

CANADA / JUDGMENT

Rong v. Tan

2024 BCCA 352

COURT

British Columbia Court of Appeal

DECIDED

17 October 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCCA 352 Rong v. Tan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Rong v. Tan,

2024 BCCA 352

Date: 20241017

Docket: CA49415

Between:

Wei-Hong Rong

Appellant

(Claimant)

And

Xu Juan Tan

Respondent

(Respondent)

Before:

The Honourable Justice Dickson

The Honourable Mr. Justice Abrioux

The Honourable Justice Winteringham

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

September 22, 2023, (Rong v. Tan, 2023 BCSC 1664, Vancouver Docket E170815);
and November 14, 2023, December 7, 2023, March 26, 2024 and April 11, 2024
(Rong v. Tan, Vancouver Docket E170815).

The Appellant, appearing in person:

W. Rong

Counsel for the Respondent:

J.C. Bellamy

Place and Date of Hearing:

Vancouver, British Columbia

September 18, 2024

Place and Date of Judgment:

Vancouver, British Columbia

October 17, 2024

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Justice Dickson

The Honourable Justice Winteringham

Summary:

The appellant challenges orders made following a family law trial, in which the judge voided a previous divorce order granted to the appellant and respondent on the basis that it was obtained through fraud, ordered an equal division of family property and debt, and ordered spousal support payable to the respondent as a lump sum. The appellant further challenges four supplementary orders relating to the sale of property ordered by the trial judge and the appellant's unsuccessful application to stay the trial order. At the hearing of this appeal, the appellant also seeks to adduce fresh evidence. Held: The appeal of the trial order, the four supplementary orders, and the application to adduce fresh evidence are dismissed. The appellant has not identified any reviewable errors arising from the trial or supplementary orders, and adducing fresh evidence would not be in the interests of justice.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] Mr. Rong appeals from the order of Gomery J. following a seven-day trial of a family law claim. Mr. Rong represented himself throughout, as he does on appeal. The reasons for judgment are indexed as 2023 BCSC 1664 and the trial order was entered on October 23, 2023.
- [2] Mr. Rong also appeals four related orders made by judges in chambers following the entry of the trial order. Those orders relate to the sale of family property ordered by the trial judge (the "Surrey property") and the dismissal of Mr. Rong's application for a stay of the trial order (the "supplementary orders").
- [3] The issues at trial related to the division of family property and debt, as well as spousal support for Ms. Tan. The judge ordered the equal division of family property, joint conduct of sale of the Surrey property, and a lump sum award of spousal support. He also set aside a divorce order made on February 15, 2005, on the basis that the parties had obtained it illegally and through fraud.
- [4] The issues on appeal relate primarily to challenges made by Mr. Rong to the judge's findings and conclusions regarding the division of family property and debt, and spousal support. He also appeals the order setting aside the divorce order.
- [5] On May 28, 2024, Butler J.A. granted Ms. Tan's application for security for costs of the appeal in the amount of \$7,000.
- [6] Although no application was brought, Mr. Rong also seeks to adduce fresh evidence on appeal.
- [7] For the reasons that follow, I would dismiss both the appeal and the application to adduce fresh evidence.

Background

- [8] Mr. Rong and Ms. Tan were both born and raised in China. Mr. Rong has a Ph. D in information technology, and Ms. Tan has a degree in chemical engineering. Prior to their marriage, Ms. Tan worked for a Chinese-American joint venture in a marketing role.
- [9] Mr. Rong and Ms. Tan were married in China in 2001 and immigrated to Canada shortly thereafter. At the time of the marriage, Mr. Rong owned two condominiums in China.
- [10] In 2002, Mr. Rong established an unincorporated business called Waple Enterprise, through which he installs and repairs garage doors. After arriving in Canada, Ms. Tan found work as a babysitter and was employed at a fish processing plant for approximately two years. This work ended in 2005, and Ms. Tan was not employed in a formal capacity again until 2022.

- [11] After an argument in 2004 which occurred when the parties lived together, Mr. Rong and Ms. Tan jointly applied for a divorce. However, in a joint pleading and individual affidavits, they falsely represented to the Court that they had been living separate and apart for more than one year, and falsified address records intended to demonstrate that Ms. Tan lived at a separate residence. Following a hearing in February 2005, the Court granted them a divorce.
- [12] Following their 'divorce'--which was later voided by the trial judge in this case--Mr. Rong and Ms. Tan lived apart for less than a year. By February 2006, they had resumed their cohabitation, intending to have a child together. Believing themselves to be legally divorced, they entered into a written agreement according to which Mr. Rong would convey to Ms. Tan a condominium unit he had recently purchased. In exchange, she agreed to have children with him.
- [13] In 2013, after two pregnancy losses, Ms. Tan returned to China to pursue IVF treatments. Mr. Rong also briefly returned to China for that purpose. Ultimately, however, Ms. Tan did not pursue IVF.
- [14] In 2015, Ms. Tan became pregnant, but Mr. Rong was not the father. Ms. Tan later gave birth to a child. At trial, Ms. Tan claimed that she had been sexually assaulted by the father, but the trial judge did not make a finding on this issue. Instead, he found that, regardless of the origins of Ms. Tan's pregnancy, she did not tell Mr. Rong because she anticipated that he would react poorly to the news. The trial judge found that Ms. Tan viewed their relationship pragmatically, as a source of material support and a place to live in British Columbia, and "put off telling [Mr. Rong] until she could avoid it no longer because she did not want to end the relationship": at para. 55.
- [15] In March 2017, Ms. Tan returned to British Columbia with her child. Mr. Rong commenced the underlying proceeding within weeks of Ms. Tan's return.

Trial Judgment

- [16] There were essentially three issues at trial:
- a) Whether the parties' divorce order, obtained in February 2005, should be set aside, and, if so, whether a new order should be made;
 - b) The proper division of family property, including whether an equal division would, in the circumstances, be significantly unfair; and
 - c) Ms. Tan's entitlement to spousal support, the quantum and duration of any such support, and whether spousal support should be awarded as a lump sum or a series of periodic payments.
- [17] I will review the judge's reasons on these issues below, within the context of Mr. Rong's grounds of appeal. In the result, the judge:

- a) Voided the 2005 divorce order and declined to make a new order of divorce based on the record before the Court;
 - b) Found that the total value of family property, taking into account an exclusion credited to Mr. Rong, was just over \$2,000,000;
 - c) Held that equal division of family property would not be significantly unfair, and ordered equal division;
 - d) Held that Ms. Tan was entitled to spousal support, and ordered support payable for ten years following the separation (including an award for retroactive support); and
 - e) Determined that spousal support should be paid as a lump sum, rather than as a series of periodic payments.
- [18] As a result of Ms. Tan and Mr. Rong's fraud and collusion in relation to the 2005 divorce, as well as their persistent failure to abide by court orders, the trial judge determined that the parties should bear their own costs: at para. 153.

On Appeal

- [19] Mr. Rong challenges the judge's findings and conclusions on a number of grounds, which I would group as allegations that the judge erred:
- (a) In setting aside the 2005 divorce order and by finding the date of separation was in December 2016 instead of October 2013;
 - (b) In his credibility and reliability assessments and in making errors that warrant appellate interference: in particular, regarding his findings relating to the calculation of the parties' assets and debts and his decision to order the equal division of family property; and
 - (c) In the calculation of Mr. Rong's income and by ordering lump sum spousal support.
- [20] In addition to these allegations, one of the grounds of appeal identified in Mr. Rong's factum is that the judge erred in finding Ms. Tan's child was the result of a sexual assault. This argument has no merit since the judge expressly did not make such a finding: at para. 55.
- [21] Mr. Rong also challenges the dismissal of his application for a stay of the trial order as well as the supplementary orders, primarily on the basis that these orders involved legal and factual errors, were punitive, and amounted to improper fines.

Standard of Review

- [22] As this Court recently stated in *Naimi v. Yunusova*, 2023 BCCA 124:
- [28] Appeal courts must apply a highly deferential standard of review to all family law matters, including issues of property division. We may intervene only where there is a material error, a serious misapprehension of the evidence, or an error of law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12, 1999 CanLII 691.

- [29] Our role is not to re-do the work of the trial judge by allowing parties to reargue the case but to correct errors. This strict and limited scope is necessary to promote finality in the resolution of parties' issues, to uphold public confidence in the judicial process and to ground the proper administration of justice: *Barendregt v. Grebliunas*, 2022 SCC 22 at paras. 100-104. It recognizes that the trial judge is in "an advantageous position when it comes to assessing and weighing vast quantities of evidence", and it is "not the role of appellate courts to second-guess the weight to be assigned to evidence ... [nor] to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion": *Housen v. Nikolaisen*, 2002 SCC 33 at para. 22-23.
- [30] In application, this means that deference is given to the findings and conclusions of the trial judge, except where there is an error of law or a palpable and overriding error of fact. Palpable means the error is obvious and overriding means that it goes to the core of the outcome of the case. Both inferences of fact and findings of fact are subject to this standard. Put another way, we will not interfere where there is some evidence upon which the judge could have relied to come to their decision: *Housen* at paras. 1, 8, 10, 19, and 36.
- [31] A high standard also applies to the review of a judge's discretionary decision. An appeal court will defer to the judge's exercise of their discretion except where they have made an error in principle, or made a palpable error such as failing to consider relevant circumstances or misconceiving the evidence, or the decision is so clearly wrong that permitting the order to stand would work an injustice: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.
- [23] The following observation in *Naimi* also applies on this appeal:
- [32] Mr. Naimi misunderstands the role of this Court. His appeal is an impermissible "second kick at the can": *Barendregt* at para. 39. He repeats arguments made below and attempts to re-litigate the factual findings of the trial judge, who had the benefit of observing the parties and receiving the evidence first-hand. Such an approach is not consonant with the strict standard of review this Court must apply.

[Emphasis added.]

Issue #1: Did the judge err in setting aside the 2005 divorce order?

The Reasons for Judgment

- [24] The trial judge found that Mr. Rong and Ms. Tan's 2005 divorce order was obtained by fraud, and that had the Court been aware of the true state of affairs, the order would not have been granted: at para. 22.
- [25] The trial judge noted that under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 8(1), a divorce may only be obtained on the ground of "marriage breakdown". Mr. Rong and Ms. Tan relied upon s. 8(2)(a), asserting that they had lived separately and apart for more than a year

preceding the commencement of their divorce proceeding. At trial, however, both parties acknowledged that they had not been living separately and apart at the time the order was sought, had sworn false affidavits, and fabricated evidence related to Ms. Tan's residence in a joint and deliberate effort to deceive the Court. In 2005, the Court made a divorce order in reliance on the parties' joint application.

- [26] The trial judge cited a recent decision of this Court, *Esteghamat-Ardakani v. Taherkhani*, 2023 BCCA 290 at para. 87, for the proposition that a court has inherent jurisdiction to set aside an order obtained by fraud, collusion, or perjury. On the basis that a divorce was not legally available to the parties when the order was made, that divorce proceedings are particularly vulnerable to collusive practices, and that the Divorce Act requires courts to satisfy themselves that there has been no collusion on an application for divorce, the trial judge concluded that the divorce order ought to be set aside: at para. 32.
- [27] Ms. Tan asked the trial judge to replace the 2005 divorce order with a new one based on the evidence before the Court. The trial judge declined to do so, as "this is not the proceeding in which the divorce was originally sought and it is not a proceeding in which a divorce has ever been sought": at para. 34.
- [28] Given that the 2005 divorce order was set aside and a new one was not ordered, the trial proceeded on the basis that the parties were, and continued to be, legally married.

Position of the Parties

- [29] Mr. Rong's position is that when the parties attended before the Supreme Court in connection with the application for a divorce order, the presiding judge asked them if they had been living separate and apart for over a year. They both answered that they had been and signed affidavits in support of the order. Mr. Rong says it was an error for the judge in this case to invalidate the 2005 divorce since the order was made 19 years ago and the only person to benefit would be Ms. Tan, who could seek increased spousal support on the basis of a longer marriage. He alleges the judge was biased against him in making the order.
- [30] However, when the trial judge asked the parties for their positions on voiding the 2005 divorce order during closing submissions, Mr. Rong stated he would agree with however the court chose to interpret the law. Ms. Tan, in her written closing submission, argued that the 2005 divorce order should be voided.
- [31] Ms. Tan's position is that the judge did not make a palpable and overriding error nor did he err in law in setting aside the order. She submits that the parties agreed in their oral evidence that they only separated after the 2005 divorce order was made. When they were specifically asked if the date of separation in their respective affidavits was false, both said it was.

Discussion

- [32] I would not accede to this ground of appeal. No palpable and overriding errors have been identified by Mr. Rong in the judge's finding that the parties had fabricated evidence to deceive the Court. Furthermore, the trial judge made no error of law in recognising, having made this finding, that "[t]he inherent jurisdiction of the court includes jurisdiction to set aside a judgment or order obtained by fraud, collusion, or perjury." *Esteghamat-Ardakani* at para. 87.
- [33] Mr. Rong also has not identified any basis for his submission that the trial judge was biased against him in choosing to void the order.
- [34] I would add that the parties' "fraudulent and collusive conduct" in the divorce proceeding was one of the factors the judge took into account in making no order as to costs in the underlying proceeding: at para. 153.

Issue #2: Did the judge err in his findings relating to the division of family property and debt?

The Reasons for Judgment

- [35] On the issue of the division of family property and debt, the trial judge began by summarising the applicable legal framework as set out in Part 5 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"). He noted that, under s. 81 of the FLA, a right to the equal division of family property, including debt, arises on separation, and summarised the statutory framework relating to valuation dates, property inclusions and exclusions, and the courts' discretionary power under s. 95(1)(a) to order an unequal division where equal division would be "significantly unfair": at paras. 36-43.

The Date of Separation and the Duration of the Marriage-like Relationship

- [36] The trial judge found that the parties' marriage-like relationship lasted from their marriage on July 16, 2001, until December 28, 2016--that is, around 15-and-a-half years: at para. 60. Based on the record before him, the judge would have placed the date of separation at March 20, 2017. However, given that Ms. Tan plead that the separation occurred on December 28, 2016, the judge determined that separation took place on that date, observing that "the three-month difference has no practical significance in this case": at para. 59.
- [37] Responding to Mr. Rong's submission that the separation occurred in 2013 when Ms. Tan left for China, the trial judge stated that the question was when the parties separated in law, not fact, in the sense that separation was not, as Mr. Rong submitted, about whether the parties were factually separated because they were in different locations: at para. 46. While the parties were physically separated, separation as a matter of law requires an intention to separate permanently on the part of at least one spouse: at para. 46. Pursuant to s. 3(4)(b) of the FLA, this intention must be evident in the parties' communications and in their actions.

[38] The trial judge found no intention to separate between 2013 and December 28, 2016, and reached this conclusion based on several findings, including:

- a) Ms. Tan left for China in 2013 to investigate IVF treatments so that she and Mr. Rong could have a child (at para. 50);
- b) In October 2013, Mr. Rong came to China to deposit sperm, which was frozen for eventual use in the IVF procedure (at para. 51);
- c) In May 2014, Mr. Rong and Ms. Tan travelled together in China (at para. 51);
- d) Ms. Tan did not proceed with IVF in 2014, and Mr. Rong understood from Ms. Tan that some medical difficulties had prevented her from undergoing the procedure, which difficulties Mr. Rong understood had resolved by the fall of 2014 (at para. 52);
- e) In 2014, when Mr. Rong had returned to Canada from China, the parties had a disagreement about expenses that resulted in Ms. Tan not proceeding with IVF (at para. 52);
- f) Mr. Rong remained committed to having a child with Ms. Tan in 2014, 2015, and 2016, sending her money for living expenses and paying a hospital in China \$500 annually to store his frozen sperm (at para. 53);
- g) In August 2015, Mr. Rong invited Ms. Tan to spend time with his family in China and invited her to a 2016 Chinese New Year celebration with his family (at para. 53);
- h) In February 2016, Mr. Rong represented Ms. Tan in a small claims action in Vancouver, telling the court that he was her husband (at para. 53);
- i) As late as December 2016, Mr. Rong "was still, in his own words, fantasizing that one day [Ms. Tan] would agree to have a baby with him by IVF" (at para. 53); and
- j) Ms. Tan's 2015 pregnancy was unintentional, and she did not tell Mr. Rong about the pregnancy, and about her child, "until she could avoid it no longer because she did not want to end the relationship": at para. 55.

[39] Accordingly, the judge concluded that prior to December 28, 2016, neither Mr. Rong nor Ms. Tan had formed an intention to separate: at para. 58.

Family Property, Valuation, and Exclusions

[40] Having determined the date of the parties' separation, as well as the date of their marriage-like relationship, the judge proceeded to delineate the family property at issue. At the outset, the judge noted that the evidence on the parties' assets, debts, and finances was incomplete and deficient, due to both missing and dated information: at paras. 61-63. Based on the record before him, he concluded, at para. 67, that the family property at the time of trial comprised:

- a) A condo purchased during the marriage, which was held in Ms. Tan's name, valued at \$244,208 (the "96 Avenue Condo");
- b) A home purchased during the marriage, which the parties held jointly, valued at \$1,450,000 (the "Surrey property");
- c) A vacant lot purchased during the marriage, held in Mr. Rong's name, valued at \$62,000 (the "Vacant Lot");
- d) A brokerage account, held in Mr. Rong's name, valued at \$97,532.43 (the "Brokerage Account");
- e) An RRSP account, held in Mr. Rong's name, valued at \$81,621 (the "RRSP Investment Account");
- f) Stocks in CMS, held in Mr. Rong's name, valued at \$96,800; and
- g) A diamond ring, in Ms. Tan's possession, valued at \$3,500.

[41] Next, the judge considered whether any part of the total family property--all together valued at \$2,035,661--fell under a statutory exclusion: at para. 68.

[42] At trial, Mr. Rong claimed exclusions deriving from the two condominium units in China he owned at the time of the marriage. While the evidence on this point was incomplete, the judge determined that it was "more likely than not that some significant fraction" of the sale proceeds from the second condominium, sold in 2010, was excluded property traceable into part of the purchase price for the Surrey property: at paras. 70-71. "Doing [his] best with the evidence," the judge concluded that Mr. Rong could claim a \$35,000 exclusion, which he noted was a "conservative" estimate: at para. 73.

[43] While the parties listed several other debts in their financial disclosures, the judge found that the only family debt was the \$178,923.59 balance owing on the 140 Street House's mortgage: at para. 75.

Mr. Rong's Claim for Unequal Division

[44] The trial judge then turned to the question, which was raised by Mr. Rong, of whether an unequal division of family property should be ordered. He commenced his analysis with the statutory framework set out in ss. 95(2) and (3) of the FLA: at paras. 78-79. He noted that the "overriding question" relating to unequal division is whether equal division will be "significantly unfair", meaning a degree of unfairness "that is compelling or meaningful" having regard to the factors enumerated in s. 95(2) of the FLA: at para. 81, citing *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44.

- [45] In assessing Mr. Rong's claim for unequal division, the judge considered several of the s. 95(2) factors, including the duration of the relationship, Ms. Tan's limited career prospects resulting from the marriage, and any significant changes in the value of family property after the date of separation: at paras. 93-96.
- [46] Mr. Rong's two principal arguments related to the agreement between himself and Ms. Tan, whereby he transferred the 96 Avenue Condo to her in exchange for her agreement to have a child with him, as well as his greater financial contribution to the acquisition and maintenance of family property. The judge rejected both of these arguments, and ultimately ordered an equal division of family property.
- [47] As for the "brutally pragmatic and thoroughly unromantic" (at para. 87) 'agreement' between Mr. Rong and Ms. Tan, which the judge found he was permitted to consider under s. 95(2)(b) of the FLA, the judge observed that the agreement contemplated reasonable efforts to have a child, which Ms. Tan did undertake: at para. 89. Furthermore, the agreement provided that if three years passed and the parties had not had a child, Ms. Tan would transfer one-half of her interest in the 96 Avenue Condo back to Mr. Rong: at para. 88. As such, far from justifying an unequal division of family property, the agreement supported an equal division of the 96 Avenue Condo in the absence of children.
- [48] Regarding Mr. Rong's submission that unequal division was warranted based on his greater financial contributions, the trial judge observed that this argument would completely undermine the legislative scheme and purpose of the FLA: at para. 97. This is because the law's presumption of equal sharing is "most important" in situations where one partner, typically a woman, is financially vulnerable because the relationship involved traditional gender roles, as was the case with Mr. Rong and Ms. Tan: at para. 97.

Position of the Parties

- [49] Mr. Rong submits that the judge made a palpable and overriding error in finding that the parties separated in December 2016 and not in October 2013 when Ms. Tan went to China.
- [50] He also argues that the judge erred:
- In not properly calculating the prenuptial property credits to which he was entitled, in particular relating to his two condominiums in China;
 - By valuing the family property as of the date of trial as opposed to the date of separation; and
 - In not calculating the amount of family debt and the costs he incurred in refinancing family property.
- [51] Mr. Rong further submits that the judge's failure to order unequal division was unfair since he did not take into account:
- That Ms. Tan had a child but he did not, and that she failed to have his child;

- That other countries would order unequal division of family property in similar circumstances; and

- That Ms. Tan had lied in her evidence at the trial.

[52] Ms. Tan's position includes the following submissions:

- There was evidence on the record from which the judge could conclude that the date of separation was December 2016;

- Valuing the family assets as at the trial date was in accordance with the FLA; and

- Mr. Rong did not meet the onus of establishing the value of his excluded property was more than \$35,000.

[53] She also says that Mr. Rong essentially left it to the trial judge to calculate the amounts that related to the family property and debt. This was confirmed, to an extent, at the hearing of this appeal, when Mr. Rong submitted that he had provided a large binder of documents to the judge, who had not properly reviewed them in order to make what Mr. Rong now submits were the correct calculations.

[54] Ms. Tan argues that the judge's conclusions were available to him on the evidence and that Mr. Rong has established no palpable and overriding error in the trial judge's findings. Furthermore, Ms. Tan argues that while Mr. Rong submits that equal division of the assets would be "unfair", the legal test is significant unfairness, which was the framework the judge considered in reaching his conclusion on this issue.

Discussion

Credibility and Attitude of the Parties

[55] Mr. Rong submits that Ms. Tan "lied" when giving evidence and that the judge ought to have accepted his evidence on such issues as the date of separation, the calculation of family assets and debt, and the parties' income for the purposes of considering spousal support. In light of this submission, it is necessary to set out the judge's observations and conclusions regarding what he termed the "[c]redibility and attitude of the parties".

Credibility and attitude of the parties

[16] The parties disagree as to many details of their interactions over the years. Fortunately, most of these disagreements are not relevant to what I have to decide. In addressing the disagreements I must resolve, I have evaluated the testimony for "its consistency with the probabilities of the surrounding conditions or circumstances", as Justice Adair put it in *Gichuru v. Smith*, 2013 BCSC 895 at para. 130.

- [17] I must add that I approach the evidence of both parties with considerable caution. Both acknowledge having lied under oath to subvert the law's requirements and obtain a quick divorce. Other aspects of their evidence also cause me concern.
- [18] In giving evidence, Mr. Rong presented as an opinionated and argumentative witness. He testified describing the discussions and process by which changes were made to the desk order divorce application at the registry, attributing certain changes to Ms. Tan. Some of this evidence was shown to be false when the court file was located, part way through the trial. He blames Ms. Tan for the false statements.
- [19] Mr. Rong's business through Waple has substantial cash receipts and outlays. It became apparent, in cross-examination, that his statements of income and expenses cannot be relied upon. He often does not charge GST to customers who pay cash, and he says that recorded "contract payments" to Ms. Tan totalling \$17,000 in 2011 and \$13,800 in 2012 were not for services rendered to his business by Ms. Tan. In cross-examination concerning his denial that Ms. Tan had a role in the business, he said that, if the suggestion was that he was lying to the Canada Revenue Agency, it was also at Ms. Tan's request.
- [20] For her part, Ms. Tan was a difficult witness: undisciplined, argumentative, and prone to overstatement. She often went out of her way to score points at Mr. Rong's expense. She denies signing an agreement that bears her signature. I think that she denies the agreement because she believes it hurts her case.
- [21] Through their conduct of this proceeding, both parties have manifested a troubling disinclination to abide by rules or orders they do not like. Ms. Tan breached a term of an order of Justice Norell granting her conduct of sale of a family asset by selling it without Mr. Rong's consent or an order approving the sale. Mr. Rong refused to comply with an order requiring him to pay interim spousal support because he disagreed with it. He flatly refuses to accept that he is obliged to pay costs of an unsuccessful application for leave to appeal, even following assessment by the registrar of the Court of Appeal.

[Emphasis added.]

- [56] As this extract illustrates, the judge was clearly cognizant of risks relating to both Mr. Rong and Ms. Tan's evidence. The reasons as a whole evince a sensitivity to the limits and the risks of the evidence before the judge, who appears to have tried to do the best he could with difficult witnesses and a record that was far from ideal.

The Date of Separation

- [57] I will now turn to the alleged error regarding the date of separation. As a question of mixed fact and law, a judge's determination of the date of separation is reviewable on the standard of palpable and overriding error, and, as a highly fact-based question of family law, necessitates a high level of appellate deference: Naimi at para. 29.

[58] Pursuant to s. 3(4)(b) of the FLA, separation in law requires a spouse to communicate, through words or actions, an intention to permanently end the relationship: *Nearing v. Sauer*, 2015 BCSC 58 at para. 54; *Gupta v. Kumar*, 2023 BCCA 106 at para. 13. Citing *Nearing* and related case law, the judge correctly stated this governing legal principle: at paras. 46-48.

[59] In my view, there was ample evidence upon which the judge could conclude that the date of separation was December 2016 and not October 2013, including:

- In October 2013, the parties were enrolling in IVF treatments with the intention of having a child;
- On January 10, 2014, Mr. Rong made a sperm donation with the intention of having a child with Ms. Tan;
- As of 2016, Mr. Rong was still referring to himself as Ms. Tan's husband;
- Mr. Rong continued to support Ms. Tan financially throughout the relationship and only stopped that support in February or March of 2017; and
- Ms. Walters, the parties' joint accounting expert, opined that the transactions occurring in the parties' accounts appeared consistent with those of a common-law couple. She was also of the view that between 2017 and 2022, the parties separated their financial accounts and the last transfer from Mr. Rong to Ms. Tan was in February 2017.

[60] Given that this conclusion has a basis in the record before the judge, who considered and applied the correct legal principles, I can see no basis to interfere with his determination as to the date of separation.

Evidence Concerning Financial Matters and the Application to Adduce Fresh Evidence

[61] Prior to considering Mr. Rong's application to adduce fresh evidence, as well as the grounds of appeal pertaining to the calculation of family property and debt and whether an equal division was significantly unfair, it is appropriate to consider the judge's comments regarding the documents produced at the trial.

State of the evidence concerning financial matters

[61] The evidence concerning the parties' assets, debts, and financial dealings is incomplete. As required by Supreme Court Family Rule 5-1, both parties prepared and filed Form F8 Financial Disclosure Statements listing family assets and debts. Unfortunately, Mr. Rong's F8 was made on September 21, 2021, almost two years before the trial began, and the valuations of financial assets listed in it are dated. Ms. Tan's F8 was made on May 29, 2023, but it lacks information as to the value of financial assets held by Mr. Rong.

- [62] In the early stages of the litigation, each party accused the other of hiding or dissipating assets. This matter was eventually addressed by a joint expert, Roseanne Walters, in a report dated January 2, 2023. Ms. Walters' report was made an exhibit at trial and neither party required her to attend for cross-examination. Ms. Walters found no evidence that Mr. Rong or Ms. Tan dissipated or hid family property. While Mr. Rong is not entirely persuaded, I accept Ms. Walters' conclusions in this regard.
- [63] Ms. Walters notes that Mr. Rong did not provide his business bank statements for the years after 2018. This is a deficiency in his financial disclosure. During the trial, at my direction, Mr. Rong provided his income tax returns and notices of assessment through 2021. His 2022 notice of assessment was unavailable.
- [62] Throughout Mr. Rong's Appeal Book and Supplementary Appeal Book are documents that were not entered as exhibits at the trial. Some were contained in a binder that Mr. Rong provided to the judge, with certain documents entered as exhibits but not others. Mr. Rong's factum also refers to certain of these documents.
- [63] Mr. Rong did not file an application to adduce additional evidence on appeal pursuant to Rule 59, Court of Appeal Rules, B.C. Reg. 120/2022, but I shall deal with this issue as if he had.
- [64] Mr. Rong's position is that he authorized Ms. Tan's counsel to obtain the documents she considered were required for the trial, and, as such, that it is not his fault if these documents were not in fact entered as exhibits. He also submits that the documents are relevant since they substantiate the amount of the assets and debts he says are in issue.
- [65] The test to determine whether additional (or "fresh") evidence should be admitted on appeal when adduced for the purpose of reviewing the decision below is set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at p. 775, as follows:
- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial
 - (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
- [66] As Justice MacKenzie noted in *Rana v. Ullah*, 2022 BCCA 192:
- [56] The test is purposive, fact-specific, and driven by an overarching concern for the interests of justice, regardless of when the evidence, or fact, came into existence: *Barendregt* at para. 3, affirming the *Palmer* test.

- [67] Mr. Rong has not met any element of the Palmer test. Bearing in mind the concerns that were identified by the judge regarding financial disclosure, it is not in the interests of justice to admit the additional evidence.

Family Assets and Debt

- [68] Mr. Rong's grounds of appeal regarding the calculation and division of family property must be considered in the context of the judge's comments regarding the evidence at trial and the need to approach the parties' evidence "with considerable caution".
- [69] It is clear from a review of the reasons that the judge carefully set out the basis for the calculations he made regarding the value of the family assets. And as Ms. Tan notes in her factum, Mr. Rong did not advance any submissions at trial regarding the calculation of family debt, limiting his submissions to the question of whether it would be unfair to divide the debt equally.
- [70] The judge also committed no reversible error in valuing the assets as at the date of trial since, absent an agreement or court order (neither of which was present in this case), this is the valuation date provided for by s. 87(b)(ii) of the FLA.
- [71] Determinations of value are questions of judgment, rather than mere calculation, and a trial judge must apply their judgment to these questions "as best [they] can": *Guang v. WEX Pharmaceuticals Inc.*, 2013 BCSC 1949 at para. 307. In my view, in calculating the amounts in question the judge did what he could with what he had--and given that it is for the parties to lead evidence, he could have done no more than this.
- [72] The judge recognised Mr. Rong's argument for unequal division of family property and debt and correctly summarised and applied the legal framework that applies, in particular the relevant provisions in ss. 95(1) and (2) of the FLA.
- [73] Mr. Rong submitted that the judge erred in not ordering an unequal division of family property based on the 2006 agreement between himself and Ms. Tan. Mr. Rong has submitted that this agreement should be considered as "any other factor" potentially leading to significant unfairness (as per s. 95(2)(i)), but it is also a relevant consideration under s. 95(2)(b) of the FLA. Mr. Rong's central complaint in reference to the 2006 agreement seems to be that Ms. Tan did not have a child with him. He says that Ms. Tan did not "contribute her part" to the family by producing children--that it was his responsibility, as a man, to cover family costs, and her responsibility, as a woman, to produce and raise children.
- [74] This submission--quite apart from running counter to established legal principles of family law and their animating values--appears to be an attempt to re-litigate the underlying issue of significant unfairness. Stated differently, it does not allege a reviewable error, and misapprehends the role of this Court.

- [75] I can see no error in the trial judge's determination that neither the 2006 agreement nor Mr. Rong and Ms. Tan's different financial contributions gave rise to significant unfairness warranting an unequal division of family property or debt in Mr. Rong's favour. The judge carefully considered the terms and context of the 2006 agreement, ultimately interpreting the agreement as contemplating equal, not unequal, division of the 96 Avenue Condo in the absence of children. The judge further, and correctly, observed that Mr. Rong's submissions on significant unfairness would wholly undermine the FLA's scheme and purpose, because "unequal financial contributions are a feature of the traditional models of marriage-like relationships in which the presumption of equal division is most important": at para. 97. Mr. Rong has pointed to no error in this analysis, and I can see no such error based on the judge's reasons and the record before him.
- [76] As part of his analysis, the judge considered s. 95(3) of the FLA, which permits a court to consider the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship if, after making a determination of spousal support, the objectives of spousal support as set out in s. 161 of the FLA remain to be met. He found that the section had been satisfied in that the objectives of spousal support had not been met and that spousal support was payable, an issue I shall consider below: at paras. 80-81.
- [77] I will now briefly address the ground of appeal that Mr. Rong's excluded property claim should also have included the value of one of the condominiums he owned in China at the time of marriage. The question is whether the excluded property claim, as found by the judge, of \$35,000 should be increased to reflect the acquisition cost of the condominium, bearing in mind that it is the party seeking the exclusion, in this case, Mr. Rong, who has the onus of proof (as per s. 85(3) of the FLA). In my view, it should not.
- [78] The judge stated that "the purchase price of the second condominium was not in evidence": at para. 69. Ms. Tan accepts that this statement was in error since the evidence was that the purchase price was 67,846 RMB, approximately \$13,500 in Canadian dollars. It is perhaps not surprising that the judge, given the frailties in the documentary disclosure and the challenging nature of the evidence at the trial, overlooked this one piece of evidence, but it is not material to his conclusion on this issue.
- [79] This was a palpable error on the trial judge's part, in that it can be "plainly seen" (Housen at para. 6). However, in my view it was not one which was overriding. This is because the judge correctly observed that "[t]he value of the second condominium at the time of marriage is not in evidence": at para. 70. At the hearing of the appeal Mr. Rong confirmed this was indeed the case. Pursuant to s. 84(2)(g) of the FLA, it is the value of the condominium at the time of the marriage, not the time of purchase, that is relevant to the calculation of excluded property in this case.

- [80] Mr. Rong bore the onus of establishing the property's value as of the time of marriage, and so it was for him to lead evidence of the value at the time of marriage. Despite this, the judge took into account the fact Mr. Rong was self-represented and that the evidence was not as precise as it ought to have been, stating:
- [71] Nevertheless, I think it is more likely than not that some significant fraction of the proceeds of the 2010 sale of the second Chinese condominium were excluded property, and the timing of the sale makes it very likely that Mr. Rong applied the sale proceeds to the purchase of the 140 Street House. The condominium was sold in 2010 and the house was purchased in December 2010. The purchase required a \$10,000 deposit and a payment of \$56,438.83 on completion; the balance of the purchased price was financed by a mortgage loan. Ms. Tan had no liquid capital resources of her own. The funds had to come from Mr. Rong. The most likely source would have been the proceeds of the Chinese property he had recently sold.
- [72] Mr. Rong is self-represented. I attribute his failure to provide better evidence establishing what was done with the proceeds of sale from the Chinese condominiums to inadvertence. It would not be fair to deny him any credit for excluded property. It would not be fair to Ms. Tan to risk over-valuing the credit, when it was Mr. Rong who undertook the underlying transactions.
- [73] Doing my best with the evidence, I credit Mr. Rong with an exclusion of \$35,000. In my view, this amount is conservative.
- [81] The judge, therefore, did include the second Chinese condominium in crediting Mr. Rong with the \$35,000 exclusion.
- [82] In conclusion, I would not accede to any of the grounds of appeal relating to the family property and debt and the judge's finding that an equal division would not be significantly unfair. There was a body of evidence upon which he could make his findings of fact and reach his conclusions, and he applied the law correctly throughout. Mr. Rong's appeal is an attempt to re-litigate the case at trial, and he has not demonstrated any palpable and overriding error insofar as these grounds of appeal are concerned.

Issue #3: Did the judge err in the calculation of Mr. Rong's income and by ordering lump sum spousal support?

The Reasons for Judgment

- [83] The judge found that Mr. Rong understated his income on his tax forms and that he had a cash business to avoid paying GST: at para. 127. This finding was supported by Ms. Walters, the parties' joint accounting expert, whose evidence established that Mr. Rong received significant cash deposits not declared in his income for tax purposes: at para. 127.

- [84] The judge determined that Mr. Rong's average gross income for the years 2013 to 2018 was 74% higher than what he reported on his tax forms: at para. 131. He then applied that figure to the appellant's declared income for those years. For example, Mr. Rong's 2017 declared income was \$81,366 and the judge imputed income of \$141,577 ($\$81,366 \times 174\% = \$141,577$). He found Mr. Rong's income was variable, and imputed an income of \$117,455 in 2022 and 2023, which was lower than the \$150,000 Ms. Tan had sought: at paras. 133-134.
- [85] The judge decided that Ms. Tan was entitled to both compensatory and non-compensatory support. In doing so, he found that Ms. Tan suffered ongoing economic disadvantage due to the 15-year long marriage: at para. 117. Considering the Spousal Support Advisory Guidelines ("SSAG"), the judge fixed spousal support at the mid-point of the range for both quantum and duration: \$1,997 per month for ten years following the separation: at para. 141.
- [86] In his view, this was one of the exceptional cases in which a lump sum award was appropriate, as the litigation had been contentious and, "extrapolating from his conduct to date", Mr. Rong would not make support payments willingly: at para. 147.

Position of the Parties

- [87] Mr. Rong's submissions on this ground of appeal are difficult to understand when considered within the context of the standard of review and the framework that applies to compensatory and non-compensatory spousal support.
- [88] He submits no support should have been ordered since Ms. Tan did not establish that her child was the result of sexual assault and says that the child's father should be responsible for spousal support. He also points to the fact that he has remarried, that his wife is unemployed, and claims that they are a "low income family".
- [89] Mr. Rong's submissions overlap with his arguments relating to the division of family assets: he argues that Ms. Tan contributed nothing to the family living costs and to the acquisition of those assets. He also says the judge erred in not ordering Ms. Tan to repay all the amounts he had paid to her during their relationship.
- [90] Mr. Rong also submits that the judge erred in calculating his income for support purposes, specifically in finding that his income as reported to the Canada Revenue Agency ("CRA") was understated. Mr. Rong says that he should not be penalised for the fact that part of his business income is based on cash payments from customers, and maintains that he conducts his business partially in cash at their request.
- [91] Ms. Tan's position is that there was a considerable body of evidence from which the judge could conclude that Mr. Rong understated his income to the CRA, which included expert evidence demonstrating a significant discrepancy between Mr. Rong's account deposit activities and his statements to the CRA: at paras. 127-134. Ms. Tan submits that the record also showed that Mr. Rong often made and received payments in cash, did not always charge tax on his invoices, and issued tax receipts from his business to Ms. Tan for work he later

claimed she did not do. Ms. Tan says that Mr. Rong later filed returns on her behalf that reported this income as self-employment income, in an effort to reduce his overall tax burden.

- [92] Ms. Tan also submits that an award of lump sum spousal support is discretionary, and that Mr. Rong has not pointed to any reviewable error in the judge's exercise of discretion on this point.

Discussion

- [93] Mr. Rong's submission that the judge erred in awarding Ms. Tan spousal support because she failed to prove that her child resulted from sexual assault, such that the child's biological father ought to pay support instead, has no basis in law. An entitlement to spousal support is distinct from an entitlement to child support. And the question of entitlement to spousal support, as set out in the FLA, does not depend on who had children with whom.
- [94] I will now deal with the alleged errors regarding the imputation of Mr. Rong's income for support purposes and the quantum of support ordered.
- [95] In my view, Mr. Rong has not identified any palpable and overriding error regarding the imputation of his income. There was an ample evidentiary basis, as set out in the reasons at paras. 124-134, for the judge to impute income to Mr. Rong. In particular, there was the evidence of Ms. Walters, the parties' jointly retained accounting expert, demonstrating that Mr. Rong consistently underreported his income to the CRA. The record as a whole further disclosed a pattern of under-reporting. Doing what he could with the evidence before him (which was incomplete because of insufficient financial disclosure), the judge applied the average 'understatement' from past years to Mr. Rong's reported income for 2017 to 2021, for which Mr. Rong did not disclose banking statements: at para. 63. Notably, the judge also imputed income to Ms. Tan: at para. 140.
- [96] As to the quantum of support ordered, again, I can see no palpable and overriding error in the judge's determination on this point. The trial judge's analysis adhered to the SSAG, falling within the middle range for both quantum and duration, and was based on findings available on the record. The judge correctly set out the legal framework that governed Ms. Tan's claim for spousal support, including the relevant provisions in the FLA, certain of the leading authorities including *Chutter v. Chutter*, 2008 BCCA 507 (at paras. 47-61), and the SSAG: at paras. 109-115.
- [97] I will turn, now, to Mr. Rong's appeal of the judge's decision to order spousal support in the form of a lump sum, rather than periodic payments.

- [198] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so "clearly wrong" that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at p. 1375. Reversing a lower court's discretionary decision is also appropriate where that court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at pp. 76-77.
- [199] Whether lump sum spousal support should be awarded is within the discretion of the trial judge, who should "weigh the advantages and disadvantages" of a lump sum payment as compared to the more traditional period periodic method: *Parton v. Parton*, 2018 BCCA 273 at para. 47.
- [100] The judge recognised that an order for lump sum spousal support is exceptional. In line with the approach this Court set out in *Parton*, he then considered the advantages and disadvantages of making such an order, concluding:
- [145] The following considerations favour a lump sum award in this case. A lump sum award can be satisfied from the proceeds of sale of the 140 Street House. The parties will not need to deal with one another again after the house is sold and the proceeds distributed. Ms. Tan will have security for the performance of Mr. Rong's future obligation, which is important in the light of his refusal to pay interim support ordered by the court in 2021.
- [146] The following considerations favour the usual order of periodic payments. There may be a material change in the parties' circumstances. Ms. Tan may obtain better employment or Mr. Rong's income may decline. A lump sum award deprives Mr. Rong of the ability to apply for a variation to reduce the support payable. It also deprives him of the ability to deduct the payments for tax purposes.
- [147] In my view, this is one of those exceptional cases in which a lump sum award is appropriate. Assuring payment of support without further conflict and litigation carries particular weight in this case. This litigation has already been contentious. The court file contains 12 filed notices of application and 29 affidavits (not including sworn F8s and an affidavit of service). Extrapolating from his conduct to date, Mr. Rong will not make support payments willingly. Any future application to vary the support payable would be difficult to address in chambers, without a further trial, because both parties' evidence is often unreliable and difficult to evaluate unless tested by cross-examination. The loss of tax deductibility carries less weight in this case than it might in other circumstances, because Mr. Rong is not fully reporting his income for tax purposes in the first place.

[Emphasis added.]

[101] In my view, Mr. Rong has not identified any reversible error by the judge in the exercise of his discretion in awarding lump sum spousal support to Ms. Tan. He has not established that the judge's decision was "clearly wrong" (Elsom at p. 1375); viewing Mr. Rong's submissions at their highest, the dispute amounts only to a difference of opinion as to a question of mixed fact and law, which does not warrant appellate intervention (Housen at paras. 22-23). I would not accede to this ground of appeal.

Issue #4: The supplementary orders

[102] Mr. Rong also appeals four supplementary orders, comprising:

- a) An order of Fitzpatrick J., dated November 14, 2023, appointing a joint realtor to list and sell the Surrey property. The order, on consent, also corrected the trial order to provide for interest on funds held in court;
- b) An order of Gropper J., dated December 7, 2023, directing that the conduct of sale of the Surrey property take place on certain terms including that the proceeds of the sale be paid into court, that Mr. Rong be responsible for certain costs, and that Mr. Rong execute the documents required to list the property and to complete the sale, failing which he would be subject to certain penalties;
- c) An order of Groves J., dated March 26, 2024, dismissing Mr. Rong's application for a stay of the trial order; and
- d) An order of Warren J., dated April 11, 2024, directing that the funds from the sale of the Surrey property be paid out of court. After Ms. Tan filed a requisition for payment of the funds, Mr. Rong applied on an urgent basis to this Court for a stay of Justice Warren's order, the application being dismissed on April 12, 2024, due to a lack of jurisdiction to grant the stay.

Position of the Parties

[103] To summarise Mr. Rong's position, he alleges the following errors:

- (a) Justice Fitzpatrick erred as there was no proper legal basis for the order appointing the joint realtor;
- (b) Justice Gropper erred by setting the listing price for the Surrey property too low, imposing penalties if Mr. Rong did not comply with the order for sale, and by ordering Mr. Rong to pay the fees associated with having the sales proceeds from the Surrey property paid into court;
- (c) Justice Groves erred in dismissing the stay application by incorrectly applying the applicable legal principles and by finding there was no serious issue to be tried; and
- (d) Justice Warren erred "in ordering a penalty".

[104] Mr. Rong also challenges each of Fitzpatrick, Gropper, Groves, and Warren J.J.'s decisions to award costs to Ms. Tan on these applications.

[105] Ms. Tan submits that none of the four impugned orders, including the orders as to costs, involve a legal or factual error.

Discussion

[106] I would not accede to any of these grounds of appeal. The orders all involved an exercise of discretion. It is not necessary to review in any detail the reasons for judgment which ground the impugned orders. It suffices to say that Mr. Rong has not identified any basis for this Court to conclude that they were based on an error of principle, a palpable error, or are so clearly wrong as to amount to an injustice: Naimi at para. 31; Elsom at p. 1375.

[107] In his written submissions, Mr. Rong appears to challenge each of Fitzpatrick, Gropper, Groves, and Warren J.J.'s decisions to award costs to Ms. Tan. He seems to characterise these awards as "penalties" that he has been "charged" in the absence of wrongdoing.

[108] An award of costs is not a "penalty". In the normal course of things, the party who loses on an application must pay a portion of the successful party's legal costs. Costs awards are not normally predicated on wrongdoing (based on the reasons given by the judges, it does not seem that any elevated costs were awarded against Mr. Rong in the course of this proceeding).

[109] Costs awards are discretionary and appellate review is limited in scope: Giles v. Westminster Savings and Credit Union, 2010 BCCA 282 at para. 72.

[110] I can find no basis to interfere with the judges' decisions to award Ms. Tan her costs. She was successful on all four applications, including in her opposition to Mr. Rong's application for a stay of Gropper J.'s order.

[111] I would dismiss these grounds of appeal.

Disposition

[112] I would dismiss both the application to adduce fresh evidence and the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Justice Winteringham"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/24/03/2024BCCA0352.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/rong-v-tan-2024>

Prepared on 29 October 2026 · Esheria