
CANADA / JUDGMENT

Weintz v. Weintz

2012 BCSC 1570

COURT

Supreme Court of British Columbia

DECIDED

25 October 2012

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

2012 BCSC 1570 Weintz v. Weintz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Weintz v. Weintz,

2012 BCSC 1570

Date: 20121025

Docket: E29777

Registry: New Westminster

Between:

Marilyn Sonya Weintz

Claimant

And

Donald Weintz, also known as Donald Frederick Weintz

Respondent

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

J. Fairburn

Counsel for the Respondent:

C. Garcia

Place and Date of Hearing:

New Westminster, B.C.

September 28, 2012

Place and Date of Judgment:

New Westminster, B.C.

October 25, 2012

- [1] The claimant applies in this matrimonial action for a reconsideration of various aspects of my judgment, digested at 2012 BCSC 120.
- [2] The claimant and respondent each own a one-half interest in the 2292 Management Ltd. ("2292") shares and the former matrimonial home. The respondent remains in control of the assets of 2292. Specifically, he has access to the real estate held by 2292 and A.J.D. Holdings Co. Ltd. ("A.J.D."). If not clear from my earlier reasons, the parties, while equal shareholders in 2292, hold different classes of shares.
- [3] A.J.D. is a holding company whose shares are owned equally by 2292 and the holding company of Paul DeGrace. A.J.D. owns all of the shares in the operating company Can-Tec, an electrical contracting company.
- [4] Prior to the application coming before me, counsel were able to agree to an order relating to the \$420,000 mortgage encumbering property occupied by the respondent on Johnston Road, White Rock, B.C., one half of which was conceded by the respondent to be his responsibility despite being borrowed by A.J.D. Other matters, related to disclosure and the respondent's use of corporate funds of 2292 were also consented to by the respondent prior to the application coming on for hearing. The issues in this application suggested for reconsideration are twofold; (1) the claimant submits the respondent should be compelled to purchase the claimant's shares in 2292 and (2) that she should be entitled to a compensation payment for the respondent's use of the shareholder loan account subsequent to the pronouncement of the triggering event in 2008.
- [5] Apart from reconsideration of the issue of property division the only other relief sought by the claimant is a vesting order respecting the premises at 12632-25th Avenue, Surrey, B.C. (the "former matrimonial home") as partial satisfaction of the claimant's entitlement to the family assets.
- [6] The respondent seeks the sale of the former matrimonial home as well as sale of the shares and/or assets of 2292. He also seeks variation of my order respecting the payment of support for the parties' adult child Kaitlin.
- [7] The background of this matter is set forth in my earlier reasons for judgment and I will not repeat them.

- [8] After five days of trial in January, 2012, I determined the value of the collective shareholding in the family holding company, namely 2292, and prescribed the terms upon which the respondent could purchase the claimant's interest in it. I contemplated the respondent's cash payment of \$629,882 and transfer of his one-half interest in the former matrimonial home to the claimant as payment for the claimant's 2292's shares.
- [9] The respondent was given 90 days following the judgment to exercise his option to buy the claimant's interest. He has chosen not to proceed with the purchase. The respondent now seeks the sale of the shares or assets in 2292 together with the former matrimonial home. Thereafter, he suggests the net proceeds be divided evenly.
- [10] An appeal of my decision has been filed by the claimant. The appeal is apparently dormant awaiting my reasons on this application.
- [11] The claimant, it appears, would be happy to divest herself of her interest in 2292 upon payment of the sum found by me to represent her entitlement to the family assets when coupled with 100% ownership of the former matrimonial home.
- [12] The respondent notes my order contemplated the sale of the shares and/or assets of the holding company in the event the respondent was unable or unwilling to buy out the claimant.
- [13] As a consequence of the respondent's decision not to buy the claimant's shares, the claimant has not received the capital to allow her to pay off the encumbrances registered against the former matrimonial home nor has she received the excess capital to invest so as to augment her income.

The Legal Foundation

Discretion to reconsider decisions

- [14] The common law discretion conferred on this court to reconsider decisions in the area of family law, prior to entry of the order, is well established law: *Sykes v. Sykes* (1995) ("Sykes"), 6 B.C.L.R. (3d) 296 (C.A.); *Harrison v. Harrison*, 2007 BCCA 120; and, more recently, in *Bronson v. Hewitt*, 2010 BCSC 871 ("Bronson").
- [15] In *Bronson* Goepel, J. provided the following summary at paras. 25-27:
- [25] Prior to entry of an order, a trial judge has an unfettered discretion to re-consider or revise any aspect of the decision. In *Clayton v. British American Securities Ltd.* (1934), 49 B.C.R. 28 (C.A.), Macdonald J.A. stated at 66-67:

My view has always been that the trial judge might resume the hearing of an action apart from rules until entry of judgment, but as it was vigorously combated I have given it careful consideration. The point, as far as I know, has not been squarely decided; at least by any cases binding upon us. It is, I think, a salutary rule to leave unfettered discretion to the trial judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the

trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur. If, e.g., a document should be discovered after pronouncement of judgment, but before entry, shewing that the judgment was wrong and the trial judge was convinced of its authenticity no lack of diligence by a solicitor in not producing it earlier should serve to perpetuate an injustice. The prudent course is to permit the trial judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur.

[26] New evidence is not an essential prerequisite to a reconsideration application. A judge may properly reopen if satisfied, either because of the argument of one of the parties, or on the basis of his or her own reconsideration of the record, that the original judgment was in error because it overlooked or misconstrued material evidence or misapplied the law: *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296 (C.A.) at para. 10.

[27] The filing of an appeal is not a bar to a reconsideration application: *Banyay v. Actton Petroleum Sales Ltd.* (1996), 17 B.C.L.R. (3d) 216 (C.A.). A reconsideration application is not an alternative method of appeal: *Kemp v. Wittenberg*, [1999] B.C.J. No. 810 (S.C.).

[16] This discretion is to be exercised sparingly.

[17] An issue may be reconsidered if the original judgment is in error because it misapplies the law: *Sykes*.

[18] Additionally, an issue can be reconsidered where there has been a change of circumstances fundamental to the original result. In *B.J.L. v. J.R.D.L.*, 2003 BCSC 381, at para. 3:

...where there has been a change of circumstances between the date the judgment was pronounced and the time of the subsequent application, provided the change in circumstances relates to something fundamental to the original reasons for judgment.

[19] In this application, Counsel for the claimant relies on *Constantinescu v. Barriault*, [1996] B.C.J. No. 2105 ("Constantinescu"), wherein Baker J. reconsidered the issue of the deductibility of employment insurance benefits from an award of damages for personal injury when persuaded she had fallen into error when, without argument, she deducted same from the plaintiff's personal injury award.

[20] Commencing at para. 7 of *Constantinescu*, Baker J. stated the following:

[7] The plaintiff's application to reconsider relates only to the finding, in paragraph 100, that unemployment insurance benefits actually received by Mr. Constantinescu in an 11 month period during which he was unable to work by virtue of two elbow surgeries, must be deducted from the award for past loss of employment income. The amount of the deduction made was \$12,100, although the net effect on the ultimate award is less, since Mr. Constantinescu was found 75% liable for causation of the accident.

- [8] There can be no doubt from a reading of paragraph 100 that the court turned its mind to this issue, and that the matter has been adjudicated. Counsel for the plaintiff submits that the conclusion reached is wrong, as a matter of law, and that the decision was made per incuriam, because counsel did not make submissions on the point, and did not draw to the court's attention any of the relevant authorities. Counsel for the plaintiff says that no submissions were made or authorities submitted because he assumed that the non-deductibility of unemployment insurance benefits was well-established law. Counsel concedes, however, that the court raised the issue during submissions, and that counsel's only response was that since the payments were in the nature of insurance, they would not be deductible.
- [9] *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296, is a recent Court of Appeal decision dealing with the discretion of a trial judge to re-open before formal judgment has been entered. At page 300, the court confirmed that the following quotation from the judgment of Justice Macdonald in *Clayton v. British American Securities Ltd.*, [1934] 3 W.W.R. 257 at 295 (B.C. C.A.), is still the law:

It is, I think, a salutary rule to leave unfettered discretion to the trial judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care, fraud and abuse of the Court's process would likely result.

- [10] The difficult question posed by the plaintiff's application in this case is whether the discretion to re-open should be exercised where the error alleged is one of law, clearly subject to review in the Court of Appeal, and where the matter could and ought to have been fully canvassed in submissions at trial, but was not.
- [11] None of the authorities referred to by counsel addresses this point directly. In *Sykes*, Justice Wood held that the unwillingness of one of the parties to accept as final an order made, or the desire to introduce a new or alternative argument which could have been, but was not, advanced at trial, are not proper bases upon which a trial judge should exercise the discretion to re-open. (p.299).
- [12] In *Bastian v. Mori*, unreported, [1991] B.C.D. Civ. 3710-01, Supreme Court, Vancouver Registry No. C876136, December 20, 1990, Justice Hood declined to reconsider the terms of a trial judgment on the basis that the application had not been made in a timely fashion, and that it was obvious that the matters in question would be reviewed by the Court of Appeal. In that case, that defendant argued that an award for cost of future care was contrary to the law of the province, as established by another trial court decision six months earlier, which had not been brought to Justice Hood's attention during submissions at trial. The earlier decision, and Justice Hood's decision, were both to be heard by the Court of Appeal.

[13] However, in *D.M. Drake & Co. v. Dave's Plumbing & Heating (1962) Ltd.*, unreported, [1981] B.C.D. Civ. 211-0, February 2, 1981, B.C. C.A., Registry No. CA791017, a number of points of law had been advanced in question form and considered by the court below, but on appeal, the court noted that one of the questions posed had not been answered. The court held that it would be beneficial if the consideration of that question by the trial judge could be before the court on appeal. The court suggested that the best course would be for the trial judge to hear and adjudicate upon the issue before it was brought back to appeal.

[14] And in *Sykes*, Justice Wood emphasized that it is not only in cases where new evidence is available that the trial judge has a discretion to re-open. He said:

It will in all cases depend on the circumstances. But a discretion to re-open may also properly be exercised where the trial judge is satisfied, either because of the argument of one of the parties, or on the basis of his own reconsideration of the record, that the original judgment was in error because it overlooked or misconstrued material evidence, or misapplied the law. (emphasis added by Baker J.)

[15] The danger in allowing a party to reopen to argue a matter which was not argued at trial, or which was inadequately argued at trial, is obvious. There must be an end to litigation, and parties must be encouraged to thoroughly canvass all the live issues raised by the pleadings, and to provide all relevant authorities during their submissions at trial. Counsel should not "assume" that judges are familiar with the authorities in every type of case. It is the job of counsel to bring the relevant authorities to the attention of the court.

[16] Although I am reluctant to reconsider a matter which was clearly in issue at trial, and which was raised with plaintiff's counsel at trial, but responded to very inadequately, I am even more reluctant to penalize the plaintiff by putting him to the expense and trouble of carrying an appeal on this issue, when the authorities which have now been brought to my attention indicate that I was in error in the manner in which I disposed of the issue.

[17] Accordingly, I have decided to grant the motion to reconsider. In relation to the deductibility of unemployment insurance benefits during the 11 months during which the plaintiff was incapacitated as a result of elbow surgery, which is the only issue before me for reconsideration, I am of the view that I am bound by the authority of *Hayre v. Walz* (1992), 67 B.C.L.R. (2d) 296 (C.A.), and that unemployment insurance benefits received during the 11 month period ought not to have been deducted from the award to the plaintiff for past loss of income.

[21] From *Constantinescu*, I conclude the following: (1) I have jurisdiction to reconsider my order if I am satisfied such results in an error of law; (2) I have discretion to reconsider my order if on reflection, I conclude that the original judgment was in error because it overlooked or misconstrued material evidence; (3) an outstanding appeal is not a bar to reconsideration; and (4) the discretion is to be used sparingly.

The Claimant's Application

Issue One: Should the Respondent be compelled to Purchase Shares?

[22] The claimant submits that in my reasons for judgment, I failed to consider the court of appeal decision in *Chapman v. Summer*, 2007 BCCA 103 ("Chapman"), which, submits the claimant, is binding on the court in the circumstances of the case at bar.

[23] Chapman was not drawn to the attention of the court during submissions. Counsel for the claimant following the evidence acknowledged that while it would be preferable for the claimant if the respondent were to buy the claimant's shares, there were other possible scenarios to divide the assets. At trial, Counsel for the claimant agreed that respondent would not be compelled to buy the shares:

MR. FAIRBURN: The past experience I've had with this problem is that the court, you know, sets a number and he has a certain time period to pay it. If he doesn't, then, you know, then the natural follows.

THE COURT: All right, well, just so I'm clear, that's -- that's, I'll tell you, absent some fairly persuasive argument as to how he's to go about this, my inclination would be, is to give Mr. Weintz the option of acquiring the interest, because there's obviously some practical benefits for both of them if he's willing to do that and can find a way to do that. But in the absence of that, placing him in a situation where he simply has to do it and the consequences of him then being able to not fulfill that would be disastrous, so --

MR. FAIRBURN: I understand that perfectly.

THE COURT: All right, thank you.

MR. FAIRBURN: Again, both parties, I think -- I think both parties, at the end of the day, they recognize that whatever they do they have to do something that's going to be to the mutual benefit in that sense, so ...

[24] The claimant submits that the Court of Appeal decision in *Chapman* provides black letter law in the circumstances of this case and is therefore binding. The claimant submits that the failure to apply the principles in *Chapman* constitutes an error of law. I disagree.

[25] In *Chapman*, Huddart, J.A., speaking for the court, determined that the respondent was required to buy out the wife's interest in the corporate holdings. She did so, in my respectful view, having regard to the specific factual matrix of the parties before them.

[26] In *Chapman*, the court concluded that there was no way for the wife to realize her interest in the family assets without making such an order. Because of the nature of the assets, mainly held within a closely held corporation in which the parties' interest was a minority 1/6th holding, the court took the view that the order compelling the husband's purchase of her interest was necessary. In *Chapman* there were no other assets of consequence beyond the corporate shares and the husband remained in the former matrimonial home because it was owned within the corporation. The wife was caring for a disabled child.

- [27] Anecdotally, the order was made as against the husband who had no better mechanism than did the wife to realize upon the value of the shares. In subsequent proceedings, the husband's family descended upon him like vultures stripping him of the value of his shares in the enterprise after the shares were ordered sold to satisfy the wife's money judgment. In the result, he went into bankruptcy.
- [28] Here, in my view, the fact situation is entirely different. Collectively, the parties own 50% of the issued shares in A.J.D. via their 100% ownership of 2292. In the event there is no buyer for the shares of 2292 or the assets it owns, the parties have a remedy. They can apply to have A.J.D. wound up.
- [29] Unlike in Chapman, the underlying value of both 2292 and A.J.D., according to Mr. Mynett, the expert who gave testimony at trial, is primarily made up of tangible assets. Many of those are redundant to the operation of the electrical contracting business. These include two Mexican condominiums and a ski chalet at Big White Mountain. In the view of Mr. Mynett, they are readily saleable.
- [30] Additionally, I note that the valuation of the parties' corporate holdings provided for only a modest allocation for the goodwill of Can-Tec given the fact that Mr. DeGrace and Mr. Weintz have no discernible plans for the continuation of the business after they choose to retire.
- [31] My decision, in part, was founded on credible evidence that the respondent here did not intend to work for more than a few more years.
- [32] As noted in the reasons for judgment, I consider the claimant "an old 57" and, as such, do not believe it appropriate to require him to soldier on with the management and ownership of Can-Tec leaving the claimant free from risk or the consequences of an early sale.
- [33] In the result, I dismiss the application by the claimant for a reconsideration of the order respecting the shares in 2292 and, specifically, dismiss the application to require the respondent to purchase the claimant's interest in them for the sum set out in my reasons for judgment.

Issue Two: Compensation for Withdrawal from the Shareholder's Loan Account

- [34] The claimant also suggests that Chapman contains binding authority which should result in a reconsideration of my order respecting the respondent's withdrawal of approximately \$187,000 from the shareholder's loan account post-separation after the pronouncement of the triggering event sometime in December 2008.
- [35] The matter was argued before me at trial on the basis that the respondent had depleted the shareholder's loan account by withdrawals requiring either repayment of \$187,000 prior to completion of the company's 2011 financial statements or, alternatively, the declaration of a \$187,000 dividend. The former would mean Mr. Mynett's valuation of 2292 was understated by the amount repaid; the latter would mean the company's value was reduced by the

amount of the dividend declared to 'clear' the deficit in the shareholder loan account. The dividend scenario would result in tax liability for the respondent.

- [36] The materials before me on this application disclose that the respondent, subsequent to trial, caused a dividend to be declared on his shares in 2292 sufficient to erase the deficit in this shareholder loan account subsequent to reasons for judgment being issued. He has a corresponding debt, unascertained at this time, for tax owing on the funds received. In my initial decision dismissing the claimant's request for a compensation order under s. 66(2)(c) of the Family Relations Act, I referenced the Court of Appeal decision in *Parminster v. Parminster*, 2011 BCCA 347, and concluded that the additional payment to the respondent was not unfair within the meaning of that section having regard to the fact that the value of 2292's shares had increased by approximately 50% since the date of separation.
- [37] In reviewing my reasons and in dialogue with both counsel at the hearing for reconsideration, I have concluded this approach was an error in law.
- [38] Although the matter of compensation to the claimant was fully canvassed at trial and argued on her behalf by claimant's counsel, upon reflection, and in view of "new evidence" that the respondent caused a dividend to be declared upon his shares in 2292 and not those owned by the claimant, I conclude s. 56(1) of the Family Relations Act has application.

[39] Section 56(1) of the Act reads as follows:

56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

- (a) a separation agreement,
- (b) a declaratory judgment under section 57,
- (c) an order for dissolution of marriage or judicial separation, or
- (d) an order declaring the marriage null and void

respecting the marriage is first made.

- [40] That interest is a prima facie one-half interest subject to reapportionment if the factors enumerated in s.65(1) apply and an equal division is unfair. At trial, I found that an equal division was not unfair.
- [41] The triggering event was the pronouncement of a s. 57 declaration on December 16, 2008. At that time, the claimant became entitled, to an undivided one-half interest in the shares held by the respondent in 2292 as a tenant in common. These are the shares upon which the dividend was declared.

- [42] I conclude the \$187,000 drawn by the respondent in 2011 was paid by way of dividend on an asset in which the claimant was entitled to a one half interest. It was not paid as salary and, as such, in my view the claimant is entitled to one half of the gross amount of the dividend. It was nothing more than a return on capital to the investor.
- [43] Given the whole of the dividend was paid on account of shares in the name of the respondent, an incident of receipt is that income tax is owed at the respondent's rate; not the claimant's rate. I am told the tax has not yet been paid.
- [44] Counsel should make efforts to determine the net value of the dividend declared to the respondent after allowance for tax and then I direct he shall pay to the claimant one-half the net amount within 60 days.
- [45] If they are in disagreement as to the sum owing, there will be liberty to apply.

Issue Three: Application for Vesting Order, re Former Matrimonial Home

- [46] With respect to the application by the claimant to have the respondent transfer his interest in the former matrimonial home to the claimant or, alternatively, that his one-half interest vest in the claimant, I believe such an order is premature.
- [47] In the current circumstances, that is the respondent's unwillingness to purchase the claimant's shares in 2292, the existence of the appeal and the fact that the respondent continues to control and enjoy the use of the redundant assets in either 2292 or A.J.D., circumstances may exist that will require this matter to be revisited by either (1) the Court of Appeal, or (2) by further application once there is a mechanism in place for the sale of the shares.
- [48] I pause to note that the onus will rest with the respondent to demonstrate that the claimant's retention of the former matrimonial home would somehow be unfair to him. Such might be the case if two events converged; the realized value of 2292 was higher than envisioned by the valuator and the former matrimonial home had increased in value, as well. That might well result in the claimant receiving a windfall.
- [49] In my view it will be unwise, at the present time, to upset the status quo.

The Respondent's Application

Issue 1: Sale of Shares and Matrimonial Home

- [50] With respect to the application by the respondent for both the sale of the shares and the former matrimonial home, I will adjourn both until either (1) a stay of execution of my judgment has been granted in respect to both those matters or for 90 days. The claimant will need to take steps to perfect the appeal. I am told this has been held in abeyance awaiting an appearance before me with the hope that costs would be reduced by dealing with this matter "on reconsideration" as opposed to proceeding with the appeal.

[51] Obviously, by virtue of my conclusions, the claimant will have to determine whether she wishes to press forward with the appeal or cooperate in the orderly sale and/or winding up of the corporate assets.

Issue 2: Application for Variation of Support for Kaitlin

[52] The affidavit of Kaitlin Weintz filed in support of this application makes clear that Kaitlin is no longer living with the claimant as was the case at the time of my reasons for judgment.

[53] Nonetheless, given the disparity between the parties' incomes and the fact that the respondent continues to enjoy the use of the redundant assets, vacation properties, contained in the corporate holdings, I am not of the view that it is appropriate that the claimant contribute to the ongoing s. 7 expenses of Kaitlin.

[54] The order requiring the respondent to pay support in the amount of \$490 monthly will be vacated, commencing October 1, 2012, the month following the bringing of this application and, thereafter, I contemplate that the respondent will continue to provide for Kaitlin's post-secondary educational expenses either through the mechanism of paying her a salary through Can-Tec or from his own resources.

Costs

[55] In my view the claimant has achieved substantial success by virtue of my reconsideration of her entitlement to one-half the net dividend declared on the respondent's shares in 2292 subsequent to trial and, in the result, should have costs of this application.

"Harvey 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/12/15/2012BCSC1570.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/weintz-v-weintz-2012-bcsc-1570>

Prepared on 29 October 2026 · Esheria