

CANADA / JUDGMENT

Small v. Small

2020 BCSC 1253

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Supreme Court of British Columbia

DECIDED

26 August 2020

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2020 BCSC 1253 Small v. Small

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Small v. Small,

2020 BCSC 1253

Date: 20200826

Docket: E180585

Registry: Vancouver

Between:

Oxana Small aka Oxana Kirsanova

Claimant

And

Trevor Scott Small also known as Trevor Small

Respondent

Before: The Honourable Madam Justice Horsman

Reasons for Judgment on Post-Trial Applications

Counsel for the Claimant:

M. Milau

Counsel for the Respondent:

J. Stein

Place and Date of Hearing:

Vancouver, B.C.

August 12 and 14, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 26, 2020

INTRODUCTION

- [1] My reasons for judgment following trial in this matter [indexed at 2020 BCSC 707] were released on May 7, 2020 (the "Trial Judgment"). The Trial Judgment addresses the issues of property and debt division, spousal support and child support. All parenting issues were resolved by a consent order prior to trial.
- [2] The trial was originally scheduled to complete in four days but eventually took seven days, concluding January 8, 2020. There was insufficient time for the parties to present final argument in person. The parties requested leave to provide final argument in writing rather than scheduling additional days. I acceded to this request on the proviso that the parties' written arguments comprehensively address the relief they were seeking.
- [3] In the Trial Judgment, I gave leave to the parties to return to the Court, if necessary, in two circumstances:
- i. In the event that there were issues arising from the Trial Judgment that required clarification, in which case the parties could request the scheduling of a judicial management conference [para. 300];
 - ii. In the event that either party sought a re-determination of income based on COVID-19 related impacts that are of more than a temporary nature [paras. 209-211].
- [4] The respondent subsequently filed a notice of application seeking a re-determination of income based on COVID-19 impacts, and also a variety of other unrelated relief (the "NOA"). Although not expressly framed as an application to re-open the trial, many of the orders sought by the respondent would require re-opening the trial.
- [5] As the trial order has not yet been entered, the parties agree that I do have discretion to re-open the trial. Such discretion should be exercised rarely and only when the interests of justice clearly require prolonging the litigation in order to avoid a miscarriage of justice: *Bajwa v. Habib*, 2020 BCCA 230 at para. 48 [Bajwa]. The discretion to re-open may properly be exercised where, for example, the original judgment contains material errors that may be corrected by further submissions, where evidence has been overlooked or misconstrued, where the law has been misapplied, or where the reasons for judgment fail to address an argument advanced at trial: *Bajwa* at para. 48, citing *Grewal v. Grewal*, 2016 BCCA 237 at

para. 86.

- [6] To the extent that the respondent's notice of application seeks to re-open the trial, I will be guided by these principles.

THE POST-TRIAL ORDERS SOUGHT BY THE RESPONDENT

a) Division of post-separation credit card debt

(NOA, Part 1, Paras. 1, 5-6)

- [7] The respondent seeks an order that the claimant be required to pay him the sum of \$47,165.54, which is one-half of his credit card debt, including interest, as of April 30, 2018.
- [8] The parties separated October 11, 2015. The respondent says his post-separation credit card debt is family debt pursuant to s. 86(b) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], because the debt was incurred for the purpose of maintaining family property. It is therefore subject to equal division. The respondent says it is appropriate to re-open the trial to address the credit card debt because this is not an issue that is dealt with in the Trial Judgment.
- [9] The issue of post-separation credit card debt requires some context. There was a significant issue at trial with respect to the respondent's payment of post-separation family expenses, including mortgage, property tax, and insurance for the family residence, the claimant's rent, and s. 7 expenses for the children. The respondent's evidence at trial, which I accepted in the Trial Judgment, was that these expenses were largely covered by way of shareholder loans to the respondent from his company Global Brand Solutions Ltd. ("GBS"). In his final argument, the respondent sought an order that the claimant reimburse half of the post-separation family expenses. His alternative position was stated as follows:
144. If Mr. Small does not receive full reimbursement for the household and section 7 expenses he incurred between October 11, 2015 and April 30, 2018, he is seeking that the parties equally be responsible for repaying the shareholders' loan of \$272,140.74 to GBS Ltd.
- [10] In support of his alternative position, the respondent asserted in his final submissions that "Mr. Small was incurring significant shareholder loans to cover post-separation expenses" and "[t]he funds available to pay for the parties' expenses came primarily from GBS Ltd" (at paras. 121, 139).
- [11] The argument that the respondent advances on the application to re-open - that the respondent additionally incurred post-separation credit card debt for the purpose of maintaining family property - is not an argument that is advanced in the respondent's final submissions at trial. The claimant disputes that the respondent incurred post-separation credit card debt for family purposes beyond what is already covered by the order for equal division of the GBS shareholder loans. If this issue were to be litigated post-trial, it would require a rigorous examination of the details of the respondent's post-separation credit card debt which has not occurred to date.

- [12] The claimant also says that if she had known the respondent was seeking an order for equal division of his post-separation credit card debt, then she would have argued that the respondent should share in the post-separation depletion of her investment accounts. The claimant says that while the respondent may have incurred credit card debt to pay expenses, she was cashing in investments for the same purpose. She says it is unfair to consider only half the equation - that is, it would be unfair to divide her investment accounts equally at of the date of separation while at the same time requiring her to incur an equal share of the respondent's post-separation credit card debt. Allowing the respondent to raise the issue of post-separation credit card debt now would, therefore, also require a rigorous examination of the details of the claimant's investment accounts in the post-separation period, which again has not occurred to date.
- [13] Counsel for the claimant also says that from her cursory review of the respondent's credit card expense records, it is apparent to her that at least some of the charges he is now claiming reimbursement for relate to retroactive s. 7 expenses. In the Trial Judgment I concluded that the respondent is not entitled to reimbursement of s. 7 expenses incurred prior to May 1, 2018, for reasons that include a lack of effective notice (paras. 255-257). As such, equal division of post-separation credit card debt would undermine not only my finding that post-separation family expenses were financed by GBS, but also my finding that the respondent is not entitled to retroactive reimbursement of s. 7 expenses.
- [14] I am not persuaded that it is appropriate to allow the re-opening of the trial in these circumstances to permit the respondent to advance a new argument for equal division of post-separation credit card debt. In my view, it is not open to the respondent at this stage of the proceeding to revisit factual findings at trial - that the parties' post-separation expenses were financed by shareholder loans from GBS - that he urged the Court to make. The result would be to disrupt the balance achieved in the Trial Judgment in the division of post-separation family expenses, and to require the parties to embark on a prolonged post-trial re-adjudication of the issue.
- [15] I conclude that no miscarriage of justice will occur if the respondent's claim for reimbursement of post-separation credit card debt is not dealt with on its merits at this stage. He had full opportunity to advance arguments at trial relating to the responsibility he assumed for payment of family expenses in the post-separation period. He succeeded in persuading the Court that a significant sum of shareholder loans incurred post-separation was family debt subject to equal division. There is no unfairness to the respondent, let alone a miscarriage of justice, in refusing him an opportunity to re-open the trial to advance arguments that would undermine factual findings that are consistent with his evidence and argument at trial.

[16] In the event that credit card debt is equally divided as of the date of separation, as otherwise mandated by ss. 81 and 86(a) of the FLA, the parties agree on the form of order for division of the parties' investment accounts as of the date of separation. In light of that agreement, I will re-open the trial only to the extent of making the following orders:

1. The parties' credit card debt will be equally divided as of the date of separation.
2. The parties will equally divide their RRSPs as at October 30, 2015, and the respondent will transfer \$11,270.70 by way of a spousal rollover.
3. The parties will equally divide their CIBC TFSA accounts as at October 30, 2015, with the respondent providing an equalization payment to the claimant of \$662.40.

b) Method of reimbursement of the GBS shareholder debt

(NOA, Part 1, Para. 2)

[17] The respondent seeks an order that the claimant reimburse GBS for her share of the shareholder loan debt of \$106,070.37 by August 30, 2020. The respondent says this is the sum owed by the claimant for her portion of the GBS debt, taking into account dividends issued after April 30, 2018 that have reduced the outstanding loans.

[18] The claimant resists reimbursing GBS this amount. The dispute is not with the respondent's quantification of the debt, per se. The claimant wishes to have some additional time to consider the respondent's calculations and there may ultimately be agreement on the number. The issue at this stage is the method of repayment. The claimant says that requiring her to repay the sum would be unfair as it would benefit the respondent personally. She says instead that I should order that her portion of the shareholder loan debt will be reduced by requiring GBS to retroactively declare dividends during the years the loans were incurred.

[19] The respondent says there are numerous difficulties with the claimant's proposal. Among other things, the respondent says that the claimant is not an equal shareholder in GBS, having left the company in 2017, and she is not entitled to take dividends as of right. The respondent is the sole director of GBS and the only person authorized to issue dividends according to GBS's articles of association. The respondent further says that GBS does not have sufficient retained earnings to pay dividends out to cover the shareholder loan debt in any event. All other issues aside, the respondent questions whether a company can retroactively declare dividends as the claimant proposes.

[20] In my view, it is not the role of the Court to direct the method by which GBS may recover the debt owed by the claimant. It is not even clear to me what jurisdiction I have to order GBS to declare dividends within the context of this proceeding. The Trial Judgment provides that the claimant is responsible for half of the parties' shareholder loan debt to GBS of April 30, 2018. It is up to GBS to determine the method by which it will collect on the debt. Further, I do not agree that there is anything unfair in requiring the claimant to repay to GBS her share of the significant post-separation expenses that were incurred for family purposes.

- [21] For these reasons, I decline to issue any order or direction that would excuse the claimant from directly repaying the shareholder loan debt to GBS. However, I am not prepared to issue a deadline for repayment at this time, as the respondent has requested. To date, the claimant has resisted repaying her share of the shareholder loans because she believed she was entitled to insist on an alternative repayment method. With that controversy resolved, I assume the parties will act promptly to seek agreement on a repayment amount and a deadline for repayment.
- [22] In the circumstances, I consider it appropriate to simply adjourn the relief sought by the respondent in term 2 of the notice of application. The respondent can re-apply for that relief in the event that the parties are unable to reach agreement.

c) Redetermination of the value of the BMW X3

(NOA, Part 1, Paras. 3-4)

- [23] The respondent requests that I re-open the trial for the purpose of re-determining the value of one of the parties' vehicles - a BMW X3. This is addressed at paras. 180-186 of the Trial Judgment. I concluded, based on a dealer's market valuation of the vehicle from March 2019, that the fair market value of the BMW X3 as of the time of trial was \$28,584.
- [24] The respondent says that I should have determined the value of the BMW X3 to be \$38,000, which is the amount that the claimant actually purchased the vehicle from GBS for in March 2019 on a without prejudice basis. The respondent relies on an exchange of communication between the parties in 2018, appended to the claimant's affidavit #12 sworn October 15, 2018. The material includes an email from a car dealer advising the claimant that the BMW X3 had a Canadian Black Book value of \$33,200 to \$37,700, but could potentially be sold privately for \$41,000. I gather that this material was the basis for the parties' without prejudice agreement to a purchase price of \$38,000.
- [25] The respondent further says that the claimant should also reimburse \$1,900 to GBS towards a provincial sales tax (PST) payment that he says would have been owing at the time of transfer. The respondent says the claimant only paid \$2,660, and the amount she should have paid (assuming the tax is 12%) is \$4,560. The respondent has adduced no evidence, either at trial or on this application, that PST is owed beyond the amount paid by the claimant or that any additional tax was paid by GBS. The respondent says I can take judicial notice of the fact that PST of 12% is payable on the transfer of a vehicle in British Columbia, and can infer from that that GBS would be liable on any unpaid amount.
- [26] I am not prepared to exercise my discretion to re-open the trial to re-determine the value of the BMW X3. The respondent does not say that evidence was misconstrued or an argument overlooked. He simply seeks to persuade me to re-hear the arguments, re-weigh the evidence, and reach a different conclusion on the valuation of the vehicle. On the payment of PST, the respondent cannot even point to evidence to re-weigh.

[27] I conclude that no miscarriage of justice would occur if the trial is not re-opened to address the merits of the respondent's arguments. Accordingly, I dismiss the respondent's application to re-open the trial to re-determine the value of the BMW X3.

d) Claimant's failure to produce documents for trial

(NOA, Part 1, para. 7)

[28] The respondent seeks an order pursuant to s. 215 of the FLA that the claimant reimburse him \$1,000 to compensate for his time and expense in locating and producing the claimant's 2015 RRSP and investment account statements. It is not in dispute that the claimant did not produce these records. The respondent says that an award in this amount is justified by the legal fees he incurred to tender evidence that the claimant ought to have produced.

[29] The claimant agrees that she ought to have disclosed the 2015 statements and says the failure to do so was an oversight on her part. The claimant says the oversight was a relatively minor one in the context of a document intensive case. She disputes that the respondent would have incurred as much as \$1,000 in legal fees to deal with the issue. She says that this is a matter more appropriately addressed as part of the parties' submissions on costs, which are still to come in this proceeding.

[30] In my view, any remedy that the respondent seeks in relation to the claimant's failure to disclose the 2015 account statements is more properly dealt with as an aspect of costs rather than as a discrete issue. I therefore dismiss the relief sought by the respondent in para. 7 of Part 1 of the NOA, without prejudice to his ability to raise the issue of non-disclosure in his submissions on costs.

e) Reimbursement of counselling sessions

(NOA, Part 1, Para. 8)

[31] The respondent seeks an order that the claimant reimburse him for her individual sessions for the reConnecting Families program in the amount of \$7,731.56, pursuant to clause 33 of the final consent order of Justice Fitzpatrick on June 24, 2019. The claimant says she intends to apply to vary the consent order on the basis of the respondent's alleged non-compliance with therapeutic recommendations. She argues that the respondent's request for reimbursement should be deferred until her variation application can be heard.

[32] The issue of reimbursement of counselling expenses is not properly before me at this time. The present hearing was scheduled to address issues falling within one of three categories: (i) clarification of orders made in the Trial Judgment, (ii) re-determination of income due to COVID-19, and (iii) an application to re-open the trial in accordance with the principles set out in Bajwa. The relief sought in para. 8 of the NOA does not fall within any of these categories. This hearing was not intended to provide an unfettered opportunity for the parties to raise any matters in dispute between them, including the enforcement of pre-trial final orders, even if unconnected to the Trial Judgment.

[33] Accordingly, I will dismiss the relief sought by the respondent in para. 8 of Part 1 of the NOA, without prejudice to the respondent's ability to pursue this issue in a separate application.

f) Re-determination of income based on COVID-19 impacts

(NOA, Part 1, Paras. 9-10)

[34] The Trial Judgment grants leave to either party to apply to have their income re-determined based on COVID-19 related impacts on income that are of more than a temporary nature. As I noted in the Trial Judgment (at para. 209), this trial concluded at the end of January 2020. As such, there was no evidence before me about how, if at all, the parties' incomes may have been impacted by the COVID-19 pandemic.

[35] The respondent now applies to have his income re-determined for spousal and child support purposes based on the impacts he says COVID-19 has had on his employment income post-trial. In the Trial Judgment, I imputed an annual income of \$100,000 to the respondent for support purposes. He seeks orders setting his income at \$65,000 for the purpose of his spousal and child support obligations in 2020, to be reviewed in June 2021.

[36] This issue also requires context. At trial, the claimant sought to impute an annual income of \$163,000, to the respondent. This was based on the income the respondent had received in the years 2012-2018 through a series of lucrative contracts he secured, through GBS, in the marine energy sector.

[37] The respondent testified at trial over the period January 6 to 8, 2020. His evidence was that in the fall of 2019, he accepted a full-time job with Acuva Technologies ("Acuva") at an annual salary of \$80,000, with bonus potential. He testified he had been unsuccessful in finding a higher paying job. In his written closing submissions, dated January 24, 2020, the respondent argued that it was "absolute lunacy" to suggest that an income of \$163,000 should be imputed to him (para. 189). He said that his income at Acuva should be taken at "face-value" as "the best salary he is currently able to negotiate" (para. 190).

[38] In support of his application for a re-determination of income, the respondent provided evidence by way of two affidavits. These affidavits disclose the following information:

- In December 2019 and January 2020, the respondent was in discussions with a company by the name of Foreship about a potential job opportunity in the marine energy field.
- In January 2020, Foreship offered GBS a contract to consult in the area of sustainable technology for a fee of \$10,500 US per month, minus travel expenses to Seattle. (This is approximately \$166,000 CDN per year.)
- The respondent's employment, through GBS, with Foreship was conditional on his obtaining a US work visa. The respondent was granted a work visa on January 15, 2020, which was his fourth attempt at securing a visa.

- The respondent resigned his employment with Acuva in mid-January in anticipation of starting work with Foreship.
 - The respondent started work with Foreship on February 1, 2020. He says Foreship's business, which is focussed on the cruise industry, was almost immediately and drastically impacted by COVID-19.
 - On May 6, 2020, the president of Foreship advised the respondent via email that his hours would be reduced to part-time until August 1, 2020. As such, GBS income from Foreship for June and July, 2020 was \$5,250 US per month rather than \$10,500 US. (This email is the only document from Foreship included as an exhibit to the respondent's affidavits.)
 - The respondent anticipates that Foreship may announce further staff and budget cuts, and it is likely that the contract with GBS will be terminated.
- [39] On receipt of the respondent's affidavit material, the claimant requested that the respondent produce copies of all of his communications with Foreship, including the offer of employment and the employment contract, as well as his 2019 tax return and notice of assessment. The respondent has not produced any of this material. He says the employment contract is in a file at the Seattle office of Foreship, which closed in March. The respondent says he cannot access the file due to COVID-19 related border closures.
- [40] The claimant objects to any re-determination of income for the respondent. She says that the respondent's affidavit evidence is not credible and reliable given his failure to produce the requested documents, including the employment contract itself. The claimant points out that the respondent failed to disclose the existence of the Foreship contract in his evidence at trial, despite the fact that he must have accepted the offer by the time his evidence completed. The claimant says that, in any event, the respondent's banking records show that he deposited \$64,000 US (approximately \$85,000 CDN) between February 1 and July 9, 2020, and therefore is on track to earn at least \$100,000 CDN in 2020.
- [41] For the reasons that follow, I conclude that the evidence does not support the re-determination of the respondent's income for support purposes in 2020 as \$65,000 rather than the \$100,000 imputed to him in the Trial Judgment.
- [42] Of primary significance, the affidavit material raises concern that the respondent failed to disclose material evidence at trial about his income. While the respondent's affidavit evidence is vague, perhaps deliberately so, about the timing of the job offer from Foreship, he deposes that he was successful on his fourth attempt to secure a US work visa on January 15, 2020. It is difficult to avoid the inference that Foreship had offered a contract to the respondent by the time the respondent testified at trial on January 6-8, 2020.
- [43] At the very least, it is clear that the respondent had formally accepted employment with Foreship, and resigned his job at Acuva, by the time his closing submissions were delivered on January 24, 2020. In his closing submissions the respondent asserted that it was "absolute lunacy" to suggest he could earn an income of \$163,000, when in fact (unbeknownst to the

claimant and the Court) he had already accepted employment that paid more than \$163,000. The respondent asked the Court to impute income to him based on his salary at Acuva when in fact he no longer worked for Acuva. He asked the Court take his \$80,000 salary at Acuva at "face-value" as the best salary he could negotiate when he had in fact negotiated a salary of twice that amount.

- [44] Given this history, I am not prepared to accept the respondent's most recent affidavits at face-value. In the absence of any supporting documentation, I reject the respondent's assertions that GBS is on the brink of losing the Foreship contract and the respondent has no current alternative employment opportunities. I also accept the submission of the claimant that the amounts the respondent has deposited into his bank account to date in 2020 do not, in any event, support any reduction in his imputed income.
- [45] I therefore dismiss the respondent's application for a re-determination of his income for spousal and child support purposes in 2020. Given that the claimant has not cross-applied to re-open the trial to re-determine income based on the respondent's non-disclosure of the Foreship contract, I express no opinion on whether it would be appropriate to re-open in these circumstances.

CONCLUSION/SUMMARY OF ORDERS

[46] In summary I make the following orders:

- i. The trial is re-opened to the extent of including the following orders in the Trial Judgment:
 - (1) The parties' credit card debt will be equally divided as of the date of separation.
 - (2) The parties will equally divide their RRSPs as at October 30, 2015, and the respondent will transfer \$11,270.70 by way of a spousal rollover.
 - (3) The parties will equally divide their CIBC TFSA accounts as at October 30, 2015, with the respondent providing an equalization payment to the claimant of \$662.40.
- ii. In relation to the remaining post-trial relief sought in the NOA:
 - (1) The respondent's application to re-open the trial to divide post-separation credit card debt and re-determine the value of the BMW X3 is dismissed.
 - (2) The respondent's application for an order that the claimant reimburse GBS \$106,070.37 by August 30, 2020, is adjourned with liberty to re-apply in the event the parties are unable to reach agreement on the amount of the debt and a deadline for repayment.
 - (3) The respondent's application for an order that the claimant pay him \$1,000 for her failure to produce her 2015 investment statements is dismissed, without prejudice to the respondent's ability to raise the issue of non-disclosure in any submissions on costs.

- (4) The respondent's application for an order that the claimant reimburse him for individual counselling sessions at reConnecting Families is dismissed, without prejudice to the respondent's ability to pursue this relief in a separate application.
- (5) The respondent's application to re-determine income for 2020 for the purposes of spousal and child support is dismissed.
- [47] The parties had requested an extension of time for making further submissions on costs, as permitted by para. 301 of the Trial Judgment, pending the hearing of the present application. Accordingly, the parties will have a further 30 days from the date of this judgment to submit a written submission on costs, not to exceed three pages.

"Horsman J."

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