
CANADA / JUDGMENT

Xu v. Chu

2019 BCCA 414

COURT

British Columbia Court of Appeal

DECIDED

14 November 2019

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2019 BCCA 414 Xu v. Chu

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Xu v. Chu,

2019 BCCA 414

Date: 20191114

Docket: CA46095

Between:

Wan Cheng Xu also known as Wancheng Xu

Respondent

(Claimant)

And

Cai Ming Chu also known as Caiming Chu

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated December 14, 2018 (Xu v. Chu, 2018 BCSC 2222, Vancouver Docket E152859).

Oral Reasons for Judgment

Counsel for the Appellant:

N. Nasser

Counsel for the Respondent:

B.J. Ingram

Place and Date of Hearing:

Vancouver, British Columbia

November 6, 2019

Place and Date of Judgment:

Vancouver, British Columbia

November 14, 2019

Summary:

The appellant seeks to overturn various conclusions reached after a family law trial, including (but not limited to) the assessed value of family property; the respondent's income for purposes of child and spousal support; and dismissal of a claim for special and extraordinary expenses. Held: Appeal allowed in part. The trial judge undervalued the family property that was subject to division; failed to gross up the respondent's imputed income to account for unpaid taxes; and miscalculated the amount of retroactive child support payable to the appellant.

[1] DEWITT-VAN OOSTEN J.A.: This appeal arises out of a family law trial. The appellant challenges conclusions reached on the net value of family property; the respondent's income for the purposes of child and spousal support; and a claim for special and extraordinary expenses under s. 7(1) and (1.1) of the federal Child Support Guidelines, SOR/97-175 (Guidelines).

Background

[2] The parties began living together in 1998, married in March 1999, and separated in October 2015. They have one child, who is 11 years old. Since separation, the child has lived primarily with the appellant (Ms. Chu).

[3] The parties formalized a furniture business in 2009 ("STI"). Both were actively engaged in the company and STI was their main source of income during the marriage.

- [4] In October 2011, the parties purchased a house on West 14th Avenue in Vancouver. This was their principal residence until separation. At that point, the respondent (Mr. Xu) moved out. Ms. Chu still lives in the home with the parties' son. As at the date of trial, the house carried \$2,021,852 in equity.
- [5] The marriage broke down in the summer of 2015, after Mr. Xu entered into a relationship with Ms. Hu, whom he had met the previous year in Shanghai.
- [6] In September 2015, Ms. Hu was in Vancouver. She entered into a pre-sale agreement to purchase a two-bedroom condominium in Richmond ("Tomicki"). The purchase price was \$514,900.
- [7] That same month, Mr. Xu transferred \$500,000 from the parties' joint bank account at HSBC into a new account that he opened at BMO solely in his name. The funds derived from \$972,783 in net proceeds generated through the sale of a house owned by the parties before the one on West 14th. Mr. Xu also transferred \$25,000 from a second joint account to one solely in his name.
- [8] In October 2015, Mr. Xu filed a notice of family claim. He obtained an order freezing the parties' bank accounts, freezing STI's accounts, and restraining Ms. Chu from dealing with or disposing of family assets. In November 2015, Ms. Chu obtained a similar order that put an end to Mr. Xu's dealings with STI.
- [9] STI had inventory when the parties separated. Until the restraining orders were in place and acted upon, each party had access to STI. As I understand the evidence, they each made sales from the inventory and did not account to the other for the sales, many of which would have been in cash.
- [10] STI voluntarily dissolved in December 2015. Ms. Chu restored the company in June 2016, but by the end of that same year, STI ceased doing business.
- [11] In February 2016, the parties received \$447,500 in net proceeds by assigning a contract to purchase a new property on West 8th Avenue to a third party. They had entered into this contract in June 2015, prior to separation.
- [12] In June 2016, Ms. Hu incorporated a company called Future Furniture Ltd. ("FFL"). It operated a short distance away from STI, and, like STI, the business imported and sold furniture. The only persons involved in the company were Ms. Hu and Mr. Xu. Ms. Hu did not have a work permit in Canada when FFL was incorporated. (She obtained a permit in June 2017.) Because of this, Mr. Xu was initially the sole director of the company.

- [13] In July or August 2016, Ms. Hu assigned her pre-sale contract for Tomicki to Mr. Xu, who reimbursed Ms. Hu for the deposit of \$102,980. Mr. Xu used the \$525,000 withdrawn from bank accounts he shared with Ms. Chu to cover the deposit, as well as complete the purchase. Tomicki has been registered in Mr. Xu's name and is mortgage free. Mr. Xu currently lives in the condominium with Ms. Hu. As at the date of trial, Tomicki's appraised value was \$780,000.
- [14] For 2016, Mr. Xu reported employment income of \$24,720. In 2017, he reported employment income of \$29,600. In 2018, he worked exclusively at FFL and testified that he was paid approximately \$2,000 per month for a total annual income of \$24,000.
- [15] From the dissolution of STI to trial, Ms. Chu did not seek full-time employment. She worked approximately 25 hours per month, asserting a Guidelines income of about \$10,000 per annum. She testified that the ongoing family litigation was difficult for her. (At times, she has represented herself in court.) She also wanted to be available for her son in the event difficulties arose during school hours.

Trial Judge's Findings

- [16] The trial judge's reasons are reported at *Xu v. Chu*, 2018 BCSC 2222. Mr. Xu sought an equal division of family property. Ms. Chu sought an unequal division in her favour, based primarily on her allegation that Mr. Xu had surreptitiously retained valuable assets from STI for his own benefit. In addition, she alleged that Mr. Xu was under-reporting his earnings and, for purposes of child and spousal support, she asked that he be imputed an annual income of \$180,000.
- [17] After various adjustments, the trial judge assessed the total net value of family property as \$2,958,827. This included the \$525,000 withdrawn by Mr. Xu from the joint accounts and used to purchase Tomicki.
- [18] The judge accepted Ms. Chu's position that an unequal division of family property was justified on grounds that, after separation, Mr. Xu improperly retained and used STI assets in establishing FFL as a competing venture. He found that "part of FFL's current value as a going concern is attributable to [the] conversion of family assets" (at para. 86).
- [19] Because of the conversion, the judge ruled that Ms. Hu and FFL held "some family assets in trust for Mr. Xu a de facto partner" in the business (at para. 87). Rather than declare a trust or award damages for the conversion, the judge compensated Ms. Chu through an unequal division of the remaining property pursuant to s. 95(2)(g)(i) and (ii) of the Family Law Act, SBC 2011, c. 25 (FLA).

- [20] He was also satisfied that an unequal division was justifiable under s. 95(3) of the FLA, given "the value of the family assets relative to the parties' reported incomes, the compensatory and non-compensatory factors supporting an award of spousal support and the difficulty in arriving at an appropriate figure for periodic spousal support payments" (at para. 88). The judge divided the net value of family property 60/40 in favour of Ms. Chu.
- [21] To address child and spousal support, it was necessary to determine Mr. Xu's income. Mr. Xu testified that he was making \$24,000 per year at FFL, but was willing to have his Guidelines income fixed at \$30,000. Although the judge found no evidence to support Ms. Chu's suggested imputation of \$180,000, he was satisfied that Mr. Xu's earning capacity extended beyond \$30,000. Among other things, he found that Mr. Xu was a "de facto partner" in FFL, with the capacity to control the income that he and Ms. Hu received from the business. The judge also found that the salary Mr. Xu was drawing from FFL had been "kept artificially low in a concerted effort by him and Ms. Hu to defeat Ms. Chu's claims in [the family action]" (at para. 102).
- [22] The judge concluded that the gross sales of FFL had been under-stated in the company's financial statements. From his perspective, the actual gross revenues were likely 30% higher, with no additional expenses:
- [105] FFL reported revenues of \$205,563 in 2017 and \$232,247 in 2018. If those figures were actually 30% higher than reported due to hidden cash sales, there would have been an additional \$61,668 earned in 2017 and \$69,674.10 in 2018. Assuming Mr. Xu shared half of those extra earnings with Ms. Hu, his income would be \$30,000 - \$35,000 greater than reported in each of those years.
- [Emphasis added.]
- [23] Based on this assumption, the judge imputed an income of \$60,000 per year to Mr. Xu, effective October 2015. Retroactive and prospective child support was determined using that figure.
- [24] Ms. Chu was also found to have under-reported her income. The trial judge imputed an annual income to her of \$28,000. He concluded that Ms. Chu had both a compensatory and non-compensatory claim to spousal support. Based on the imputed incomes, lump-sum support under the Spousal Support Advisory Guidelines (SSAG) ranged from \$0 to \$29,746. Ultimately, the judge awarded Ms. Chu a lump sum of \$25,000:
- [116] Given that the parties appear to have underreported their incomes relative to the assets they have acquired during the marriage, any spousal support award based on these incomes would likely not compensate Ms. Chu adequately and would, for that reason, fail to achieve the objectives under s. 161 [of the FLA]. In light of the uncertainty surrounding the parties' actual incomes and the level of those incomes relative to the value of the family property subject to division, I am ordering that Mr. Xu pay a further lump sum of \$25,000 out of the family property subject to division which, together with the unequal division of the family

property that I am also ordering, will suffice to compensate Ms. Chu, both retroactively and prospectively.

[25] On the issue of special and extraordinary expenses, the trial judge said this:

[110] I am ordering that [the child's] special and extraordinary expenses are to be shared in proportion to [the parties'] respective incomes. Ms. Chu adduced no evidence at trial of any such expenses, so I make no order as to the need for the parents to contribute to any specific expense. If one parent seeks to be reimbursed for a non-medical expense incurred for [the child], that parent will need the consent of the other parent or a court order.

[Emphasis added.]

Issues on Appeal

[26] The appellant says the judge erred by:

- a) not including the fair market value of Tomicki as family property, as well as \$10,000 held by Mr. Xu in a BMO bank account that Ms. Chu says was linked to the parties' joint accounts;
- b) failing to attribute 100% of the FFL-related earnings for 2017 and 2018 to Mr. Xu;
- c) failing to gross up Mr. Xu's imputed income to account for unpaid taxes;
- d) miscalculating the retroactive child support payable by Mr. Xu; and
- e) not addressing Ms. Chu's claim for retroactive s. 7(1) and (1.1) expenses.

Standards of Review

[27] The standards of review applied to trial judgments, generally, are set out in *Housen v. Nikolaisen*, 2002 SCC 33. Questions of law attract a standard of correctness (at para. 8). Findings of fact are only set aside when they are shown to be palpably wrong and to have affected the outcome (paras. 10 and 25). Findings of mixed fact and law attract a palpable and overriding error standard, unless they involve an extricable legal question, at which point the correctness standard is engaged (para. 36).

[28] In the family law context, significant deference is given to support orders. These orders will not be overturned unless the judge's reasons disclose an error in principle, significant misapprehension of the evidence, or the award is clearly wrong: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 11-12.

Analysis

Net value of family property

[29] The parties agree that Tomicki was wholly acquired using money that was family property. As a result, the residence became family property under s. 84(1)(b)(i) of the FLA.

- [30] A jointly obtained appraisal assessed the fair market value of Tomicki as at the date of trial as \$780,000. Counsel for Mr. Xu prepared a "Scott Schedule of Assets" for use at trial. The fair market value was included in the Schedule; however, only the funds transferred from the joint accounts and used to complete the purchase were acknowledged by Mr. Xu to be "Family Property". The judge included the \$525,000 from the joint accounts as family property, not Tomicki's fair market value.
- [31] From his reasons, it is obvious that the trial judge worked from the Scott Schedule when assessing the net value of family property. However, counsel did not draw his attention to the need to consider Tomicki's fair market value. Instead, their submissions were primarily focused on the funds withdrawn from the joint accounts.
- [32] Ms. Chu says the trial judge was obliged to include Tomicki as family property, with its assessed value of \$780,000. Under s. 87(a) and (b) of the FLA, the valuation date for (real) family property is presumptively the date of trial, based on its fair market value. Mr. Xu accepts that this is the general rule and, as a result, that parties will typically share in any post-separation increases in value: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 39.
- [33] However, emphasizing the importance of finality in family law litigation (see Hickey at para. 12), Mr. Xu says it is too late for Ms. Chu to argue that she is entitled to share in the difference between the funds used to purchase Tomicki and the property's fair market value. Her counsel did not take issue with the values stated in the Scott Schedule. In fact, counsel for Ms. Chu was asked in closing if he disagreed with the "accounting" of family property and debts provided by Mr. Xu. He said it was "generally" accurate.
- [34] Notwithstanding the submissions at trial, I am satisfied that not including Tomicki as family property amounts to an error of law and warrants intervention on appeal. In addressing this property, the trial judge did not apply the methodology mandated by the FLA. Ms. Chu's amended counterclaim listed Tomicki as property in which she had an interest. The condominium was included on the Scott Schedule. Its division was a live issue at trial and to resolve it, valuation of the condominium was necessary. The parties obtained a joint appraisal for that purpose. Counsel for Mr. Xu acknowledged on the appeal that Mr. Xu did not provide justification for assessing Tomicki's value at a date other than the date of trial.
- [35] In my view, what likely happened here is that the judge mistakenly stated the value at \$525,000 based on the way in which the Scott Schedule was drafted and the parties' focus on the funds withdrawn by Mr. Xu pre-separation. In light of these circumstances, I consider it appropriate to add the \$255,000 in increased value to the net value of family property.
- [36] The trial judge awarded Ms. Chu an unequal division. This determination was informed by multiple factors, including Mr. Xu's wrongful conversion of STI assets; Ms. Chu's compensatory and non-compensatory entitlement to spousal support; and the fact that the judge could not be sure of the parties' actual incomes for the purpose of periodic spousal support. Balancing these factors against what he understood to be the net value of family property, the judge decided that a 60/40 division in favour of Ms. Chu would remedy any

unfairness that would have resulted from an equal division.

- [37] Unfairness having been fully addressed at trial, I am of the view that the appropriate way to remedy the failure to include Tomicki as family property is to divide the additional \$255,000 equally between the parties consistent with s. 81 of the FLA. Accordingly, they are each entitled to a \$127,500 share.
- [38] Ms. Chu also asks that money held by Mr. Xu in a BMO bank account at the time of trial be included as family property (she estimates this at around \$10,000). At the same time, her counsel acknowledges there was no documentary evidence substantiating that the \$10,000 derived from the parties' joint accounts or disposal of family property. In these circumstances, it was not an error for the judge to not account for the \$10,000 as family property. I would not accede to this aspect of Ms. Chu's appeal.

Imputation of income to Mr. Xu

- [39] Ms. Chu says the trial judge should have attributed the entirety of FFL's earnings for 2017 and 2018 to Mr. Xu. She advances two main arguments in support of this position.
- [40] First, she says Ms. Hu did not receive a work permit until June 2017 and was not legally entitled to earn employment income until that time. As such, it was improper to attribute half of FFL's 2017 earnings to Ms. Hu.
- [41] Second, Ms. Chu contends it was not reasonable for the judge to assume that monies arising from imputed gross sales to FFL would be divided between Ms. Hu and Mr. Xu. She says Ms. Hu did not work at FFL until she received her work permit and, more importantly, she did not have the capacity to do 50% of the work necessary to keep the company profitable. It is Mr. Xu who operates, controls, and benefits most from the business.
- [42] Mr. Xu raises several concerns with this argument; however, in the main, he says that the assumed 50/50 split of additional cash sales between Mr. Xu and Ms. Hu was a finding of fact that was reasonably open to the trial judge on the entirety of the evidence and attracts a deferential standard of review. The judge found that Mr. Xu is a "de facto partner" in FFL. In other words, the business functions as a joint venture between Mr. Xu and Ms. Hu.
- [43] I have reviewed the evidence of Mr. Xu and Ms. Hu. They both testified that Ms. Hu was responsible for starting FFL. She applied for its incorporation and is the sole shareholder. Ms. Hu said she invested over \$100,000 of her own funds into the business. These funds came, in part, from a clothing store that she owned in Shanghai. Both Mr. Xu and Ms. Hu testified about her prior business experience, including ordering inventory. They described themselves as working together at FFL. Mr. Xu looked after sales and managed the inventory. Ms. Hu was responsible for all banking and the advertising. Mr. Xu described Ms. Hu as the "boss". In her testimony, Ms. Hu acknowledged being the directing mind from the company's inception and said that before she received her work permit, she fulfilled this role from behind the scenes.

- [44] The evidentiary record is scant in some areas and open to different interpretations. However, I agree with the respondent that on the evidence as a whole, it was reasonably open to the judge to conclude that Mr. Xu and Ms. Hu were jointly involved in FFL from its inception and that the business was (and continues to be) run as a de facto partnership. This was a finding of fact for the trial judge to make and the appellant has not demonstrated palpable error.
- [45] Nor has she persuaded me that the absence of a work permit before June 2017 precluded the judge from recognizing that Ms. Hu would have an interest in FFL's earnings. At a minimum, this submission overlooks Ms. Hu's interest in FFL as shareholder and investor. I would not accede to this ground of appeal.

Gross up for unpaid taxes

- [46] Relying on *Gonabady-Namadon v. Mohammadzadeh*, 2009 BCCA 448, Ms. Chu argues that the trial judge should have grossed up Mr. Xu's imputed income for the purposes of child and spousal support. The respondent does not suggest it would have been wrong for the judge to do so; rather, he says this is another issue raised for the first time on appeal and that Ms. Chu is not entitled to re-litigate the judge's calculation.
- [47] *Gonabady-Namadon* makes clear that to "arrive properly" at a Guidelines income for child support, an imputation of gross income should "account adequately for tax liability" (at paras. 40-41). See also s. 19(1)(h) of the Guidelines.
- [48] The trial judge's imputed income for Mr. Xu was based on a finding of "hidden cash sales" in both STI and FFL, which would have resulted in Mr. Xu receiving \$30,000 to \$35,000 more than his reported income for the years in question. The judge then imputed \$60,000 per year to Mr. Xu, adding his 50% share of the additional cash sales to his reported income. There is no indication that the judge turned his mind to the non-payment of taxes on the unreported income. This should be corrected by grossing up that portion of the imputation:

Year

Reported Income

Imputed Income

Difference

2015

\$25,000

\$60,000

\$35,000

2016

\$24,720

\$60,000

\$35,280

2017

\$29,601

\$60,000

\$30,399

2018

\$24,000

\$60,000

\$36,000

- [49] In the circumstances of this case, appreciating the uncertainty of the evidence on income and approximated tax implications, I consider a 20% gross-up on the unreported income to be fair. Accordingly, Mr. Xu's Guidelines income for the years 2015-2018 is more appropriately imputed as: \$67,000; \$67,056; \$66,080; and \$67,200.
- [50] The revision to Mr. Xu's income requires this Court to review the child and spousal support orders made at trial. Both orders used a \$60,000 imputed income as their baseline.
- [51] Based on the Guidelines, and effective December 1, 2019, Mr. Xu must pay \$637 per month in child support. Changes to the retroactive child support amounts are set out below.
- [52] The judge awarded Ms. Chu a lump sum of \$25,000 in spousal support. In reaching this figure, he considered the ranges provided in the SSAG based on the parties' imputed incomes. The high end of the range was \$29,746. The trial judge awarded Ms. Chu 84% of that amount. He was of the view that once combined with the unequal division of family property, this would adequately compensate Ms. Chu, both retroactively and prospectively.
- [53] Because of the judge's reliance on imputed incomes in setting spousal support, it is my view that the gross-up on Mr. Xu's income logically calls for an increase in the award made at trial. Based on the revised income of \$67,200 for 2018 (and, therefore, 2019), the SSAG provide a lump sum range of \$0 (low), \$18,612 (mid-range) and \$48,421 (high). Consistent with the trial judge's determination of an 84% high-end entitlement, which I agree is appropriate given the length of the marriage and Ms. Chu's age and financial circumstances, I would vary the lump sum award to \$41,000.

Retroactive child support

[54] The parties agree that the judge erred on the amount payable for retroactive child support for the period of April 2016 to April 2017 by misstating the number of months involved as 8, rather than 20. Mr. Xu accepts that this requires correction. Given the error on gross-up, the retroactive child support requires correction in any event.

[55] From October 2015 to March 2016, Mr. Xu did not pay child support. From April 2016 to December 2018, he paid \$269 per month. The trial judge ordered that effective January 1, 2019, he was to pay \$567 monthly.

[56] Based on Mr. Xu's revised imputed income, the amounts payable as retroactive child support from October 2015 to November 2019 are as follow:

Year

Payable

Paid

Owing

2015

$(3 \times 624) = \$1,872$

0

\$1,872

2016

$(12 \times 624) = \$7,488$

$(9 \times 269) = \$2,421$

\$5,067

2017

$(11 \times 615) = \$6,765$

(2011 tables)

$(1 \times 626) = \$626$

(2017 tables)

$(12 \times 269) = \$3,228$

\$4,163

2018

(12 x 637) = \$7,644

(12 x 269) = \$3,228

\$4,416

2019

(11 x 637) = \$7,007

(11 x 567) = \$6,237

\$770

Total: \$16,288

Section 7 expenses

- [57] The trial judge found no evidence in support of Ms. Chu's claim for special and extraordinary expenses from the date of separation to trial. He declined to make a specific award and, instead, ordered that prospectively the parties will share these expenses in proportion to their incomes.
- [58] Ms. Chu says the judge was wrong about the lack of evidence and there was a foundation in support of her claim. The respondent disagrees, taking the position that none of the expenses were proved.
- [59] In direct examination, Ms. Chu testified that she paid approximately \$1,500 per month for "day schools." In cross-examination, she said the child's expenses amounted to "close to" \$1,600 per month for "afterschool classes and special needs, or health, dental, all together, roughly, about that amount." In her F8 Financial Statement filed before trial, Ms. Chu put the expenses at \$1,924 per month. There was evidence that the child attended after-school care five days per week from 3:00 to 6:00 p.m. (although Ms. Chu was only working about 25 hours per month), as well as various extra-curricular activities, including guitar and piano lessons, gymnastics, art classes, and language lessons. However, no supporting receipts were admitted in evidence.
- [60] With different estimates of the total expenses and no substantiating receipts, it is understandable the trial judge concluded that the appellant's claim had not been proved. The evidence was not sufficient to assess the reliability of the claim and, importantly, determine whether the expenses were necessary and reasonable (s. 7(1), Guidelines).
- [61] I would reject this ground of appeal. The prospective order for a proportionate sharing of special and extraordinary expenses based on the parties' respective incomes remains intact.

Disposition

[62] For the reasons provided, I would allow the appeal in part, and vary the final order of the trial judge to this extent:

- a) the difference between the purchase price of Tomicki and its fair market value at the date of trial (\$255,000) must be included in the total net value of family property;
- b) the \$255,000 in increased value is to be divided equally between the parties;
- c) the respondent's imputed income is grossed up to account for unpaid taxes on the unreported cash sales, resulting in an increase to the amount of child support payable. Effective December 1, 2019, based on a Guidelines income of \$67,200, Mr. Xu must pay \$637 per month in child support;
- d) retroactive child support must also be adjusted to account for the gross-up in the amounts set out in these reasons, with a cumulative total owing by Mr. Xu of \$16,288; and
- e) the lump sum award for spousal support is varied to \$41,000.

[63] I would not give effect to the remainder of the appellant's grounds of appeal.

[64] GROBERMAN J.A.: I agree.

[65] FENLON J.A.: I agree.

[66] GROBERMAN J.A.: The appeal is allowed in part as stated in the reasons of Justice DeWitt-Van Oosten.

[Discussion with counsel re costs]

[67] GROBERMAN J.A.: The statute provides that the party who is substantially successful is entitled to costs. If there is dispute, the parties may address the Court in writing.

"The Honourable Madam Justice DeWitt-Van Oosten"

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