler breached the Rules. In addition, Rule 10-5(1)(a) requires that a party applying for an order referred to in subrule (2), which includes, pursuant to subrule (2)(c), orders to set aside or replace the whole or any part of a settlement agreement, must (emphasis on must) make an application in accordance with Rule 10-6. The procedure set out in Rule 10-5 is mandatory: Halliday, at para. 59.
10. Mr. Kler contends that this case is distinguishable from Halliday. I respectfully disagree. The reasons of Justice Goepel are clear and binding on this court. In addition, Mr. Kler relies upon the decision of Justice Humphries of this court in Carreiro v. Carreiro, 2015 BCSC 1901, for the proposition that the Rules favour allowing his action to proceed. Although Justice Humphries exercised her discretion pursuant to Rule 1-3 to allow a claim to dismiss a settlement agreement to continue, she specifically stated in her reasons that she was not ruling on the question of whether the claim should have been brought as an application pursuant to Rule 10-5(1) and (2).

[Underlining in original.]

- [30] Mr. Justice Mayer noted, at para. 13, that the husband was at liberty to "apply for an order that this application be referred to the trial list or for any other procedural steps, including examinations for discovery which he considers may be beneficial."

V. ANALYSIS

- [31] The respondent contends that the primary issues between the parties are almost exclusively related to property and s. 93 of the FLA. She submits that the claimant should not be permitted to "shoehorn" this family case into Rule 2-1 just because spousal support is also raised.
- [32] However, this is not purely a property dispute. It is clear from the amended notice of application that the claimant also challenges the term in the Separation Agreement dealing with spousal support. The Family Rules appear to be silent on separation agreement disputes that engage one of the enumerated grounds but also raise other grounds not enumerated in Rule 2-1, such as the case here.
- [33] I agree with the respondent that the principal challenge to the Separation Agreement, at least from a financial perspective, is the distribution of real property. And the parties will likely devote most of their time in this litigation to that issue.
- [34] The respondent's submission is persuasive. However, in my view, the submission does not detract from the weight of the authority under which this dispute is governed. In both Halliday and Kler, the dispute between the parties engaged more than spousal support. Both courts identified division of assets as a live issue in the dispute.

- [35] In that regard, it cannot be said that the issue was not, at least in some way, present when the case was determined. To distinguish Halliday from the facts presented here would require me to ignore para. 31, where Mr. Justice Goepel stated "she seeks to have the separation agreement either varied or set aside with regard to spousal support and the division of property." It, therefore, cannot be said that the issue of separation agreements engaging property disputes was not before the Court.
- [36] The same can be said with respect to Kler. The respondent submits that had this distinction between property agreements and parenting/support agreements been fully argued before Mr. Justice Mayer, he would have decided Kler differently. Again, I am not satisfied that this is so. That is because Mr. Justice Mayer also identified at the outset that the relief sought includes the division of family property and debt.
- [37] In view of the respondent's position, I turn to the guidance provided by Justice Wilson, as he then was, in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.). There, in the oft-cited passage, Wilson J. wrote that he would only go against the judgment of another judge (of the same level of court) if subsequent decisions have affected the validity of the impugned judgment; it is demonstrated that some binding authority in case law, or some relevant statute was not considered; or the judgment was unconsidered.
- [38] In the case before me, counsel did not provide me with any decisions affecting the validity of Halliday. Nor did counsel demonstrate that some binding authority in case law or some relevant statute was not considered. Nor did counsel suggest the judgment was unconsidered.
- [39] The difficulty with the respondent's position is that many of these same submissions appear to have been before the Court of Appeal, in Halliday, and Mr. Justice Mayer, in Kler. There were property issues identified in both proceedings. I am unable to ignore the weight of the authority that binds this court.
- [40] I turn to the issue of prejudice. The respondent submits she is prejudiced by this manner of proceeding because there is no obligatory JCC, the respondent cannot demand particulars, the claimant need not provide a list of documents and the claimant need not respond to notices to admit.
- [41] In answer to the respondent's submission regarding prejudice and as noted by Mayer J., the parties have access to discovery (Rule 9-2) and can apply to be referred to the trial list (Rule 14-2). I also note that during oral argument, the parties advised that they had scheduled a JCC for December 10, 2018. The claimant says, and I agree, that this manner of proceeding is consistent with the object of the Family Rules, as emphasized in Halliday: to assist the parties to resolve their legal issues in a family law case fairly and in a way that will secure the just, speedy and inexpensive determination of every family law case on its merits.

VI. ORDER

[42] Despite the respondent's submission, in my view, I am bound to follow Halliday in this family law case. In that regard, I dismiss the respondent's objection to the form of proceeding.

"Winteringham J."

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