

CANADA / JUDGMENT

Xu v. Chu

2020 BCCA 44

COURT

British Columbia Court of Appeal

DECIDED

4 February 2020

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2020 BCCA 44 Xu v. Chu COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Xu v. Chu, 2020 BCCA 44 Date: 20200204 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 Supplementary Reasons to Xu v. Chu, 2019 BCCA 414, Vancouver CA46095. 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 Written Submissions Received: December 23, 2019 January 15, 2020 Date of Supplementary Judgment: February 4, 2020 Written Reasons of the Court Summary: The appellant seeks her costs following an appeal in a family law matter. She succeeded in obtaining a variation of the trial judge's property and support awards; however, not to the extent sought. Held: The parties shall bear their own costs on the appeal. While the appellant achieved some success, she failed to establish the most financially significant of her grounds of appeal, which would have resulted in substantial variations to the orders made at trial. Reasons for Judgment of the Court:

- [1] These reasons address costs on a family law appeal, indexed as Xu v. Chu, 2019 BCCA 414. The parties have filed written submissions on the issue.
- [2] Although the appellant's notice of appeal sought costs on both the appeal and in the court below, her written submission advances an argument exclusive to the appeal. She says she should receive the entirety of her costs on the appeal or, alternatively, her disbursements. The respondent contends that the appellant did not achieve "substantial success" in this Court and, consequently, each party should bear their own costs, consistent with the approach taken by the trial judge.
- [3] The appeal was allowed in part. We found that the trial judge undervalued the family property, failed to gross up the respondent's imputed income to account for unpaid taxes, and committed a mathematical error in calculating retroactive child support. Both parties agreed there had been a miscalculation.

- [4] Because of the errors, the orders made by the trial court required variation. The appellant received an additional \$127,500 in family property; her lump sum spousal support increased by \$16,000; retroactive child support between separation and completion of the trial increased by approximately \$2,500 (once the mathematical error was corrected); and the respondent's post-trial child support payment went from \$567 to \$637 per month.
- [5] We rejected the appellant's challenge to the judge's dismissal of her claim for retroactive special and extraordinary expenses; an argument that \$10,000 from a bank account in the respondent's name should also be included as family property; and a submission that the respondent's imputed income was substantially higher than the amount found warranted on the evidence. Had the appellant's primary position on imputed income succeeded, the respondent's retroactive and prospective child support obligations would have been substantially higher. Moreover, based on that submission, the appellant sought a spousal support increase from a lump sum of \$25,000 to as high as \$277,587.
- [6] The entitlement to costs on appeal is governed by s. 23 of the Court of Appeal Act, R.S.B.C. 1996, c. 77. As explained in *Malak v. Hanna*, 2020 BCCA 6 at para. 5, "it is well-established that a party that achieves substantial success on appeal is entitled to costs and that substantial success does not require success of all issues".
- [7] In deciding whether there has been substantial success, the Court may consider a broad array of factors, including the nature of the matters in dispute; their relative importance; how each party fared in resolution of those matters; and the extent to which successful grounds altered the trial outcome: *Marquez v. Zapiola*, 2014 BCCA 35 at paras. 16-18; *Mirza v. Mirza*, 2007 BCCA 106 at paras. 7-8. In family law litigation, the effect of a costs order on the "balance and interrelationship achieved in the orders dividing assets and establishing support obligations" can also be an important consideration: *Stein v. Stein*, 2007 BCCA 187 at para. 6.
- [8] Applying this framework, we are of the view that the parties must bear their own costs on the appeal. The appellant achieved success on three out of the five contested grounds, obtaining increases in the value of family property, child support (both retroactive and prospective), and spousal support. The additional \$127,500 in family property is substantial. However, the error made by the trial judge in respect of family property was enabled by both parties (para. 31 of the appeal judgment). The miscalculation on retroactive child support was not in dispute and, at the hearing of the appeal, we were told that the respondent attempted to have the miscalculation corrected post-verdict, before formal entry of the trial order. However, the appellant refused. The mathematical error was obvious and appellate consideration of this issue would have been unnecessary had the correction been made before the trial judge.
- [9] Finally, as stated, although child support and spousal support increased on appeal, the increases were substantially less than sought by the appellant and reflected her alternative positions. The issue that carried the greatest monetary risk to the respondent was the

appellant's submission that his imputed income for 2017 and 2018 should consist of the whole of Future Furniture Ltd.'s earnings. Had this submission carried the day, it would have resulted in significant increases in the retroactive and prospective child support amounts, as well as spousal support. The appellant did not succeed on this ground, failing to demonstrate palpable error by the trial judge.

- [10] Costs are discretionary: *Doucette v. McInnes*, 2012 BCCA 235 at paras. 23-24. In light of the appellant's limited success on the appeal, and the factors noted above, we are of the view that this case is appropriately characterized as one in which success on the appeal was divided. As a result, the parties should bear their own costs. Although the appellant did not press this issue in her written submissions, this is also a case where we would have declined to interfere with the order on costs made below.

Disposition

- [11] For the reasons provided, each party is responsible for their own costs on the appeal, with one exception. The Registrar awarded costs to the respondent in connection with settling the appeal book, in any event of the appeal. Accordingly, the appellant is responsible for those costs. "The Honourable Mr. Justice Groberman" "The Honourable Madam Justice Fenlon" "The Honourable Madam Justice DeWitt-Van Oosten"

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