
CANADA / JUDGMENT

Yip v. Yip

2016 BCSC 1595

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Supreme Court of British Columbia

DECIDED

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2016 BCSC 1595 Yip v. Yip

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yip v. Yip,

2016 BCSC 1595

Date: 20160829

Docket: E150808

Registry: Vancouver

Between:

Dave Kwai Ming Yip

Claimant

And

Nelly Aurora Serna Yip

Respondent

Before: The Honourable Mr. Justice Smith

Corrected Judgment: The text of the judgment was corrected

at paragraph 53 on August 31, 2016

Reasons for Judgment

Counsel for Claimant:

M. Cochrane

Counsel for Respondent:

I. Turaglio

Place and Date of Hearing:

Vancouver, B.C.

July 26 and 27, 2016

Place and Date of Judgment:

Vancouver, B.C.

August 29, 2016

- [1] Under the Family Law Act, S.B.C. 2011, c. 25 [FLA], separated spouses divide family property and family debt that existed at the date of separation, but the valuation date is usually the date of the hearing. This summary trial application illustrates the difficulties that can arise from the fact that there are different kinds of "separation."
- [2] Almost six years after they separated physically--by living in different parts of the same house--the parties in this case have still not separated their economic lives. They have retained joint lines of credit and joint credit cards, from which they have both continued to pay household and personal expenses. Each now argues that this has benefited the other disproportionality and seeks an unequal division of family property to compensate.
- [3] The claimant husband also says that he brought some registered retirement savings plan ("RRSP") funds into the relationship and that he has made further RRSP contributions since separation that should not be divided. The respondent wife, in addition to unequal division of property, seeks spousal support.
- [4] The parties were married in 1992 and have three children who are now aged 11, 14, and 18. The husband, who is now 51, is senior operations manager for a parking company and was the primary income earner throughout the marriage. The wife, who is now 48, earns some income cleaning houses but has been primarily responsible for childcare.
- [5] In November 2010, the husband moved into a basement suite in the family home in Coquitlam, B.C., where he still lives. The wife and children have continued to live upstairs.
- [6] Prior to separation, the husband's income was deposited into two joint lines of credit, from which all mortgage payments and household expenses, as well as almost all personal expenses, were paid. That arrangement has continued unchanged since separation. The lines of credit are registered against the family home.

- [7] The wife argues that the husband has increased the debt on the lines of credit with expenditures that were for his exclusive benefit. The husband says more of his income has gone to support the wife and children than would have been the case if he had been ordered to pay child and spousal support. He seeks credit for that "notional overpayment."
- [8] These matters were argued in such fine detail that the issues even included whether the benefit from household utility bills, paid over the last six years, should be attributed to the parties equally or on an 80/20 basis to reflect greater use by the wife and children. At one point during argument, I asked only half-jokingly whether anyone was being asked to account for a deposit refund on returned beer bottles.
- [9] The most significant family property is the family home, which the parties have now agreed to sell. Based on the home's assessed value, they expect it to sell for at least \$900,000. There is a mortgage with an outstanding balance of approximately \$291,000 and the balances owing on the two lines of credit total almost \$183,000. After those amounts are paid out of the sale proceeds, equal division of the remaining equity would leave each party with at least \$213,000.
- [10] The wife says that since the end of 2010, the family debt has increased by \$200,000 and the husband's draws from the lines of credit have exceeded hers by a total of \$146,000. That is equal to about 80% of the current balance owing on the lines of credit, and the wife says it should be paid entirely out of the husband's share of the sale proceeds. Those additional expenditures by the husband, she says, have included \$70,000 for RRSP contributions, \$15,000 for a tax-free savings account (most of which was lost in high-risk investments), and \$24,500 for legal fees. She says he has also taken more frequent and more expensive vacations than she has and has leased more expensive vehicles.
- [11] The husband argues that it is the wife who has been "encroaching disproportionately" on the lines of credit. He says that with his income as the only source of funds, the wife has benefitted from one half the amounts spent on the mortgage and other household expenses and that she and the children have benefitted from 80% of the amounts spent on utilities. These amounts, according to the husband, total \$129,780.95 since the beginning of 2011. At the same time, he says the wife has spent \$104,131.25 directly on groceries and expenses related to the children and has received a further benefit of \$24,427.17, being half of what he has spent on groceries and expenses related to the children.
- [12] Based on those calculations, the husband says the wife has "received" benefits worth a total of \$259,339.78. But he estimates that if she had not been able to draw on the lines of credit and had been required to rely on child and spousal support, the total support he would have been required to pay under the applicable Guidelines would have been only \$189,523. He says that "notional overpayment" of support, totalling \$69,816.78, should be deducted from the wife's share of the matrimonial home proceeds.

- [13] The husband has two RRSPs totalling a little more than \$300,000. He agrees the wife should receive one half of the value of those plans as they stood at the date of separation, as well as the growth on that portion, but that he should receive the full benefit of his post-separation contributions. As I understand his calculations, this would result in his retaining approximately 75% of the current RRSP value.
- [14] He also says that he should receive credit for \$10,879 in RRSP funds that he brought into the marriage, most of which was used in the purchase of the parties' first family home.
- [15] The question is whether the FLA requires the Court to conduct what almost amounts to a forensic audit of the parties' expenditures over six years in order to achieve an appropriate division of family property and debt.

The Legislation

Property division is dealt with in Part 5 of the FLA. For the purpose of this matter, the relevant sections are:

Equal entitlement and responsibility

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

...

Family property

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
- (b) after separation,
 - (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or

(ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

(2) Without limiting subsection (1), family property includes the following:

...

(d) money of a spouse in an account with a financial institution;

...

Excluded property

85 (1) The following is excluded from family property:

(a) property acquired by a spouse before the relationship between the spouses began;

...

(g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

(2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

Family debt

86 Family debt includes all financial obligations incurred by a spouse

(a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and

(b) after the date of separation, if incurred for the purpose of maintaining family property.

Valuing family property and family debt

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

(a) the value of family property must be based on its fair market value, and

(b) the value of family property and family debt must be determined as of the date

(i) an agreement dividing the family property and family debt is made, or

(ii) of the hearing before the court respecting the division of property and family debt.

...

Unequal division by order

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

...

[16] The Court of Appeal has recently confirmed in *Jaszczevska v. Kostanski*, 2016 BCCA 286 at para. 36, that the goal of the FLA is to simplify division of family property and make it more certain and predictable than was the case under the former legislation. This was done in part by reducing the court's discretion to depart from the presumptive equal division.

- [17] In establishing a scheme under which property and debt, existing at the date of separation, is presumptively to be valued on the date of the hearing, the legislature clearly anticipated changes in value taking place between those dates. Significantly, it did not create an automatic right to an accounting of how those changes came about or how they might accrue to the benefit or detriment of one party or the other.
- [18] Section 95(2)(f) allows for an unequal division where one spouse has "caused a significant decrease or increase in the value of family property or family debt beyond market trends." However, the necessary pre-condition to an unequal division is a determination by the Court that equal division would be "significantly unfair" in the circumstances (s. 95(1)).
- [19] Changes in value may also be addressed through s. 87, which permits a date, other than the date of hearing, to be used as a valuation date, but that is also subject to a test of significant unfairness. In *Blair v. Johnson*, 2015 BCSC 761, Madam Justice Fleming said at para. 69:
- [69] Section 95 of the FLA requires significant unfairness on specified grounds before the court may order an unequal division of family property. To the extent that s. 95 and s. 87 may provide alternate routes to address the substantial unfairness that would arise from awarding parties equal shares in family property valued at trial, it seems to me the significant unfairness threshold should also be met before the court departs from the date of trial as the valuation date pursuant to s. 87. To conclude otherwise would allow for an earlier valuation date resulting in a radical departure from an equal division as of the date of trial in circumstances where the significant unfairness threshold under s. 95 is not met. I say this leaving aside circumstances where it is necessary to set an earlier date because family property has been sold etc. or debt eliminated prior to the hearing. It is important to bear in mind the basic principle of equal entitlement (and responsibility) found in s. 81 that is integral to the division of family property regime in the FLA.
- [20] In *Jaszczewska*, at para. 39, the Court of Appeal said:
- [39] Also, because family property is generally valued on the date of the hearing, the parties will presumptively share in any post-separation increases in the value of family property. Once again, because of s. 81, this entitlement exists independent of the parties' respective contribution to the post-separation increase in value.

(emphasis added)

Division of Family Debt

- [21] The definition of family debt under s. 86 includes debt acquired after separation if the debt was incurred for the purpose of maintaining family property. It is common ground that at least a large portion of the funds obtained through the lines of credit were used for maintenance of the family home, including mortgage payments and utility costs. To the extent funds were used for other purposes, the lines of credit were still secured against the family home. The full amount owing on the lines of credit must therefore be considered

family debt, subject only the question of unequal division.

[22] In *K.M.J. v. J.H.D.N.*, 2014 BCSC 1895 at para. 156, Mr. Justice Betton used a hypothetical line of credit to illustrate the different approaches that may be taken to family debt in different circumstances. One of those scenarios raises the issue that is present here:

[156] ...

- If the debt had been run up well above the separation date level, so that the value was significantly different at hearing, this significant unfairness could again be addressed through the application of ss. 87 or 95. The peculiar circumstances of each case may drive the selection of which section to use and the date to be selected.

It must be emphasized that in that passage, significant unfairness is the pre-condition to unequal division or the selection of an alternative valuation date.

[23] After parties separate physically, there is often a transition period during which their relationship of financial interdependence continues. It may be weeks or months before they get around to closing joint bank accounts, cancelling joint credit cards, and otherwise beginning to untangle their financial affairs.

[24] But the financial relationship between these parties has survived the physical separation not by a few weeks or months but by almost six years. There is no evidence of the parties taking any steps to separate their finances in even minor ways nor evidence of any discussions or plans to separate them until March 25, 2015, when the husband filed his notice of family claim. Even then, the parties were still functioning as a financial unit when they filed these competing applications in July 2016.

[25] One of the factors to be considered under s. 95 is the terms of any agreement between the spouses (s. 95(2)(b)). I find that these parties must be taken by their conduct to have agreed to continue the financial arrangements that existed prior to their physical separation. Each had the benefit of access to the lines of credit for his or her own purposes or for family purposes. Each understood that they had no ability to control or restrict the other's use of the lines of credit. It is not appropriate, reasonable, or practical for the parties to now ask the Court to review six years of expenditures in order to determine who may have obtained the greater benefit from that implied agreement.

[26] I am not satisfied that equal division of family debt would be significantly unfair in these circumstances.

Family Property

[27] The husband's RRSPs, which he seeks to divide unequally, are the only significant property at issue. These are the same accounts that existed at the date of separation. The husband has since made further contributions, but the funds for those additional contributions came from the lines of credit, which were secured against the family home. Withdrawals to fund

RRSP contributions reduced the credit available for maintenance of family property or other family purposes. I find that those subsequent contributions were therefore "derived" from family property within the meaning of s. 84(1)(b)(i) and are therefore family property.

- [28] In *Asselin v. Roy*, 2013 BCSC 1681 at para. 172 and *Andermatt v. Tahmasebpour*, 2015 BCSC 1127 at para 101, the court said that RRSP contributions made after separation will be deducted from the divisible portion of the RRSP. However, the court does not appear to have actually made that deduction in either of those cases. In *B.M.P v. S.L.B*, 2015 BCSC 448 at para. 146, the court applied s. 87 to value RRSPs at the date of separation where one party had been the sole contributor.
- [29] Those and similar cases must, in my view, now be read in light of the clear statement in *Jaszczewska*, referred to above, that the presumptive right to equal division applies to post-separation increases regardless of contribution. Equal division of post-separation RRSP contributions may be significantly unfair in some cases where parties have separated their affairs and gone on with their independent financial lives. It is not significantly unfair in a case like this, where the husband has borrowed money to make the contributions from lines of credit that were secured against the family home and were also being used to pay ongoing family expenses.
- [30] I have already found that the parties effectively agreed to continue to hold and use the lines of credit after separation as they had before. I find that agreement extends to the use of the lines of credit for RRSP contributions and it is not significantly unfair to treat the post-separation contributions in the same way as the pre-separation ones. The RRSPs must be divided equally.
- [31] The only remaining property question is whether the RRSP funds the husband says he brought into the relationship should be treated as excluded property.
- [32] The respondent has produced a letter from a bank, dated March 15, 1993, indicating that on that date he held \$10,879 in RRSP funds. That date was about five months after the parties were married. The husband says in an affidavit that he had that RRSP in that amount before the relationship began. He has also produced documents showing that most, although not all, of that money was later withdrawn to purchase a home.
- [33] In *Asselin*, Mr. Justice Harvey said at para. 106
- [106] To implement the objectives [of the legislation], more mathematical certainty from a clear evidentiary record is required. Where inheritances are said to come into play, estate documents should be produced. Where exclusion of property is sought, on whatever basis, documents showing the value of property as at the time cohabitation commenced and at the date of separation will be critical in the assessment which the court is to perform. Where one party suggests, as is the case here, that excluded property has changed character into another asset, documents should be provided to allow the court to trace the transaction back to the property said to be excluded.

[34] In *Shih v. Shih*, 2015 BCSC 2108, Madam Justice Warren said at para. 64:

[64] The principle that emerges from the case law is that a broad brush or rough estimate approach to identifying excluded property is not appropriate and that a party claiming excluded property must establish, on a balance of probabilities, the basis for and extent of the exclusion with precision. Where it is asserted that excluded property has changed character, each link in the chain required to trace the property into a currently owned asset must also be established. Depending on the nature of the claim in question, this may mean, in practical terms, that it is impossible for a party to meet the onus without documentary evidence. For example, where the claim in question is a bank account that one party says pre-existed the relationship the court may conclude that a party's viva voce testimony of the balance in the account at a particular point in time several years earlier is unreliable, and therefore insufficient to meet the onus, if not corroborated by a bank statement. On the other hand, where the claim in question is founded upon an unusually memorable event, such as inheritance, the court may conclude that a party's viva voce testimony as to the value of the inheritance is reliable without corroborating documents. In other words, in determining whether the onus has been met, the court will assess the credibility and reliability of the whole of the evidence tendered in the context of the specific case, but having regard for the precision mandated by the more formulaic approach of the FLA.

(emphasis added)

[35] The bank letter produced by the husband was created soon enough after the relationship began to support an inference that at least a substantial portion of the account existed before the marriage. But it does not prove that the full amount was contributed before the marriage, and I do not find the husband's recollection, more than 20 years after the fact, sufficiently persuasive to be accepted in the absence of clear documentary corroboration. I find the husband has failed to establish the basis for an exclusion of property with the precision required.

[36] I therefore conclude that all family property should be divided equally, with the exception of a motorcycle that the parties agree the husband brought into the relationship and will retain. The parties have also agreed to the division of certain other property, such as their respective vehicles.

Child Support

[37] There is no dispute about the husband's obligation to pay child support. His total income in 2015 was \$124,029. The parties have agreed that certain deductions for employment expenses are appropriate, and I agree with counsel for the husband that a further deduction is appropriate to reflect employer RRSP contributions over which the husband has no discretion: *Redlick v. Redlick*, 2013 BCSC 1155 at para. 60. In the result, his Guideline income is \$115,242 requiring child support of \$2,174 per month.

Spousal Support

- [38] In the early years of the marriage, the wife had a business cleaning homes and offices but closed that business when the second child was born in 2002. She resumed her cleaning business, working for residential customers, in about 2012. She says she works about 20 hours a week and her net income in 2015 was just under \$12,000.
- [39] She says she only works for clients in Coquitlam and Burnaby because that allows her to be near the children and their schools, should a need for her attendance arise, and because working farther afield would not be practical due to the travel time and cost involved. She does not have fixed contracts with her clients and is subject to cancellations for various reasons and to losing clients who move.
- [40] The husband argues that she is underemployed and could be working more hours. He asks that an income of \$36,000 be attributed to her for purposes of spousal support.
- [41] This was a largely "traditional marriage" to which the comments of the court in the leading case of *Moge v. Moge*, [1992] 3 SCR 813 at 863-64 apply:
- ... The diminished earning capacity with which an ex-wife enters the labour force after years of reduced or non-participation will be even more difficult to overcome when economic choice is reduced, unlike that of her ex-husband, due to the necessity of remaining within proximity to schools, not working late, remaining at home when the child is ill, etc. The other spouse encounters none of these impediments and is generally free to live virtually wherever he wants and work whenever he wants.
- [42] It is likely that, as the younger children grow older and the wife has more time to devote to her business, she will find more clients and her income will gradually increase. But the husband's calculations of the income she might earn working longer hours are speculative and not supported by evidence of the additional work being available to her.
- [43] There is no evidence on which I could find that she is likely to earn as much as \$36,000 and certainly no evidence that she could jump immediately to that income level.
- [44] I therefore find that an annual income of \$12,000 should be attributed to the wife for the purpose of fixing child support.
- [45] I find that the marriage and its breakdown have left the wife at considerable financial disadvantage that will not be easily remedied. Although I have declined to order an unequal division of debt to reflect the husband's greater drawings since separation, I recognize that an equal division of debt will leave the wife with a somewhat smaller capital fund from the sale of the family home than might have otherwise been the case.

- [46] The wife has produced calculations under the Spousal Support Advisory Guidelines showing a range of spousal support from \$1,069 to \$1,685, with the midpoint being \$1,373. Those numbers are based on a Guideline income for the husband that it is \$1,500 higher than what I have found to be the case, but I take them as illustrating an approximate range.
- [47] I find this to be an appropriate case for support in an amount near the high point of the applicable range and order spousal support of \$1,600 a month. The duration of spousal support entitlement is indefinite, subject to future material changes of circumstances, but, as agreed by the parties, the amount will be reviewed each time one of the children ceases to be a child of the marriage under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). The reviews will be based on the parties' respective incomes at the time, with the first such review to take place no later than August 1, 2020.
- [48] Child and spousal will be payable beginning September 1, 2016, subject to the following adjustment pending sale of the family home. The parties have agreed to list the home for sale, with joint conduct of sale. Their apparent intention is to continue the present living arrangements in that house until it is sold.
- [49] As long as both parties continue to live in the house and until the sale of it completes, the husband will continue to pay the mortgage, taxes, and utilities and may deduct one half of those amounts from the spousal support payable. The wife will immediately stop using the joint lines of credit and credit cards.

Divorce and Other Matters

- [50] Both parties seek a divorce. I am satisfied that grounds are established and a divorce is granted.
- [51] The parties have agreed to a number of other matters relating to guardianship, sharing of s.7 expenses, and the wife's change of name, all of which may be incorporated into the formal order.
- [52] The wife's notice of application sought orders in relation to the existing Registered Education Savings Plans (the "RESPs") for the children, but the matter was not argued in detail. I accept the husband's evidence that further contributions will not result in any further matching funds from the government, and I accept that the wife is not in a position to make equal contributions. I make no order in respect of the RESPs.

Summary

- [53] In summary, all family property and debt that the parties have not previously agreed upon will be divided equally. The husband will pay child support of \$2,174 and spousal support of \$1,600 a month, subject to the interim arrangements pending sale of the family home that are set in paragraph 49 above. Spousal support will be reviewable on the terms set out in paragraph 47.

[54] The claimant and respondent are divorced, with the divorce to take effect on the 31st day after the date of these Reasons.

[55] The respondent has had greater success on this application and will have her costs.

"N. Smith J."

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