

CANADA / JUDGMENT

Yu v. Yu

2000 BCSC 698

COURT

Supreme Court of British Columbia

DECIDED

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2000 BCSC 698

Citation: YU v. YU2000 BCSC 698

Date: 20000428
Docket No.: D109676
Registry: VANCOUVER
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: SUSANA YUK-YEE YU
PLAINTIFF

AND: EDWARD SI-LAI YU
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE BENNETT

Counsel for the Plaintiff: Gordon K.M. Yu

Counsel for the Defendant Gary M. Harasym

Date and Place of Trial: April 10-14, 2000

VANCOUVER, BC

- [1] Mr. and Mrs. Yu were married in 1978 and separated in 1998. They have two children, both who are in university in Ontario. The elder daughter, Bernice, is mostly self-supporting, receiving limited assistance from her father. The son, Leo, is supported by his father. Leo has turned down opportunities to work during summer vacation. Child support is not an issue.

Issues

- [2] The parties seek a divorce based on a one-year separation. I am satisfied that the requirements of the Divorce Act have been met, and order the parties be divorced.
- [3] Mrs. Yu seeks a division of assets and \$3000.00 per month in spousal support.

Facts

- [4] Mrs. Yu has the equivalent of a grade 11 education. She took a short course on data entry. She worked for seven years for the Federal Government as a data entry operator. She was promoted at some point to a data librarian. She described the job as simple. There is no evidence with respect to her earnings. Her pension was withdrawn when she left the government service.
- [5] She worked in Vancouver and Toronto. She married in Toronto in 1978. In 1979, Mr. Yu wished to move to British Columbia because there were better job opportunities. Mrs. Yu could not obtain a transfer from the government, so she left her employment. Her daughter was born in 1980, and her son was born in 1981. Although she had brief employment during this time, she essentially stayed home and looked after the children, until the family business was started.
- [6] In the meantime, Mr. Yu worked for Peat, Marwick as a program analyst. He then worked for CanArctic Technology. Eventually, he wished to start his own business and around 1984, he started up what became Ed Yu and Associates.
- [7] This business first operated out of the basement of the family home. The start-up money was from family savings.
- [8] Mrs. Yu worked in this business from the beginning until around 1995. She did bookkeeping, banking, invoices, deliveries, purchasing and cleaned the office. The business sells computer equipment and now has software for municipal governments. It is a Premier sales company for IBM.
- [9] Mrs. Yu, on the evidence before me, also assumed the bulk of the care for the children.
- [10] By 1995, Ed Yu and Associates was a mid-size operation. There were several moves from offices. It is now located on W. Broadway in Vancouver. There are a number of salaried employees and contract workers. With bonuses, some of the employees in the past, have made in excess of \$100,000.00
- [11] The Yu's also bought and sold houses. Mrs. Yu testified that the money made from the sale of the houses was put into the company. However, they also received in excess of \$200,000 from Mr. Yu's parents to buy a house. Mrs. Yu says this money was a gift, however, Mr. Yu's parents are suing both Mr. and Mrs. Yu for non-payment of what they have characterized as a loan.

- [12] The Yu's drew a very small income from the company. Each drew approximately \$18,000 per year. However, they also drew on a shareholder's loan as a financial resource. In addition, many expenses were funnelled through the company, including all the automobile expenses, included leases, gas and repairs, cell phones, meal expenses and so on. Thus, the draw from the company does not in any way reflect their actual income.
- [13] Around 1995, Ed Yu and Associates retained an accountant, Diane Henson, and Mrs. Yu stopped working for the company. She did continue to draw a salary of \$18,000 from the company, and does so to this date. Mrs. Yu began working on the building of what she referred to as her "dream home" at 1887 W. 29th Ave., Vancouver. She eventually was the general contractor for this house.
- [14] The family had taken trips and a cruise, they joined the Arbutus Club, Mrs. Yu drove a 1998 Toyota Rav 4 and Mr. Yu drove a Cadillac. As will be seen, they were living far beyond their means.
- [15] A huge mortgage was taken out to build the "dream home". The home was 6200 square feet. Before separation, the family was paying in excess of \$8,000.00 on two mortgages for this home.
- [16] In 1996, a loan was secured from United Civic Savings in the amount of \$900,000. The loan was initially drawn at \$500,000. Out of this amount, \$265,000 of debt, including a significant amount of company debt, was paid off. An additional \$195,000 went toward house construction. Additional money was borrowed, refinancing occurred and eventually the house carried mortgages in the amount of \$975,000 of which \$600,000 went to house construction, a company line of credit and an Arbutus Club membership.
- [17] At some point, a lien involving \$40,000 was placed on the property. The Yu's borrowed \$80,000 from Mrs. Yu's sister and brother-in-law to remove the lien. The additional \$40,000 was used for the business and for personal expenses. Litigation is still pending over the lien and some funds remain in a lawyer's trust account pending the outcome of the litigation.
- [18] The loan from Mrs. Yu's relatives is referred to in the financial statements as the Powerline account. Mr. Yu was paying the interest on this loan, an amount around \$400.00 per month, until Mrs. Yu obtained an order for spousal maintenance in August 1999. He stopped paying the Powerline in September 1999 and told Diane Henson he could no longer afford it. Mrs. Yu has been paying this debt from her income.
- [19] Another event was that when the matrimonial home was 70% complete, it was significantly destroyed by an arson fire, and had to be re-built
- [20] The matrimonial home is for sale for slightly in excess of \$1,000,000. The mortgages have been defaulted and the home is under foreclosure. No equity will likely be seen by either party for this house.

- [21] I find that before separation, Ed Yu and Associates was in financial trouble. Mr. Yu was borrowing money to put into the company. Mr. and Mrs. Yu were living beyond their means. Indeed, at one point a meeting was held with Mr. and Mrs. Yu and Diane Henson, the company's accountant. The purpose of the meeting was to place Mrs. Yu on a budget and to convince her to stop using her credit cards because the financial situation was difficult. Mrs. Yu refused.
- [22] After separation, Mr. Yu had all of the business accounts changed because Mrs. Yu began writing cheques on the company accounts for herself.
- [23] After separation, Mr. Yu made two significant investments through the company. First, he attempted to expand Ed Yu and Associates by opening a company in Ontario. Ed Yu and Associates invested \$80,000 in the Ontario company. This company has closed and is defunct.
- [24] The next investment was a software called Responseware. This investment was \$150,000. The company paid \$50,000 as a down payment and the remainder was financed by the vendor. Ed Yu personally guaranteed this arrangement. The payments have not been made in recent months.
- [25] It is too early to tell if Responseware will result in a profit for Ed Yu and Associates. It depends, in part, if the company can keep afloat until it can render a profit.
- [26] In addition, Mr. Yu has borrowed significant sums (for example \$150,000 from Hall Mark Global Solutions), which was used to pay \$135,000 debt to Revenue Canada. Some of his credit cards have been cancelled for non-payment. The list goes on.
- [27] I have received a valuation of the company. This valuation, while I do not doubt its accuracy, is of little assistance in the final analysis. The opinion is based on premises that cannot be said to apply in this case. First, the company has been given no value on the open market. This is true, but the company has value in that it is still a viable company, and it may well turn around. It is an IBM Premier business partnership. Mr. Hooge, the valuator, was unaware of its high record of sales. The company generates income. Mr. Hooge based his analysis, in part, on the fact that Mr. Yu did not draw an income in 1998. In fact Mr. Yu's income was hidden in the wages and benefits of his employees for that year. When asked about this, Mr. Hooge said it wouldn't change his opinion because Mr. Yu should be earning between \$75,000 to \$100,000 per year for his management of this company. However, he said this meant as an arm's length manager, not as an owner and someone who could include expenses within a company, such as cars, telephones and so on.
- [28] I find that Mr. Hooge's opinion that the company is worth nothing is of little use in assessing either the value of the shares, the value of the shareholder's loan or the income potential of the company.

- [29] However, I accept, based on the records, the evidence of Mr. Hooge and the evidence of Ms. Henson, that this company is in serious trouble, that it was in difficulty before the separation and its survival is questionable.
- [30] Certainly, if I order payment out of the shareholder's loan to Mrs. Yu, she would receive next to nothing and such an order will put this company into bankruptcy.
- [31] Another complicating factor occurred as a result of an application pursuant to Rule 18A. Mrs. Yu's shares of the company were transferred to Mr. Yu on August 19, 1999, with the value of the shares to be determined at trial.

Discussion

- [32] The law is clear, Mrs. Yu is entitled to half of the value of the shares and to half the value of the shareholder's loan.
- [33] The shareholder's loan has been used since separation to split the debt between the two parties. These debts include Mr. Yu's car, yet he has stopped payment of Mrs. Yu's car lease. It appears that her support payments are also coming from the shareholder's loan, which is in part, her money.
- [34] I find that the shareholder's loan was valued at \$233,031 on the date of the triggering event, according to Mr. Hooge's report. This is the book value.
- [35] Although Mrs. Yu is entitled to 50%, it is difficult to determine how to divide what is, for the time being, almost nothing. The only reasonable solution is to craft a repayment plan of this loan which will not undermine the company's efforts to stay afloat but will provide Mrs. Yu some of the value. It is not to be forgotten that Mr. Yu, after separation, decided to invest significant amounts of company money in ventures, of which one he lost his investment and the other is questionable. He agreed to take responsibility for this risk according to the August 19, 1999, order of Taylor, J.
- [36] I find that Mrs. Yu's entitlement to the shareholder's loan is rounded out to \$115,000. The company will pay out this loan, at no interest, in the amount of \$500.00 per month until the amount is paid. This payment plan may be reviewed in two years, and payment accelerated if the company turns around.
- [37] I find that the shares which were transferred to Mr. Yu by Mr. Justice Taylor are held in trust for Mrs. Yu. She is entitled to realize on the value of these shares.
- [38] Looking at capital assets, the accounts receivable, including \$80,790 paid to the Ontario company, and accounts payable (not including the shareholder's loan), the company has a value of approximately \$103,890. The figures are taken from Schedule One of Mr. Hooge's report. This is the best I can do to assess the value of the shares. The valuation is at the date of Mr. Hooge's report, as of June 30, 1999. I find that this is a reasonable valuation. The trial date is not an appropriate valuation date because Mr. Yu accepted the risk after the share transfer, and the value of the shares have clearly dropped because of his management.

- [39] Mrs. Yu is entitled to one-half of that value, thus \$52,000 rounded-off. If Mrs. Yu attempts to realize on the value of these shares now, she will jeopardize the company. Mrs. Yu is to be forwarded financial statements annually so she can monitor the progress of the company. The \$52,000 is to be paid to Mrs. Yu from Mr. Yu at \$600 per month until the debt is paid. Mrs. Yu may apply to court for an acceleration of payments if Mr. Yu's financial situation improves.
- [40] In terms of other assets, I find that the Canadian Savings Bonds cashed by Mrs. Yu were cashed before separation. I have no evidence to the contrary.
- [41] Mr. Yu will take responsibility for his car loan. Mrs. Yu will take responsibility for her car lease. The responsibility for the debt to Mrs. Yu's family, Molly and Wing Chan, will be divided equally.
- [42] If there is any equity from the sale of the house, it will be divided equally after first repaying the loan to Molly and Wing Chan, Mrs. Yu's sister and brother-in law.
- [43] I have not been asked to address the debt claimed by Mr. Yu's parents. Nothing in this judgment is to affect that matter.
- [44] Mrs. Yu apparently obtained quite a bit of furniture, but as noted, Mr. Yu was claiming his car and other expenses through the company, and some of those expenses were attributed to Mrs. Yu's shareholder's loan. Yet, Mrs. Yu's expenses were born by her. To balance this situation, I find that Mrs. Yu may keep the furniture and the pool table without any adjustment.
- [45] There is also a claim for compensation for the money spent on the bad investments. In assessing the value of the company shares and the shareholder's loan, I have taken these into account. I see no basis upon which to make a separate compensation order.
- [46] There is also a request for compensation for the Arbutus Club membership. This membership cost \$20,000, plus monthly dues. On the evidence before me, the membership can be split and Mrs. Yu can continue to make the monthly payments as a member. This membership has no other value. I have no evidence that it is similar to a club membership which cannot be divided, and therefore, if the parties both wish to continue as a member, they must purchase a new membership. In such a case, a compensation order may be appropriate. I requested evidence on this point by agreement with counsel, however, I have not received it. I see no point in delaying this decision because the evidence has not been forthcoming.
- [47] The next issue is spousal support. Mrs. Yu is entitled to spousal support. She is currently receiving \$800 per month plus \$1200 net per month from the company as salary. Obviously she can no longer receive income as a company employee. Revenue Canada would not permit this to continue.

- [48] Mrs. Yu worked throughout her marriage for the company. She has gained considerable skills. She also was the general contractor for the building of the new home. Mrs. Yu can easily obtain employment with her skills. She has chosen not to work. She complains of ill health caused by stress of her marriage breakdown and a bad back from lifting her children when they were small. Although clinical records have been filed, there is no medical opinion substantiating the suggestion that Mrs. Yu can not work.
- [49] Mrs. Yu's most recent expenses are not extravagant for a person with an average income. The problem is that Ed Yu and Associates can barely make its payroll. The evidence before me from Ms. Henson was that she was not certain the company would make its next payroll.
- [50] In the dire circumstances, I make the following order based on Mrs. Yu's needs and the ability of Mr. Yu to pay. Mrs. Yu is to receive \$1200.00 per month in spousal support from Mr. Yu for a period of two years, in addition to the monthly payments for her shareholders loan and shares. This order will be reviewed after two years. The purpose of the review is to assess whether Mrs. Yu has employment, and to assess Mr. Yu's ability to pay. Ed Yu and Associates may well not survive. That does not mean Mr. Yu is unable to obtain employment. The evidence at trial suggests that Mr. Yu would be able to make a good income as an employee. Certainly, Mr. Hooge's assessment is that a person performing his job should earn in the range of \$75-100,000.
- [51] Any money derived from the pending litigation regarding the lien will be equally divided between the parties.
- [52] The company is relieved from the requirement to prepare general ledgers.
- [53] In summary, I find the following:
1. The parties are divorced.
 2. The shareholder's loan is payable in monthly instalments of \$500.00 per month until the total of \$115,000 is paid.
 3. Mrs. Yu's shares of the company are held in trust by Mr. Yu. They are valued at \$52,000. This amount is payable in monthly instalments of \$600 until the total is paid.
 4. The debt to Molly and Wing Chan is to be born equally. If there is any equity from the sale of the matrimonial home, this debt will be paid first and the remainder will be equally divided.
 5. Mrs. Yu is to receive \$1200.00 per month in spousal support. There will be a review of this amount after two years in order to assess the financial situation of both parties.
 6. The company is no longer required to keep general ledgers.
- [54] Each party will bear their own costs, subject to counsel notifying the other within thirty days of the date of this decision that they wish to make submissions on costs.

"E.A. Bennett, J."

The Honourable Madam Justice E.A. Bennett

May 2, 2000 -- Corrigendum issued by Madam Justice Bennett advising that,

- [1] In Paragraph 46 of my Reasons for Judgment filed April 28,2000, I state that I had not received requested information from counsel regarding the Arbutus Club.
 - [2] After releasing the decision, counsel advised that a letter was sent on April 19, 2000 regarding the Arbutus Club membership. Unfortunately, the letter was not brought to my attention.
 - [3] The letter confirms that the membership can be split. It thus has no independent value. Counsel for Mrs. Yu indicated he would abandon his request for compensation if the membership could be split. The judgment therefore is not altered as a result of receiving this information.
 - [4] I am grateful for counsel bringing this matter to my attention.
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