

CANADA / JUDGMENT

Lu v. Yao

2021 BCCA 157

COURT

British Columbia Court of Appeal

DECIDED

19 April 2021

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2021 BCCA 157 Lu v. Yao

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Lu v. Yao,

2021 BCCA 157

Date: 20210419

Docket: CA46689

Between:

Baijian Lu aka Benson Baijian Lu

Appellant

(Claimant)

And

Ji Yao

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Stromberg-Stein

The Honourable Madam Justice Fisher

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

January 13, 2020 (Lu v. Yao, 2020 BCSC 24, Vancouver Docket E060413).

Counsel for the Appellant

(via videoconference):

G.K. Thomas

Counsel for the Respondent

(via videoconference):

L.M. Slater

Place and Date of Hearing:

Vancouver, British Columbia

March 15, 2021

Place and Date of Judgment:

Vancouver, British Columbia

April 19, 2021

Written Reasons by:

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Stromberg-Stein

Summary:

Appeal from dismissal of application to cancel arrears of child and spousal support. Under a separation agreement, the appellant was obligated to pay child and spousal support and certain expenses related to the family home. His payments over the years were sporadic, in varying and sometimes large amounts. The respondent also received funds from the sale of three properties owned by the appellant's company. The respondent applied these monies to specified home expenses and to support. Eventually, the respondent registered with the Family Maintenance Enforcement Program (FMEP), claiming that the appellant was in arrears of \$831,000. The chambers judge dismissed the appellant's application to cancel the arrears but reduced the amount owing to \$576,673.80. On appeal, the appellant argued that the chambers judge erred by failing to credit him with all or some of the net proceeds from the sale of two of the properties, and by misapprehending the evidence of the monies he had paid to the respondent over the years. Held: Appeal allowed in part. The chambers judge erred only in overlooking some of the evidence of amounts the respondent received for support but did not report to FMEP, resulting in further credits to the appellant of \$66,080.21. The order below is varied to fix the arrears at

\$510,593.59.

Reasons for Judgment of the Honourable Madam Justice Fisher:

- [1] This is an appeal from an order dismissing the appellant's application to cancel arrears of child and spousal support. The primary issue is whether the appellant was properly credited with payments the respondent received from him or on his behalf over the course of many years.
- [2] Under a separation agreement made January 5, 2006, the appellant, Baijian Lu, was obligated to pay to the respondent, Ji Yao, child support for their two children, spousal support, and certain expenses related to the family home. The child support was \$4,000 per child per month, the spousal support was \$2,000 per month, and the expenses for the family home were to cover the mortgage, property taxes, water and sewer rates, insurance and maintenance. The child support ended on December 31, 2018 and the spousal support on October 23, 2018. The parties agreed that the total combined child and spousal support the appellant was to pay under the separation agreement was \$1,545,484.
- [3] The appellant's payments over the years were sporadic, in varying and sometimes large amounts. The respondent eventually registered with the Family Maintenance Enforcement Program (FMEP), claiming that she had received \$529,000 from the appellant for support, leaving total arrears of \$831,000 as of May 9, 2017.
- [4] The appellant contended that he had made over \$1 million in payments and had in fact overpaid his support obligations.

The decision below

- [5] The chambers judge heard the appellant's application over seven days in June and October 2018. The parties filed numerous affidavits. The appellant was cross-examined on his affidavits and his financial statement but the respondent was not. In April 2018, the chambers judge released reasons determining that the children remained children of the marriage until December 31, 2018. The judge heard further submissions on the remaining issues in September 2019 and released reasons on January 13, 2020, indexed at 2020 BCSC 24, dismissing the appellant's application but reducing the arrears to \$576,673.80.
- [6] The judge was not satisfied that the appellant had demonstrated that it would be grossly unfair not to cancel the arrears, or that he had demonstrated a material and long-lasting change, in accordance with the principles set out in *Earle v. Earle*, [1999] B.C.J. No. 383. On key points, the judge rejected the appellant's evidence as not credible. She noted various inconsistencies in his evidence, the lack of detail, and the failure to provide documents to support his assertions related to his financial circumstances or the payments he made to the respondent.

- [7] The primary evidence in dispute related to the sale of three properties belonging to the appellant's company. The respondent was responsible for these sales, as the appellant was living out of Canada after their separation, until 2016. The first property, on No. 6 Road in Richmond, B.C., was sold in June 2006, and the respondent received net proceeds of \$337,181. The second property, on Howe Street in Vancouver, was sold in November 2007, and the respondent received net proceeds of \$754,094. The third property, on No. 3 Road in Richmond, was sold in December 2009 and the respondent received net proceeds of \$115,950. The respondent did not apply any of this money to the appellant's child and spousal support obligations in her report to FMEP.
- [8] The chambers judge accepted most of the respondent's evidence as to what she did with these proceeds and found the documents she produced to be consistent with her version of the transactions. More specifically, she accepted the following evidence of the respondent:
- a) From the proceeds from the sale of the No. 6 Road property, the respondent transferred \$200,000 to the appellant, applied \$71,534 to the outstanding mortgage on that property,[1] applied \$15,444 to pay the property taxes for the family residence, and paid \$22,000 towards expenses of the appellant's company.
 - b) The respondent received two cheques from the sale of the Howe Street property. The first, for \$430,233, was received as a gift from the appellant for the two children. It was initially placed in investments in each of the children's names but eventually used to pay their university and living expenses. The second cheque, for \$323,860, went missing.
 - c) The respondent was unable to determine what happened to the net proceeds of \$115,950 from the sale of the No. 3 Road property.
- [9] The judge found the most accurate accounting of what the appellant paid over the years for child and spousal support to be \$529,000, which she based on the FMEP documents, the respondent's documents, and the respondent's evidence explaining the allocation of funds, including the proceeds from the sale of the three properties.
- [10] The judge was aware that the appellant had paid more than \$529,000 over the years and the respondent had allocated much of that money for residential expenses under the separation agreement. She did not accept the appellant's evidence as to the allocation of the funds and concluded that he had not met his burden to demonstrate that the funds paid in excess of \$529,000 were with respect to child and spousal support.
- [11] However, the judge offset the amount of arrears by the value of the two missing cheques of \$323,860 and \$115,950, and fixed the arrears at \$576,673.80.

On appeal

- [12] The appellant submits that the chambers judge erred in failing to credit him with the following payments:

- a) \$430,233 from the proceeds of the sale of the Howe Street property;
 - b) part of the proceeds from the sale of the No. 6 Road property to properly account for the actual amount received, in an amount between \$30,000 and \$100,000; and
 - c) \$9,700 that the respondent admitted should be credited to the appellant.
- [13] The appellant also submits that the judge erred in relying on the FMEP records, which were based on the amounts reported by the respondent.
- [14] The respondent submits that the appellant has raised no reversible error.

The standard of review

- [15] It is common ground that considerable deference must be accorded to orders for support. An appellant must show an error in law or principle, a significant misapprehension of the evidence or a palpable and overriding error of fact, or the award is clearly wrong: see *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 11-12; *Hsieh v. Lui*, 2017 BCCA 51 at para. 38.
- [16] The appellant acknowledges that this appeal raises factual issues only, and in light of the judge's findings regarding his credibility and her rejection of much of his evidence, he relies only on the evidence of the respondent and contends that the errors asserted above were palpable and overriding.

Analysis

- [17] The issues raised in this appeal must be assessed in the context of the hearing below. The evidence before the chambers judge was extensive, consisting of numerous affidavits filed by each party containing paragraph after paragraph challenging the evidence of the other, often simply asserting that their evidence was false. The affidavits also attached numerous documents and spreadsheets. The judge quite accurately described the evidence as chaotic and difficult to assess. She rejected much of the appellant's evidence, finding it problematic in many ways, the least of which was his reliance on deficient records. In contrast, while she found the respondent's evidence about the missing cheques problematic, the judge accepted her evidence about the transactions and the distribution of proceeds.
- [18] One of the difficulties with the evidence was the fact that the respondent co-mingled the appellant's payments for his obligation for child and spousal support with his obligation to pay residential expenses, and to a lesser extent with payments for company expenses. However, the respondent's evidence and supporting documents, which she summarized in the spreadsheets she prepared, demonstrated that in general, where she allocated moneys to obligations other than child and spousal support, the documents showed where those payments went. Otherwise, it is apparent that the respondent allocated, or purported to allocate the funds received to child and spousal support.

[19] One of the appellant's overarching submissions was that the judge ought to have allocated all monies received first to child support. However, in the context of this case, where the appellant had other obligations under the separation agreement, the judge made no error in accepting the respondent's evidence regarding her allocations of the funds to obligations other than child and spousal support where the documentary records supported that evidence.

[20] From my review of the record, it is evident that the chambers judge did the best she could with the evidence that was presented to her, and overall, her findings are supported by the evidence. However, as I explain below, the judge overlooked some aspects of the evidence that she had accepted, which showed that some further amounts paid by or on behalf of the appellant should have been applied to his support obligations.

1. The Howe Street proceeds

[21] The appellant submits that the chambers judge erred in relying on the respondent's evidence that the proceeds of \$430,233 were a gift from the appellant for the children. He says there was conflicting evidence about this that was not addressed, and points out that the judge made no explicit finding other than what is expressed in the following paragraph:

[109] I address the sale of the Howe St. Property. I do not accept Mr. Lu's testimony that Ms. Yao sold this property without his knowledge or consent. I accept Ms. Yao's testimony, as confirmed in the real estate documents and associated bank records, that Ms. Yao listed the property for sale and that she did so with Mr. Lu's knowledge and consent. I have determined that the net sale proceeds were \$754,094.52 and that the proceeds were split into two cheques. The first cheque, for \$430,233.92 was received by Ms. Yao and distributed as she described in her affidavit.

[22] The respondent submits that there was evidence on which the chambers judge could conclude that these proceeds were not payments towards the appellant's child support obligations, and therefore there is no basis for this court to intervene.

[23] The judge relied on the following evidence of the respondent, contained at para. 66 of her second affidavit:

the sale proceeds were divided into two cheques. I do not know the reason for this and I recall only that I received one cheque in the amount of \$430,233.92. The Claimant informed me, and I verily believe it to be true, that he intended to gift this money to the Children. I deposited the \$430,233.92 cheque into my RBC bank account [account number omitted]. I then invested this money in two investments for \$215,000 for each of Kevin and Michelle. Over time, I returned the funds to the children's and my accounts and then used the monies to pay for living expenses of the Children and I also created an RESP for the Children. I have exhausted the RESP funds to meet the Children's post-secondary educational costs.

- [24] The appellant points out that this evidence is inconsistent with the respondent's evidence at para. 64 of the same affidavit, which explains that the appellant had directed her to sell the Howe Street property because he wanted the money:
- (c) The property did not sell on those occasions and was taken off the market, and the Howe Street Property was relisted in 2007. I do not recall the date it was relisted, but it was relisted when the Claimant told me that he had a new family and wanted the Howe Street Property sold as he wanted the money. The sale completed in November 2007
- [25] He says that the respondent had the evidentiary burden of establishing that this money was a gift, and the judge ought to have scrutinized her evidence more carefully and considered that this money was actually used for the children's support.
- [26] As I read the judge's reasons at para. 109, she quite clearly accepted the respondent's evidence as to the circumstances of the sale and her receipt of the \$430,233. I am not satisfied that the respondent's evidence at para. 64(c) is entirely inconsistent with her evidence at para. 66, but in any event, the appellant's affidavit in response simply denied any knowledge about the sale. Moreover, his initial affidavit was internally inconsistent, in that he asserted both that the properties were sold without his knowledge or consent, and in 2008, he had instructed the respondent to sell the properties and to use the sale proceeds to offset child and spousal support. The judge clearly rejected his evidence on this issue.
- [27] It is not the role of this court to re-weigh the evidence. In my view, it was open to the chambers judge to accept the respondent's evidence that the \$430,233 from the proceeds of sale was to be a gift to the children. The documentary record was consistent with this, as it showed that the respondent purchased two investment funds for the children on the same day she deposited the money into her bank account. In a later affidavit, the respondent deposed that the RESPs she eventually purchased for their benefit were exhausted by 2016.
- [28] The fact that the respondent eventually used these funds for the children's support does not change the result. As she deposed, she needed to use the funds for that purpose because the appellant unilaterally stopped making any child support payments in 2012 and 2014, after each of the children turned 18, despite his obligation to do so until they were 19 or older if they remained children of the marriage.
- [29] Finally, the appellant contends that the judge failed to explain why she credited the appellant with the remaining proceeds for the sale of Howe Street, as well as the proceeds from the No. 3 Road property, but failed to credit him with the \$430,233, and that such a result is illogical. Respectfully, I disagree. The judge clearly explained why she was not satisfied with the respondent's evidence about the missing cheques. Treating these two cheques differently was neither illogical nor inappropriate.
- [30] I would not accede to this ground of appeal.

2. The No. 6 Road proceeds

- [31] The appellant submits that the chambers judge erred in finding that \$71,534 from the proceeds of sale for the No. 6 Road property were used to pay off the mortgage on that property, and erred in failing to credit him with some of these proceeds on the basis of the respondent's evidence. He says he should have been credited with \$99,737, which is the amount of the proceeds (\$337,181) less the \$200,000 that he received, \$15,444 paid for property taxes on the family residence, and \$22,000 paid for his company's expenses. Alternatively, he says that he should have been credited with at least \$30,000 on the basis of the respondent's evidence that she retained this amount and used it for the living expenses of her and the children.
- [32] There is no dispute that the judge was in error with respect to the \$71,534, as the respondent applied this amount to the mortgage on the family residence, not the No. 6 Road property. However, I agree with the respondent that this error was not material, as these funds were in fact used to pay down the appellant's debt under the mortgage.
- [33] However, I agree with the appellant that the judge erred in overlooking the respondent's evidence that the appellant told her to use the remaining funds of approximately \$30,000 and offset them against his obligations under the separation agreement, which she did, and which she used for support purposes. The evidence did not establish that the respondent used any of this amount for specific residential expenses.
- [34] I would therefore accede to this ground of appeal to the extent of crediting the appellant with \$30,000 towards the child and spousal support arrears.

3. FMEP records

- [35] The appellant submits that the judge, by relying on the FMEP records to determine the amount of the arrears, misapprehended the evidence that showed he had paid more than \$529,000 for support over the years. He further submits that the respondent's own evidence shows that he paid at least \$31,887 more for support than what she reported to FMEP and he should therefore be credited with that amount.
- [36] Much of the appellant's written argument focused on the absence of evidence that the respondent reported the proceeds of sale of the properties to FMEP. However, at the appeal he focused on the following evidence of the respondent regarding the payments she received from the appellant after 2009:
169. The Claimant after 2009 ceased to transfer to me the whole of the \$10,000 Cdn. in child and spousal support payments. While the amounts paid by the Claimant to me were always inconsistent, they varied from a low of \$4,557 in the month of October 2010, to a high of \$7,846. The amounts paid to me by cash transfer from the Claimant are approximately as follows, as set out in the Spreadsheet:
- (a) The total transferred to me by the Claimant in 2010 was only about \$73,500.
- (b) The Claimant in 2011 transferred only about \$74,600.

- (c) The Claimant in 2012 transferred to me only about \$60,660.
- (d) The Claimant in 2014 transferred to me only about \$49,287.
- [37] The appellant says that these amounts are higher than those reported to FMEP for the same years, resulting in an admission by the respondent that she had received a total of \$560,887 towards support, rather than the \$529,000 reported.
- [38] I note that the respondent's evidence in the above passage from her affidavit refers to approximate amounts, and at para. 172 of the same affidavit she deposes that she had included all of the payments made to her by the appellant in her spreadsheet [Ex. QQ]. A review of the spreadsheet shows that the more precise amounts the respondent received annually from 2010 to 2014 are about \$5,000 less than the approximate amounts, but they do show that the respondent reported \$26,380.21 less to FMEP than she actually received from the appellant. Again, the respondent did not allocate these payments to other expenses.
- [39] The chambers judge did not rely solely on the FMEP records in determining the payments received for support. She also relied on the respondent's documents and her evidence explaining the allocation of funds. However, it is apparent that she overlooked this aspect of the respondent's evidence. I agree with the appellant that the judge erred in finding that the most accurate accounting for the money paid for child and spousal support was \$529,000, as the respondent's own calculations established that he had paid \$26,380.21 more, or \$555,380.21.
4. \$9,700 credit
- [40] The appellant's submission about this credit is based on the respondent's evidence that she had made an error in her spreadsheet as follows:
160. The entry on February 1, 2006 on page 1, relates to a wire transfer of \$9,700 from the Claimant. The 2nd figure of \$9,700 is in the wrong column, and should be listed in Column G (Lu's Payments). As a result of this correction, the total due to me by the Claimant as shown in the spreadsheet should be reduced by \$9,700, as the total payments will increase by \$9,700
- [41] The respondent submits that there is no evidence that this amount was a payment for child and spousal support and the judge made no error in failing to include it as such.
- [42] In my view, the respondent's evidence clearly acknowledges that the total amount due to her from the appellant should be reduced by this amount. She did not indicate that these funds were applied to other obligations. Again, it is evident that the judge simply overlooked this evidence. The appellant should receive this credit.

Conclusion and disposition

- [43] For all of these reasons, I would allow the appeal in part. The appellant's arrears of child and spousal support should be reduced to take into account the following credits:

- (a) \$30,000 from the proceeds of sale from the No. 6 Road property;
- (b) \$26,380.21 to take into account the payments recorded by the respondent as having been received for child and spousal support in addition to the \$529,000; and
- (c) \$9,700 due to the respondent's acknowledgement;

for a total of \$66,080.21.

[44] I would set aside the order fixing the arrears for child and spousal support and replace it with an order setting the arrears at \$510,593.59.

[45] As a condition of hearing this appeal, the appellant was required to pay into court the full principal amount of the judgment below, being \$576,673.80. Given that interest is also owing on the arrears, I would direct that this money be paid out to the respondent.

[46] As for costs, I do not consider the appellant to have been substantially successful and would not be inclined to award him costs of the appeal. I would order the parties to bear their own costs.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

[1] This was an error, as the respondent's evidence was that the \$71,534 was applied to the mortgage on the family residence.

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