
CANADA / JUDGMENT

Yao v. Li

2013 BCSC 1314

COURT

Supreme Court of British Columbia

DECIDED

23 July 2013

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2013 BCSC 1314 Yao v. Li

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yao v. Li,

2013 BCSC 1314

Date: 20130723

Docket: E103845

Registry: Vancouver

Between:

Rong Yao

also known as Michelle Yao

Claimant

And

Xiong Hu Li

Respondent

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Claimant:

S.S. Silber

Counsel for the Respondent:

no one appearing

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 10 and 11, 2013

Place and Date of Judgment:

Vancouver, B.C.

July 23, 2013

I

- [1] This matter, which has been before this court since the claimant filed a Notice of Family Claim on December 6, 2010, has had a complicated pre-trial history. This has some bearing on the relief sought at the trial, which proceeded on the evidence of the claimant alone. The respondent failed to attend, although he was properly notified, and was represented for much of the time the matter has been before this court, and, on several occasions at his instigation, before the Court of Appeal.
- [2] The parties are in their early 40s. They were married on June 15, 1999 in China. They separated in December 2009 and were divorced by this court on April 27, 2012.
- [3] The parties immigrated to Vancouver in October 2006 with their son Frank, who was born August 1, 2001. Concern about the possibility of political instability, as well as a desire to have a second child, which was illegal in China, were factors in the move. The claimant said that at the time she did not want to relocate. She had no friends and no occupation in Canada and was at a disadvantage given her limited command of English.
- [4] Shortly after the family got settled into a home on West 5th Avenue in Vancouver, the respondent returned to China. He came back to B.C. sporadically to visit the claimant and his son. The claimant visited the respondent and his family in China during holiday periods in the summer and Christmas vacations.
- [5] A second son Rhett, was born in Canada on September 22, 2008. The family moved to a larger house on Churchill Street in the Shaughnessy neighbourhood of Vancouver because they wanted more space. It cost about \$5.3 million. They kept the West 5th Avenue house for some time and then sold it for \$2.5 million or about \$700,000 more than they had paid. The family was living in the Churchill Street house when the parties separation.
- [6] The claimant says that the respondent was seldom in Vancouver, coming over perhaps twice a year for about a week at a time.

- [7] The claimant said there were many disputes and she suspected that the respondent had been unfaithful to her. She and the children were in China in December of 2009 when the separation occurred. She returned to Canada in January, 2010.
- [8] The claimant agreed with the respondent and his parents that she would come to China for a visit in August of 2010. Upon arrival on August 1, 2010 she says the respondent impounded the children's passports. Frank was a permanent resident of Canada but, having been born in China, a Chinese citizen. Rhett was a Canadian citizen. Apart from living in Canada since 2006, Frank had completed two years of school in Canada and was enrolled in a private school for the fall of 2010. There is every indication on the evidence before me that the children were both habitually resident in Canada and that there was every intention on the part of the claimant to return with the children to Vancouver.
- [9] The respondent refused to allow the claimant to go back to Vancouver with the children on their August 20, 2010 return tickets. She remained, and lived with them in the respondent's parent's house. Frank was enrolled in a Chinese school in Grade 1, or two years behind his grade level in Canada.
- [10] The claimant says her movements were restricted.
- [11] The claimant made several efforts to get back to Canada. She contacted the police about her situation and spoke to the Canadian Embassy. She contacted a lawyer in Canada who appeared in court in Vancouver to obtain an order, without notice, from Master Tokarek, giving her sole custody of both children, with no access to the respondent.
- [12] With the assistance of that order the claimant was able to obtain a travel document from the Canadian Embassy allowing her to leave China with Rhett on February 11, 2011. She had to leave Frank behind, and has not seen him since, although she has had occasional telephone contact.
- [13] It took some time and effort and an order for substitutional service upon the respondent to serve him with the Notice of Family Claim.
- [14] On June 15, 2011, the respondent filed a Jurisdictional Response disputing the jurisdiction of the British Columbia court over him in this proceeding.
- [15] On December 1, 2011, the parties each sought orders from this court. The respondent's application for an order setting aside the order of Master Tokarek and for the return of Rhett to China was dismissed. The respondent was ordered to return Frank to British Columbia within seven days of the order. On that occasion this court observed:
- [3] Having heard both counsel on the extensive material which has been placed before the court, I am satisfied that the fundamental situation is that the children were habitually resident in the province of British Columbia at the time the order was made, and that their remaining in China from August of 2010 to the date that that order was made was effectively a removal or withholding of the children without the consent of the parent who had

ordinary custodial care of them, that being the claimant. That is essentially the finding that Master Tokarek was obliged to make as a preface to making the order he did. Having heard from both parties in this case, I am of the view that, on the material as it exists, and doing the best I can with it, that fundamental relationship has not changed. The fact is the children started out in British Columbia and left British Columbia in circumstances where they expected to return and were expected to resume ordinary activities of residency, including attending school and taking part in other activities that are indicative of ordinary residence. That is essentially what it is necessary to decide today.

- [4] With respect to the rest of the material, all I will say is that there appears to be a considerable amount of difference between the parties, but I am satisfied that, having now heard the extensive arguments and read the extensive material the parties have produced, the order of Master Tokarek remains appropriate as an interim order setting out the status of these proceedings at this time.
- [16] On December 8, 2011, the respondent applied for an extension of time to return Frank to British Columbia and was granted until January 31, 2012 to do so.
- [17] On February 13, 2012, the respondent's application that the proceedings be stayed on the grounds that the court did not have jurisdiction was dismissed. The respondent was ordered to file a Response to Family Claim within 10 days.
- [18] On February 22, 2012, the respondent filed a Response to Family Claim. It is essentially a bare denial of the facts asserted by the claimant.
- [19] On April 27, 2012, the parties each brought applications before the court. The respondent wanted the matter adjourned. The claimant sought a divorce, spousal support, child support for Rhett, and an order for special and extra-ordinary expenses. On that occasion this court observed:
 - [1] THE COURT: This is an application for various forms of relief, including an order that the claimant Rong Yao, also known as Michelle Yao, be exempt from the requirements that a judicial case conference be conducted in this proceeding. In the course of the colloquy that has taken place between the court and counsel, I have ruled that that order is granted.
 - [2] Just by way of brief explanation, Mr. Li sought and obtained an order that a judicial case conference be waived in circumstances when he wished to bring an application that this court should not exercise its jurisdiction in this matter. In general, I would say that when one party is relieved of the responsibility to attend a judicial case conference, it should apply to both. In this case, Mr. Li's application may have been a particular or special case, but the fact is that when objection is taken by him to a judicial case conference being waived on the part of Ms. Yao, the clear responsibility on his part, then, would be to make himself available to attend one, and it is clear from my discussion with counsel on that point that he has no intention of coming. Therefore, the requirement that a judicial case conference be conducted simply works as an impediment to anything happening on this file in this

jurisdiction and, accordingly, that explains why I have said that one need not be held before further orders are made.

- [3] There is, secondly, an application for an order for divorce. Counsel has pointed out that the court is required to be satisfied that adequate provision has been made for child support before such an order is made, and so I will turn, first of all, to the other applications that are made which are for child and spousal support.
- [4] With respect to both of those applications, there have been previous proceedings in this matter, the upshot of which was, for present purposes, that I ordered that the matter be put over to April 25th on the basis that the respondent would produce all of his responding material by April 17th, 2012. He did not do so and appeared today to make an application for an adjournment on the basis that he had not been adequately served with notice, particularly the 60-day notice require for him to file financial information. As I have already ruled, that notice period expired, in my view, 60 days after these proceedings commenced and, in any event, could not have expired later than two months after February 13th when I made an order that this court had jurisdiction in this matter. Therefore, that is not an impediment to proceeding and was not an appropriate ground for adjournment, as I have previously ruled.
- [5] That leaves the matter to be decided on the basis of the material before the court, and the respondent has attempted to use the fact that he has not produced any material to persuade the court that it cannot make an order. There is, however, evidence on the file of a lavish lifestyle and lavish levels of spending on his part and on the part of Ms. Yao. The claimant, Ms. Yao, lives in a house that might properly be described as a mansion, worth several million dollars in British Columbia; there is an \$18,000 mortgage payment on that property which Mr. Li is paying. Mr. Li has given an affidavit that suggests the house belongs to his parents and is, in effect, held in trust, but that is all he says, and there is no supporting documentation for that. In another place in his affidavit he suggests that Ms. Yao took some \$1.7 million from an account he describes as "our account", which suggests that he has means of his own. The material suggests that Mr. Li spent lavishly on Ms. Yao while they were together, including a 2009 Rolex watch that cost \$130,000 and a 2010 Porsche 911 for approximately \$150,000. Ms. Yao herself says that she had use of credit cards to an unlimited amount and spent money lavishly in high-end stores, of which she gives several examples, and in various places.
- [6] Ms. Yao estimates her total monthly expenses to be some \$38,000 per month and suggests total annual expenses of \$466,676. These include sums of money for things like vacation at \$1700 per month, and expenditures that by ordinary standards are very high. It is nonetheless, the evidence before the court, and there has been nothing filed to specifically refute any of these allegations, although there has certainly been opportunity and there has been an obligation to respond throughout this proceeding. Counsel has produced a series of calculations grossing up the spousal support and also illustrating the effect of the DivorceMate calculations. I should emphasize that in my approach to that on an interim

basis I am not attempting to reach a refined number, nor am I attempting to reach a final number that reflects the allocation of resources between the parties as a result of their marriage. In the circumstances, this being an interim application, I think needs and means is a little bit of an artifice as well. Given what counsel has produced, I am satisfied that it is fair to infer that Mr. Li has at least \$1,600,000 available to him. On the basis of that estimate, although I reduce the number slightly because I think there is some surplusage in the material that I have been presented, I am prepared to order that he pay \$40,000 per year in spousal support and \$12,000 per year in child support. I am also satisfied that, on the basis of the material before me, \$10,800 per year is justified as special and extraordinary expenses for the child Rhett. I should make clear that although there is an issue with respect to the child Frank, who remains, against Ms. Yao's wishes, in China, the orders I have made reflect only her custody in Canada of the child Rhett.

- [7] MS. NORDLINGER: My Lord, I think you said \$40,000 and \$12,000 per year. Did you mean per month?
- [8] THE COURT: Per month. I'm sorry. Yes.
- [20] A divorce was also granted.

II

- [21] From that point on the respondent has taken no active part in this proceeding, except to seek leave to appeal the February 13, 2012 order, to adduce fresh evidence, and to seek a stay of both that order and the order of April 27, 2012, all of which were dismissed on July 27, 2012, and a further appeal which was dismissed as abandoned on October 16, 2012.
- [22] This is all to say that apart from attempting to obstruct and delay the proceedings in Canada, the respondent has not appeared to address the substance of the claims brought against him, nor has he complied with any of the specific orders the court made respecting custody of Frank.
- [23] Several further orders were made for production of documents relating to Frank's status and the respondent's failure to comply with orders of the court.
- [24] On November 29, 2012, the claimant was given sole conduct of sale of the house on Churchill Street in Vancouver.
- [25] On March 13, 2013, a sale of that property was approved for a price of \$6,100,000. Of note, the respondent had "by consent" allowed an unpaid legal account for unidentified legal services by an entity called the Harvey Law Corporation for \$255,950 to be registered against the property.
- [26] The respondent has not paid any of the interim spousal or child support this court ordered, nor has he paid the orders for costs that have been made in this court and in the Court of Appeal.

III

[27] The respondent initiated divorce proceedings in China. The court in China issued an order of divorce after a Divorce had already been granted in British Columbia. It purported to give custody of Frank to the respondent and custody of Rhett to the claimant. The respondent was ordered to pay the equivalent of about \$8,000 per year to the claimant for support of Rhett. He has not paid any of that money either.

IV

[28] The claimant is seeking an order that she receive the whole net sale proceeds from the sale of the Churchill Street home, as well as the balance of the assets in British Columbia.

[29] The claimant has already received the sum of \$167,700 from the net sale proceeds pursuant to the order of this court on March 13, 2013, which was the amount then owing by the respondent as arrears of child support. The characterization of these funds was left for determination at the trial.

[30] As of June 30, 2013, the net sale proceeds in trust, inclusive of interest earned to date, amount to some \$3,378,583 (the "proceeds"). This includes funds of approximately \$261,700 that have been set aside on account of the judgment obtained by Harvey Law Corporation, which the claimant says she knows nothing about.

[31] The balance of the family assets in British Columbia consist of:

- (a) an apartment unit in the claimant's name, located in the Maynards Block, at 301 - 429 West 2nd Avenue, with equity of approximately \$62,000;
- (b) bank accounts in the claimant's name (including TFSA accounts) valued at approximately \$85,000;
- (c) a 2010 Porsche and a 2006 Audi vehicle, both in the claimant's name, valued at \$75,000 and \$22,000 respectively.

[32] Despite the requirements under the Supreme Court Family Rules and the provisions of the Child Support Guidelines, and despite being specifically ordered to produce his Form 8 Financial Statement on November 29, 2012, the respondent has never produced any financial information.

[33] The cases of *Cunha v. Cunha* (1994) 99 B.C.L.R. (2d) 93 (B.C.S.C.) and *Laxton v. Cogan* 2008 BCSC 42 establish that in cases of non-disclosure, described as "the cancer of matrimonial property litigation", an inference may be drawn that the value of the undisclosed assets is at least equal to the value of the disclosed assets.

- [34] More recently, in *Wu v. Sun*, 2011 BCCA 293, the Court of Appeal, at para. 41, refers to non-disclosure as the "Achilles heel of family assets litigation". The Court affirmed that strong measures are justified in discouraging nondisclosure, but cautioned that there must be "some evidence" of the value of the undisclosed assets, before the inference is appropriate because "one cannot make something out of nothing." The evidence may, however be "sparse".
- [35] The basis on which the claimant seeks the whole of the proceeds of sale of the home, as well as the other assets in B.C., is that the assets in the respondent's possession in China are, on the evidence, more than equivalent in value than the family assets in this jurisdiction.
- [36] The claimant referred to 16 properties that were previously in her name but, she says, were transferred by the respondent to his mother using a Power of Attorney the claimant had signed years earlier. When the claimant learned about the transfers, she revoked the Power of Attorney and brought an action in China to claim an interest in the properties, and to prevent further transfers from occurring. There is evidence of the value of those parcels in the July 5, 2011 decision of the Chinese Court which states that the claims may be worth RMB26.26793 million ". Applying the current exchange rate of about 0.17 (1 RMB = 0.17 CDN), those properties, would have a value of \$4.46 million Canadian. The claimant says that she could not pay the required case acceptance fee to the Chinese Court and that under the rules applicable in China, her action against the respondent and his mother was automatically withdrawn.
- [37] The Chinese Court also confirmed, in the respondent's divorce action, that the property "involves assets worth a substantial amount of money".
- [38] These statements, taken together, are some evidence by which to infer that the respondent has assets in China are at least as valuable as the assets in British Columbia. There is additional material obtained by the claimant's counsel in China, which suggests that the respondent has substantial business holdings he has not disclosed in this proceeding. These documents contain the following information:
- a. Tab 1 to 3 - as of April 22, 2010, the Respondent owned 40% of shareholdings of Fujian Jindi Group of Companies - he paid 354.938 million CNY for 35.4928% of the shareholdings (equates to approximately \$58 million CDN);
 - b. Tab 5 - The Respondent initially had a 25.5% share of Fujian Renwen Construction Co. Ltd., having invested \$7,650,000 CNY (equates to \$1.3 million CDN);
 - c. Tabs 7 - 9 - On February 18, 2011, the Respondent transferred 20.3% of his interest in Fujian Renwen Construction Co. Ltd. to Fujian Jindi Group, receiving 20.3 million CNY (\$3.4 million CDN), leaving him with 5% of the shareholdings of the company;
 - d. Tabs 10 - 11 - On January 5, 2010, the Respondent purchased 13.3% of the shares of Fujian Province Renwen Investment Holdings Co. Ltd. for 4 million CNY (\$680,000 CDN);

- e. Tab 12 - As of April 1, 2011, the Respondent owned 40% of the shareholdings of Fujian Wenbo Education Investment Co. Ltd. with a paid-up capital of 8.0 million CNY (\$1,360,000 CDN);
- f. Tab 13 - As of April 1, 2011, the Respondent owned 20% of shares in Longyan Renwen Construction Co. Ltd. with paid up capital of 10 million CNY (\$1,700,000 CDN);
- g. Tab 14 - As of March 8, 2011, the Respondent owned 95% of shares in Xiamen Jinhengchang Renovation and Construction Co. Ltd. with paid up capital of 950,000 CNY (\$161,000 CDN);
- h. Tab 16 - 18 - On February 24, 2011, the Respondent transferred 55% of his shares in Xiamen Renwen Investment and Development Co. Ltd. to Fujian Jindi Group of Companies and received 27.5 million CNY (\$4,675,000 CDN), and thereafter held 5% of the shares in that company;
- i. Tab 20 - 23 - ON February 16, 2011, the Respondent transferred 35% of his shares in Xiamen Renwen Properties Co. Ltd. to Fujian Jindi Group of Companies Ltd. and received 35 million CNY (\$5,950,000 CDN), leaving him with a 5% shareholding in that company;
- j. Tab 24 - As of April 1, 2011, the Respondent owned 20% of the shares in Zhangzhou Jindi Renwen Investment Co. Ltd., with 4 million CNY in paid up capital (\$680,000 CDN).

[39] These documents are additional support for a finding that the respondent appears to have significant financial interests in China. They also suggest that he has received millions of dollars from the transfer of various shareholdings, beginning in February 2011.

[40] I think it may also be reasonable to infer, from the attitude the respondent has taken to this litigation, that the money in Canada is of less consequence to him than revealing his assets appears to be. If these transactions are not what they appear to be and there are trust or other implications, the respondent has not taken the several opportunities he has had to explain them.

[41] I am satisfied that there is sufficient evidence of more than equivalent holdings in China that could be characterized as "family assets" that, in the absence of any explanation, justifies a finding that the claimant is entitled to all of the assets in British Columbia, worth about \$3.79 million.

V

[42] Accordingly it is not necessary to consider reapportionment, although if it were, the relevant sections would have been s. 65(e) and (f). They read:

65(1) If the provisions for division of property between spouses under section 56, Part 6 of their marriage agreement, as the case may be, would be unfair having regard to

- (e) the needs of each spouse to become or remain economically independent and self sufficient, or

- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

[43] In my view, reapportionment would have been justified in any event, on the following findings of fact:

- (a) Since immigrating to Canada the parties had a traditional marriage in which the claimant did not work out of the home and assumed the role of stay-at-home mother. As a result of her move to Canada and assuming this role, she has virtually no marketable skills. Her English, while understandable is not fluent and she is now 41 years of age.
- (b) Apart from a few months after she returned from China in February 2011, when the respondent paid the mortgage, the claimant has maintained the Churchill Street home, without any financial assistance until it was sold in May 2013. This was a significant burden to her in that the mortgage payments alone over that period averaged approximately \$15,000 per month. Further, even after the respondent was ordered to pay child support and spousal support, he did not pay for any of the expenses of the claimant and Rhett.

[44] Under s. 65(f), the court could also have taken into account the respondent's failure to disclose assets, as a factor militating in favour of reapportionment. In *Dong v. Liu* 2008 BCSC 1795, this court observed:

39. As a final matter and, perhaps, the most important consideration here, it seems apparent that Dong has failed to disclose assets during the course of this litigation.
40. For example, Dong provides no answer to the assertion that he owned 10 companies and had an interest in 17 buildings prior to the seizures and forfeiture. He has had three years to respond to the information provided in the October 2005 affidavit of Liu but has not done so. Of course, he has had other difficulties, but that said, he has had ample opportunity to respond.
41. His conviction in China corroborates that he held substantial undisclosed assets. Even if I cannot give weight to the conviction order, something not asserted before me, Dong has filed with the court documents in which he asserts that valuable properties and money have been wrongly taken from him and seeks Canada's assistance in that regard. Thus, his own material confirms the evidence of Liu and Paul regarding the undisclosed assets. Dong's uncorroborated assertions against Liu pale in comparison to the magnitude of the assets he admits he held in China, and which have been confiscated.

42. In *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (B.C.S.C.), Fraser J. referred, at paragraph 9, to non-disclosure of assets as the "cancer of matrimonial property litigation". He concluded at paragraph 11 that "where there has been concealment of assets, it ordinarily should be held that the concealment is ongoing, that there are assets still undisclosed, and that the division of assets should be affected accordingly".
43. Of course, the court must view the matter, as best it can, at the conclusion of the litigation. But if the court is still of a view that there has been non-disclosure, according to Fraser J. at paragraph 15, "[t]he proper working inference is that the value of undisclosed assets is at least equal to the value of disclosed assets".
44. In *Laxton v. Coglon* 2008 BCSC 42 (B.C.S.C.), Kelleher J., following *Cunha*, concluded that the value of the defendant husband's undisclosed assets was at least equal to the value of disclosed assets, and awarded the plaintiff wife the full value of the disputed assets.
45. In this case I conclude that there has been concealment of assets by Dong. The value of those assets is uncertain but the working inference in *Cunha* would, in this case, be a far too conservative estimate. Nonetheless, applying the rule in *Cunha* implies that Dong has undisclosed assets at least equal to the value of the family assets here at issue, that is, the matrimonial home, its' contents and the vehicle.
46. Dong argues that there is no jurisdiction in this court to consider foreign held assets, citing *Jeske v. Jeske* (1982), 39 B.C.L.R. 396, 29 R.F.L. (2d) 348 (B.C.S.C.). As I read that decision, however, the court declined to make an order for sale of Alberta-held assets, or to provide relief pursuant to the Matrimonial Property Act, R.S.A. 1980, c. M-9. This is not such a case. No relief is sought in respect of foreign held assets.
47. In the circumstances, and in view of Dong's deliberate non-disclosure, Liu is entitled to reapportionment of the family assets at issue here 100% in her favour, including the house, the household contents and the vehicle.
- [45] It is therefore my view that the claimant would have been entitled to all of the assets in Canada even if it were necessary to apply a reapportionment analysis.

VI

- [46] The respondent is in arrears of spousal support under this court's order of April 27, 2012 in the amount of \$680,000 (\$40,000 per month from March 1, 2012 through July 1, 2013). Accordingly, the claimant seeks judgment against the respondent for these arrears.
- [47] The statutory criteria for granting an order for spousal support are set out in s.15.2(4) of the Divorce Act:
- (4) In making an order under subsection (1) the Court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabitated;
- (b) the functions performed by each spouse during cohabitation;
- (c) any order, agreement or arrangement relating to support of either spouse.

[48] The objectives of an order for spousal support are set out in s. 15.2(6):

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouse any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage;
 - (d) insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Support is intended to "achieve an equitable sharing of the economic consequences of marriage breakdown", (see: *Moge v. Moge* [1992] 3 SCR 813 at paras. 47-52).

[49] In *Bracklow v. Bracklow* [1999] 1 S.C.R. 420 at 431, the Supreme Court of Canada identified three grounds for entitlement to spousal support: (1) compensatory support; (2) non-compensatory support; and (3) contractual support. The claimant seeks support on both a compensatory and non-compensatory basis.

[50] Compensatory support is intended to "provide redress to the recipient spouse for economic disadvantage arising from the marriage. In *Chutter v. Chutter*, 2008 BCCA 507 at para. 50, the Court of Appeal observed:

50 Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (*Moge*, at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

- [51] In this case the claimant came to Canada at the request of the respondent and is in a situation of the economic disadvantage relative to him. I think the claimant is entitled to compensatory spousal support because she has been financially disadvantaged by the breakdown of the marriage. Against her wishes, the claimant moved to Canada and left her teaching job behind. She knew no one, did not speak English, and has found it very difficult and lonely.
- [52] Before the separation the respondent fully supported the claimant, and the children, in an affluent manner. Apart from the home in Shaughnessy, the claimant drove expensive vehicles, travelled, and spent money freely. As she testified, the respondent funded their joint account to maintain the claimant and the children, and replenished it as necessary. With the end of the marriage the claimant has been completely cut off from her former way of life.
- [53] While the claimant has taken some English courses, her skills are limited. To date, she has not taken further education or training in Canada. The claimant testified that she would like to go to Emily Carr to take art, as that is her background. She also talks of opening a coffee shop. To do either of these things she would need to better language skills. Her availability to take courses is also limited by Rhett's schedule.
- [54] The claimant's future earning capacity is limited, as is her ability to become self-sufficient. It is highly unlikely that even if she were to obtain employment, the types of jobs she will be able to obtain would provide her with anything like the way of life she enjoyed during the marriage.
- [55] The claimant's only potential source of income in the short term is investment income on the portion of the proceeds that remain after she purchases a home for herself and Rhett. In the circumstances she will almost certainly need to draw on those funds.
- [56] The allocation of all of the assets in British Columbia to the claimant does not disentitle her to spousal support. In Chutter (a case in which the wife received substantial assets worth approximately \$4 million) the Court of Appeal observed at para. 90, that this did not operate to deny her claim to spousal support:

If the Appellant must encroach upon her capital to maintain a standard of living comparable to that which she enjoyed during the marriage, then arguably she is suffering hardship from the breakdown of the marriage and experiencing the loss of marital standard of living, since her capital would deplete over time and eventually she would be in a worse position than had the marriage continued. If that is so, whether the respondent has the means to assist her financially to live a lifestyle closer to what they shared as a couple is a relevant question.

[57] I am of the view that the claimant is entitled to support considering the standard of living the parties enjoyed during the marriage.

[58] Respecting quantum, the respondent has produced no financial information that would enable the court to assess his income. The only documentary evidence is the corporate searches and the other information I have already outlined.

[59] While that documentation does not disclose the respondent's income, it suggests that he has considerable means. The corporate searches appear to show he has received the equivalent of about \$13 million for the sale of shares in various companies since February 2011.

[60] When the respondent was ordered to pay interim spousal support to the claimant of \$40,000 per month, on April 27, 2012, I accepted an imputation of income to him of \$1.6 million per year. This was based in part on the amount of money that the claimant and the children had available to them while the parties were still together. At that time, the respondent's counsel argued that the court should not make an order for support because he had not produced any financial information. I took the view that if the respondent had concerns about the interim order for support, his remedy was to come to court with "a full set of information and show that the real situation differs materially" from that which the court imputed.

[61] The respondent has not acted on that invitation, nor has he taken any steps to come before the Court to change the order. This leaves the court in no better position than it was in setting interim spousal support of \$40,000 per month, and in no position to vary that sum downward on any evidentiary basis.

[62] Accordingly, I order that arrears of spousal support be fixed at \$680,000, and that spousal support be fixed in the amount of \$40,000 per month, commencing August 1, 2013, and continuing on the 1st day of each month thereafter.

VII

[63] The claimant submits, in the alternative, that an order for lump sum support is warranted, given the respondent's blatant disregard for the interim support order, as well as the fact that he resides in a foreign jurisdiction (see *Wilson v. Wilson* (1997) 27 R.F.L. (4th) 131 (B.C.C.A.) para. 18).

- [64] She submits that Spousal Support Advisory Guidelines calculations suggest a range of lump sum spousal support of anywhere between \$1.743 million (at income of \$1 million for the respondent and \$60,000 for the claimant) to \$3.128 million (at income of \$1.6 million for the respondent and no income for the claimant).
- [65] I do not think a lump sum order is appropriate in the circumstances. In the first place, it is difficult to see how such an order might be enforced. In the second, I think it fairer to the respondent, should he re-consider his position and begin participating in this proceeding, to be liable only for the amounts that have accumulated over time and not for a prospective amount.

VIII

- [66] The respondent is in arrears of child support under this court's order of April 27, 2012, in the amount of \$219,300 (\$12,900 per month from March 1, 2012 through July 1, 2013). Accordingly, the claimant seeks judgment against the respondent on these arrears in the amount of \$219,300.
- [67] The claimant submits that, as with spousal support, the respondent's income should be imputed at \$1.6 million, consistent with the interim order, since he failed to discharge the onus on him to provide financial disclosure to show that a different amount should have been fixed.
- [68] An adverse inference may be drawn when a party fails to make the required disclosure under the Child Support Guidelines. Section 23 of the guidelines gives the Court a very broad discretion to "impute income in such amount as it considers appropriate." (see: *Mansoor v. Mansoor*, 2012 BCSC 602; *Motyka v. Motyka* 2001 BCCA 18).
- [69] At an imputed income of \$1.6 million, the respondent's child support obligation is fixed at \$219,300 in arrears and should remain at \$12,000 per month from and after August 1, 2013.

IX

- [70] The claimant has incurred section 7 extraordinary expenses for Rhett, as set out in her Form 8, of \$1,072 per month. I accept that these expenses are reasonable in the circumstances. Given the claimant's lack of income, I order the respondent to pay \$1,072 per month in addition to child support.

X

- [71] In the alternative to an order for ongoing periodic child support, the claimant sought lump sum child support for Rhett. Such awards may be warranted in circumstances where the payor:
- (a) resides in a state that is not reciprocating in recognizing or enforcing periodic child support awards of foreign states;

- (b) has demonstrated an inclination to disobey court orders;
- (c) has avoided due process in the litigation; or
- (d) has demonstrated an unwillingness to pay foreign creditors.

(see: K.V.D.P. v. T.E., 2004 BCSC 537, paras. 38-42).

[72] In this case, the respondent:

- (a) resides in China, which is a non-reciprocating state; thus an award for periodic support would be difficult and expensive to enforce payment and collect arrears;
- (b) is in breach of several Orders of the Court and is most certainly disinclined to obey an Order for the payment of monthly support (he already has);
- (c) has avoided due process in the litigation including evading service of the family law proceeding which required the claimant to obtain an Order for substituted service and failing to provide financial disclosure; and
- (d) according to the Certificate of Costs obtained by Harvey Law Corp., owes legal fees of over \$250,000, which indicates an unwillingness to pay foreign creditors (including the claimant who is owed almost \$900,000 in support and Court costs of in the range of \$30,000).

[73] The claimant submits that child support award of \$13,072 per month (inclusive of section 7 expenses), would yield a lump sum child support award for Rhett, until the age of 19, of approximately \$2.2 million.

[74] For the same reason that I declined to make a lump sum order in respect to spousal support (see para. 65 herein) I decline to do so for child support as well. From and after August 1, 2013, I order the respondent to pay to the claimant as child support for Rhett, the sum of \$13,072 per month until further order of this court.

[75] Lastly, the claimant sought an order that in the event that Frank is returned to the claimant's care, she be at liberty to seek child support for Frank. I am not sure such an order is necessary, but I affirm that she is at liberty to do so.

[76] I should also say that respecting the interim distribution of \$167,700 against arrears of child support, it should be clear from the arrears fixed that my order is that the amount remains due and owing and was not properly payable out of what I have found to be the claimant's sole claim to the equity in the Vancouver house.

XI

[77] The respondent's conduct in this litigation has, to say the least, been reprehensible. He has failed to disclose his financial information and he has disobeyed virtually every Order of the Court. I accept that the effect of his misconduct has made it extremely difficult and expensive for the claimant to pursue her claims. I do not hesitate to order that the claimant shall have the special costs of these proceedings, throughout.

XI

[78] Lastly, it is the finding of this court that the child, Frank Li, remains in the control of the respondent in defiance of Article 3 of the "Hague Convention on the Civil Aspects of International Child Abduction," that is, that his habitual residence at the time he was detained in China was British Columbia, Canada.

[79] These courts are open to both parties. Should the respondent take the view that the court has imposed unwarranted burdens upon him he may apply, upon bringing himself into compliance with existing orders, or showing cause, on full and frank disclosure, why this is not possible.

[80] In summary I order that:

- (a) The parties' assets in British Columbia vest in the claimant;
- (b) Spousal support arrears are fixed at \$680,000;
- (c) Spousal support shall continue from and after August 1, 2013 at \$40,000 per month;
- (d) Child support arrears are fixed at \$219,300;
- (e) Child support shall continue from and after August 1, 2013 at the rate of \$13,072 inclusive of extraordinary expenses;
- (f) The claimant is entitled to special costs throughout.

"McEwan J."

The Honourable Mr. Justice McEwan

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