
CANADA / JUDGMENT

Wei v. Xu

2020 BCSC 2137

COURT

Supreme Court of British Columbia

DECIDED

4 December 2020

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

2020 BCSC 2137 Wei v. Xu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wei v. Xu,

2020 BCSC 2137

Date: 20201204

Docket: E160539

Registry: Vancouver

Between:

Xin Wei

Claimant

And

Yong Xu

Zhenteng Xu

Respondents

Before: The Honourable Madam Justice Ahmad

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

J. Kang

Counsel for the Respondent Yong Xu:

S. Samra, (a/s)

Counsel for Respondent Zhenteng Xu:

N. Deol

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 26, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 4, 2020

- [1] THE COURT: This is an application that was heard on November 26, 2020. At the conclusion of submissions on that date, I adjourned the matter to Friday, December 4th, 2020, for delivery of my reasons.
- [2] I have counsel for the claimant, Ms. Wei, on the line with me as well as Ms. Deol, counsel for one of the proposed third parties on the line. We do not have counsel for the respondent Mr. Xu. However, as this matter was adjourned to a specific date, I will be proceeding with my reasons today.

Introduction

- [3] Several applications were scheduled to be determined on this contested family proceeding. Those applications were set out in three notices of application:
- a) the claimant's notice of application filed February 28, 2020;
 - b) the claimant's notice of application filed August 18, 2020; and
 - c) the respondents' amended notice of application filed November 24, 2020.
- [4] Having considered the number of applications to be heard in the time that was available, I decided to proceed first with the claimant's application set out in para. 1 of her application filed August 18, 2020.
- [5] On that application, Ms. Wei applies pursuant to s. 89 of the Family Law Act for an interim distribution of family property to fund her legal expenses for these proceedings. The remaining applications were adjourned generally.

- [6] This is the second application for an interim distribution that the claimant has made, the first being an application before Master Elwood on March 17, 2020. On that application, which I will refer to as the "first application," Master Elwood ordered that an interim distribution of \$28,000 to be used for the purposes enumerated under s. 89 of the Family Law Act. On this application Ms. Wei seeks an additional \$130,000 to be distributed to her to fund her legal fees in these proceedings.

Background

- [7] The claimant, Ms. Wei, is 41 years old. The respondent Yong Xu is 51 years old. They started cohabitation in 2012 and married in October of that same year. They have one son, Will, who was born in 2013 and is currently seven years old.
- [8] As noted, this is Ms. Wei's second application for interim distribution of family property. Of the amount sought for interim distribution on the first application, almost \$50,000 was for arrears of legal fees owing. Ms. Wei sought \$40,000 to fund the seven-day trial that was then set to commence five days later on March 23, 2020.
- [9] For reasons set out in the oral reasons for judgment, Master Elwood granted Ms. Wei an interim distribution of \$28,000. He rejected the claim for arrears, on the basis that there was no evidence showing that her lawyer would abandon the trial unless that amount was paid. However, he held that it would be reasonable to release \$40,000 to conduct a seven-day trial, but reduced that amount to \$28,000 after considering Mr. Xu's contribution towards the cost of a s. 211 report.

On March 9, 2020, the trial was adjourned generally due to the court's suspension of operations and response to COVID-19. The matter has now been set for trial for nine days commencing on July 26, 2021.

- [10] In the notice of application before me, Ms. Wei sought an additional interim payment of \$120,000. At the hearing counsel advised she is now seeking \$130,000. That amount is made up as follows:
- a) \$59,167 for the current arrears of legal fees as of August 2020;
 - b) approximately \$10,000 in arrears that have been incurred since August 2020;
 - c) \$50,000 retainer for the nine-day trial; and
 - d) the balance, being \$10,732 for steps that will be required in the litigation prior to trial, including further discovery, other interlocutory court applications, including the applications that were adjourned, and potential negotiation or mediation.

Legal Framework

- [11] Section 89 of the Family Law Act allows the court to make an order for interim distribution of family property to provide money to fund a family law proceeding. In *Bartch v. Bartch*, 2017 BCSC 210, this court set out the test governing interim distributions of family property as follows:
- a) the applicant must show an advance is required to adequately mount a challenge to the other spouse's position at trial or pretrial; and
 - b) the applicant must show that the advance or payment on an interim distribution basis will not jeopardize the other spouse's position at trial, i.e., it will not be harmful to the interests of the spouse.
- [12] In addition to those factors, in *MacFarlane v. Ponds*, 2019 BCSC 544, the court also assessed whether the applicant had a reasonable prospect of success on the claims at trial. I now turn to a consideration of those three factors.

Is an advance necessary to challenge the respondent's position at trial?

- [13] At the first stage of my analysis of this factor, I will consider the legal costs that Ms. Wei can expect to incur to proceed to the end of the trial. I will then consider her current means to pay those costs.
- [14] As set out above, as of August 2020, Ms. Wei was in arrears of legal fees in the amount of \$59,167. By invoice dated August 6, 2020, counsel advised Ms. Wei that they would require full payment of that amount plus an additional retainer of \$10,000 to continue serving her. When the first application was before Mr. Elwood, there was no evidence that paying the accounts receivable was necessary for Ms. Wei to mount her case. I have that evidence before me in the form of the August 6, 2020 invoice and advice to Ms. Wei. I accept that payment of the arrears and an additional \$10,000, totalling approximately \$70,000, is required to allow Ms. Wei to proceed with this action.
- [15] In addition, counsel anticipates that Ms. Wei will incur fees of approximately \$50,000 for trial. That estimate is consistent with Master Elwood's estimate that it could cost \$40,000 to proceed to the seven-day trial that had been previously set for March 2020. His observation that this has been a hard-fought case with numerous issues to be determined remains as true now as it did then. The additional two days easily counts for the increase in the cost estimate. I accept counsel's estimate that a nine-day trial will cost an additional \$50,000.
- [16] In addition to the trial, the parties also anticipate that they will have to attend a number of interlocutory applications, including the three additional applications that were scheduled but unable to be heard with this one. Included in those applications are cross-applications to add third parties that each of the parties say will be required to allow for the full determination of this matter. If either party succeeds in those applications, and in particular if Ms. Wei succeeds in her application to add Mr. Xu's father as a party, she will also have to

conduct further discoveries including discovery of documents and oral discovery of him. In addition, I am advised that the parties have scheduled a mediation for January. There will be a cost of both preparation and attendance for that mediation.

- [17] Again, it is difficult to accurately estimate both costs of the pretrial matters. I note, however, that for the applications that were scheduled for hearing, the parties have filed 33 affidavits and portions of two discovery transcripts. Given that, together with the relative complexity of the applications and the hard-fought nature of these proceedings, I am satisfied that Ms. Wei's estimate of approximately \$10,000 for pretrial matters is reasonable.
- [18] While Mr. Xu does not argue that Ms. Wei's cost estimate is too high, he notes that there is a mediation scheduled for January 2021. If the parties succeed in resolving the matter, there will be no further costs of trial.
- [19] Ideally, of course, the parties will be able to settle and finalize their outstanding claims at the mediation. However, given the nature of the disputes, including allegations of hiding assets, it seems to me it is unlikely to be the case. In my view if Ms. Wei is otherwise entitled to an interim distribution pursuant to s. 89, the distribution should not be withheld because the parties may resolve the dispute. In case the matter is resolved, any amount paid pursuant to an interim distribution would of course be credited to Mr. Xu.
- [20] As part 2 of my consideration of whether an advance is necessary, I will now turn to a consideration of whether Ms. Wei is able to pay the estimated costs of litigation. Having considered the same issue on the first application, Master Elwood noted at paras. 14 and 15 of his reasons as follows:
- [14] The respondent further argues that there is no evidence the claimant is unable to raise the funds from other sources. Without going very far into the evidence, I note that Master Muir was satisfied that the claimant's need had been established for the purpose of interim spousal support. Evidence of the claimant's limited English language ability and the bare minimum wage type employment she has been able to obtain to the date of that decision, which was in October 2019, satisfied Master Muir there was need on the claimant's behalf.
- [15] Likewise, I am satisfied there is sufficient evidence of need for the claimant to level the playing field with the respondent, whose most recent line 150 income was \$142,000.
- [21] There is nothing in the evidence before me to indicate that Ms. Wei's situation has changed from the date of Master Elwood's decision. To the contrary, Ms. Wei's most recent F8 financial statement sworn on August 13, 2020, discloses the following:
- a) She has no employment income.
 - b) She has had to stay at home to take care of her son full-time.
 - c) She has \$3,116.24 in her bank account.

- d) She owes a combined debt of \$203,573 for credit cards and personal loans. This is in addition to mortgage and arrears owed to her family law counsel.
- [22] While she does receive child support, those funds are for the child's benefit, not Ms. Wei's. The spousal support payments amount to approximately \$30,000 per year.
- [23] By contrast, Mr. Xu's last F8 financial statement dated September 12, 2019, indicates that he has employment income of approximately \$142,000. While some of that income is used to pay child and spousal support, like Master Elwood in March 2020, I am satisfied that there is sufficient evidence of the need for the claimant to level the playing field with the respondent. Ms. Wei has met the first factor of the s. 89 test. I now turn to the second factor.

Will an advance be harmful to the interests of Mr. Xu?

- [24] Mr. Xu argues that any interim distribution to Ms. Wei will be harmful to him, particularly if it is subsequently determined that Ms. Wei's entitlement to family property is less than the distribution that may be ordered or if costs are awarded against her.
- [25] In that case, he says he will be unable to recover any amount owing from her, alleging that she could easily move to China, thereby escaping any repayment obligations she may have in B.C. There is no evidence to substantiate that possibility. To the contrary, the evidence before me disclosed that Ms. Wei sold an apartment she owned in China and has lived in BC since at least 2012, including the time she has lived in BC with the child of the marriage since 2013. Although she made several trips to China in the past few years, there is nothing to suggest that it is her intention to do so permanently. I am not satisfied on the evidence that there is a risk that Ms. Wei will leave the jurisdiction to avoid a possible adverse judgment against her.
- [26] The more realistic possibility is that if an interim distribution results in an overpayment to Ms. Wei at the end of trial, she may not be in a position to pay the amount of the overpayment to Mr. Xu. I will address that potential harm to Mr. Xu further under the reasonable prospect of success branch in the s. 89 test. I will turn to that consideration now.

Is there a reasonable prospect that Ms. Wei will succeed on her claim to the family property at trial?

- [27] Under this branch of the s. 89 test, I must be satisfied that there is a reasonable prospect that Ms. Wei will recover a share of the family property to address the concern of Mr. Xu that he will be prejudiced by an order for interim distribution.
- [28] Establishing a reasonable prospect of success will be more important where the responding spouse raises a threshold issue on the merits, such as a marriage agreement or the existence of a marriage-like relationship, as was the case in the MacFarlane decision. And I refer to the oral reasons for judgment of Master Elwood dated March 17, 2020. At para. 7 of his reasons Master Elwood noted that:

- [7] The reasonable prospect of success branch of the test is less important or takes on a less important role in a case such as this where the claimant clearly has some entitlement to family property and the argument of the respondent will be that the trial judge should order less than an equal division of the family property based on the factors set out in s. 95 of the Family Law Act.
- [29] On this application, there are approximately 33 affidavits before me, some of which address the issues that will be argued at trial. Those issues include some complex claims, including excluded property claims, allegations of both parties that assets and income are being hidden, a claim of the distribution of property in China, a claim of alienation of the child of the marriage, and a claim to the unequal division of assets.
- [30] As was the case for Master Elwood, it is not possible nor is it appropriate for me to engage in a comprehensive analysis of the conflicting evidence of the strength of Ms. Wei's claim to the family property. That analysis is for the trial judge to decide on the full body of evidence that will be available at trial.
- [31] On the first application, Master Elwood noted that his:
- task is only to decide whether there is a reasonable prospect the claimant will recover a sufficient share of the family property to address the concern of the respondent that he will be prejudiced by an order for an interim distribution.
- [32] My task on this application is no different and is similarly limited. As noted, there is much that is at issue with respect to the assets to be included or excluded as family property and the parties' respective entitlement to those assets. However, there does not appear to be any dispute or any significant dispute regarding two assets to be included as family property. They are the parties' former matrimonial home located in Delta which was acquired during the marriage, and Mr. Xu's pension and RSP accounts, which appear to have increased in value during the time of the marriage.
- [33] The net equity in the Delta home appears to be approximately \$478,000. If she is entitled to half of that equity, Ms. Wei's interest would be approximately \$239,000. The total gain in the most valuable of the RSP accounts during the course of the marriage was approximately \$37,900, half being \$18,950. Together, the presumptive entitlement to half of those assets is approximately \$257,900. I note that although Mr. Xu disputes Ms. Wei's entitlement to half of the family property, he does not dispute the calculations.
- [34] As Ms. Wei concedes, even if she is entitled to half of those family assets, other deductions must be made from her interest, including:
- a) approximately \$80,500 representing Mr. Xu's credit for post-separation mortgage payments;
 - b) \$25,000 representing Mr. Xu's possible entitlement to the increase in value in an apartment owned and sold by Ms. Wei in China, which Ms. Wei disputes; and

- c) the \$28,000 distributed pursuant to the order of Master Elwood.

Deducting those amounts from half of the value of the Delta home and the increase in the RSP accounts results in a possible recovery by Ms. Wei of \$124,400.

[35] In addition to that claim for family property, Ms. Wei has other claims she will be making at trial. Those claims include:

- a) A claim for occupational rent for Mr. Xu's use of the Delta home since separation. At \$2,000 per month, that claim could be as much as approximately \$120,000, Ms. Wei's half being \$60,000.
- b) A claim for retroactive spousal support for the period from February 2016 to August 2019, which, if successful, could amount to approximately \$107,000.
- c) A claim against a bank account that exists but is not disclosed in Mr. Xu's F8 financial statements.
- d) A claim that Mr. Xu has earned undisclosed income in China.

Succeeding on the claims for occupational rent and retroactive spousal support alone will result in additional entitlement to Ms. Wei of \$167,000.

[36] Again, it is not for me to delve into the details of those claims on this application, and I decline to do so. However, given the evidence that is available, I am satisfied that there is a reasonable prospect that Ms. Wei may at least partially succeed in some of those claims. In that case, her claim against Mr. Xu will exceed the \$124,400 to which I have concluded she has the reasonable prospect of recovering for the property claims.

[37] For his part, Mr. Xu disputes that Ms. Wei will be entitled to half of the family property. In that regard he has raised several of the same factors he raised in the first application, including an excluded property claim, the duration of the marriage, the fact that he has maintained the family property and paid support since separation, and his allegation that Ms. Wei disposed of family property in China.

[38] Of those, the relatively short duration of the marriage, being approximately three and a half years, is the most compelling to detract from Ms. Wei's presumptive entitlement to a half interest in the family property. However, I am not satisfied that the three and a half year marriage alone will be enough to wholly disentitle Ms. Wei to any portion of the family assets. To the extent that she may not be entitled to the presumptive half interest, that is made up for in other claims, including the claim for occupational rent and retroactive spousal support that Ms. Wei will advance.

[39] Mr. Xu also alleges there is a family debt of \$265,700 owed to his father which he says must be deducted from the value of the family property. In my view that debt is questionable. Firstly, there is no written agreement to substantiate the alleged loan. Secondly, in an affidavit sworn in July 2016 that is just after the parties' separation in January 2016, Mr. Xu

listed the debt owed to his father as \$40,000. In a follow-up affidavit sworn in September 2019, Mr. Xu revised the amount of the debt to \$265,750 but allocated it to loans allegedly made prior to the parties' separation. Finally, the amount of the alleged loan corresponds to the amount that Ms. Wei had transferred to Mr. Xu's father, who in turn had returned that money to her. In other words, it appears that the amount claimed as owing to Mr. Xu's father as family debt was Ms. Wei's money in the first place.

- [40] The circumstances are such that I conclude Ms. Wei has a reasonable prospect of showing that no family debt is owed to Mr. Xu's father. I conclude that Ms. Wei has a reasonable prospect of success on her property claims.
- [41] Notwithstanding that conclusion, I am mindful of the fact that the amount sought for the interim distribution, being \$130,000, exceeds her potential recovery of the undisputed family assets on an equal basis, which is \$124,400.
- [42] Before I can make an order for an interim distribution pursuant to s. 89, I must be satisfied that it will not be harmful to Mr. Xu. As I alluded to earlier, to address any potential harm that may result to Mr. Xu given Ms. Wei's limited ability to repay any overpayment that may result from an interim distribution, I will reduce the amount of the interim distribution by \$20,000 to \$110,000.

Conclusion

- [43] On the basis of the above, I am satisfied that Ms. Wei has met the factors required of her to succeed on an application for an interim distribution of family property pursuant to s. 89 of the Family Law Act.
- [44] I am also satisfied that an interim distribution of \$110,000 will be sufficient to allow Ms. Wei to continue with these proceedings, while at the same time will ensure that Mr. Xu's interests are not harmed.
- [45] I note that the \$28,000 distribution that was paid pursuant to the order of Master Elwood was made for the costs of a trial that did not occur. In my view that amount must be taken into account to reduce the amount of the interim distribution to \$82,000.
- [46] For the above reasons, I order as follows:
- there will be an interim distribution of family property to Ms. Wei in the amount of \$82,000 payable within 14 days of the date of this order;
 - the payment contemplated by this order is to be paid to counsel for Ms. Wei in trust to be used solely for the purposes enumerated under s. 89 of the Family Law Act;
 - Ms. Wei will irrevocably instruct her counsel to pay to counsel for Mr. Xu in trust any amount remaining of the funds at the final conclusion of these proceedings; and
 - costs of this application are payable to Ms. Wei.

[47] Counsel, are there any matters arising that I should address before I conclude these reasons?

[48] MS. DEOL: No, My Lady.

[49] THE COURT: Mr. Kang?

[50] MR. KANG: No, My Lady. Oh, except there is one very small thing. In the event that there is going to be a written reasons for judgment, I would like to note that the parties have already set a trial. I believe Your Ladyship said they are attempting to set a trial.

[51] THE COURT: Right.

[52] MR. KANG: They have set a trial.

[53] THE COURT: And when is that trial date?

[54] MR. KANG: If you could just give me one second.

[55] THE COURT: Well, Mr. Kang, that is actually fine. If it is requested that these reasons are transcribed, I will note that in my reasons.

[56] MR. KANG: Thank you very much, My Lady.

[57] THE COURT: Thank you, Mr. Kang.

[58] MR. KANG: Thank you.

[59] THE COURT: Thank you, counsel.

[60] MS. DEOL: Thank you.

"Ahmad J."

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/sc/20/21/2020BCSC2137.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/wei-v-xu-2020>

Prepared on 29 October 2026 · Esheria