

CANADA / JUDGMENT

Zhao v. Fang

2022 BCCA 227

COURT

British Columbia Court of Appeal

DECIDED

29 June 2022

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2022 BCCA 227 Zhao v. Fang

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Zhao v. Fang,

2022 BCCA 227

Date: 20220629

Docket: CA46242

Between:

Zhi Dong Zhao

Respondent

(Claimant)

And

Yan Hong Fang

Appellant

(Respondent)

Before:

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated

June 20, 2019 (Zhao v. Fang, 2019 BCSC 995, New Westminster Docket E46971).

Counsel for the Appellant:

P. Cote

Counsel for the Respondent:

G.K. Thomas

Place and Date of Hearing:

Vancouver, British Columbia

May 16, 2022

Place and Date of Judgment:

Vancouver, British Columbia

June 29, 2022

Written Reasons by:

The Honourable Madam Justice Fisher

Concurred in by:

The Honourable Madam Justice Mackenzie

The Honourable Mr. Justice Abrioux

Summary:

This appeal arises from an order in a family law dispute that divided family property and imputed income to the respondent. The appellant contends that the trial judge erred in finding certain funds to have been gifted to the respondent, failing to divide certain investment funds, and relying on a prior interim order in imputing income to the respondent up to the date of trial for the purpose of child and spousal support. Held: Appeal allowed in part. When the reasons are read as a whole and in context with the record, they are sufficient to permit appellate review on the question of whether the funds were a gift, and there was evidence to support the judge's conclusion. The investment funds in question were family property and are ordered to be divided equally. Considering the evidence regarding the respondent's income, all child and spousal support orders should be retroactive to May 1, 2016, the effective date of the interim order.

Reasons for Judgment of the Honourable Madam Justice Fisher:

- [1] This appeal arises from a family law dispute and an order that divided family property and imputed income to the respondent, Zhi Dong Zhao. The appellant, Yan Hong Fang, contends that the trial judge erred in finding certain funds to have been gifted to Mr. Zhao, failing to divide certain investment funds, and relying on a prior interim order in imputing income to Mr. Zhao up to the date of trial.

Background

- [2] The parties were married in June 1995 and separated in July 2013. They lived in China for most of their marriage, but Mr. Zhao split his time between Canada and China from 2001 to 2005. They left China together in May 2013 to settle in British Columbia. They have two children.
- [3] In May 2008, Mr. Zhao received approximately \$520,000 from his mother in China. In June 2008, he purchased a townhouse in Surrey, B.C. for \$408,000. The purchase was financed in part with a mortgage that Mr. Zhao paid out in 2010. At that time, Mr. Zhao was working in China but stayed in the townhouse when he was in Canada. The family moved into the townhouse in May 2013.
- [4] The family was apparently supported by Mr. Zhao's work in China, which involved construction projects provided to him by his father. Mr. Zhao's actual income is unknown, but he acknowledged at trial that he had received advances of approximately 5 million Chinese Yuan (about \$1,000,000 CDN using the trial judge's exchange rate of 5 yuan to \$1) from three projects between 2004 and 2008.
- [5] The parties' relationship broke down soon after they came to British Columbia together. It ended after an incident in late July 2013 that resulted in Mr. Zhao being charged with assault, and later entering into a peace bond. Mr. Zhao filed a notice of family claim in July 2014 and Ms. Fang filed a counterclaim in August 2014. A series of interim orders were subsequently made. The first interim order that addressed child and spousal support was made by Master Keighley on July 11, 2016 (the July 11, 2016 interim order). In that order, Mr. Zhao's income was imputed at \$60,000 and he was ordered to pay both child and spousal support as of May 1, 2016.

The trial decision

- [6] The trial judge expressed skepticism regarding the nature and quality of the evidence of the parties' incomes and property. There was evidence of substantial wealth in China and "huge" sums of money being transferred through various bank accounts between 2000 and 2014. There was also evidence that each of the parties owned property in China, but they had agreed that these were not to be litigated in Canada.
- [7] The judge found that Mr. Zhao had not made full disclosure to the court and expressed "great concerns" about his truthfulness:

- [77] in part due to the patent issues of historical financial disclosure, the evident discrepancies between his documents and his oral evidence, his ostensible slide to penury, his frequent outbursts and tirades when pressed in court, and the end result being a difficulty in rational reasoning based on the evidence.
- [8] The judge also expressed concerns about Ms. Fang's credibility, finding her unduly defensive about her ability to earn income and her antagonism toward Mr. Zhao: at para. 84.
- [9] The judge was clearly concerned about the quality of the evidence related to the financial issues, noting that the court would ordinarily take the family's assets into account in assessing the means of the parties and considering issues of reapportionment, income and support obligations. He was satisfied that the respective families' wealth was a "background, but vital issue": at paras. 80-81.
- [10] The trial judge considered each party's evidence of their assets. Mr. Zhao conceded that Ms. Fang had an entitlement to family property, including commercial property in China, in the amount of \$44,243, which he sold after separation. The judge purported to make findings only with respect to the townhouse in Surrey and a vehicle (a Nissan Quest):
- [97] The townhouse was purchased in June 2008 for \$408,000. I accept the evidence is \$520,000 was provided by his mother and used to make the down payment on the townhouse. The Nissan Quest was purchased at the same time.
- [98] Further I agree it appears that the entirety of the mortgage was paid out on February 10, 2010, using the balance of funds which Mr. Zhao had been investing from time to time.
- [99] The townhouse is appraised at \$655,000 as of January 2018, the increase in value is \$247,000 and each of the parties is entitled to one half share or \$123,500.
- [100] With respect to the Nissan Quest, it was purchased September 2008 for \$33,700, and paid using the funds provided by Mr. Zhao's mother. However, it appears to have been entirely used as a family asset.
- [101] Master Keighley on July 11, 2016, made an order on a without prejudice basis that the 2008 Nissan Quest be transferred to Ms. Fang. But Ms. Fang does not use the vehicle, rents another, and expresses no position. Mr. Zhao can recover the vehicle.
- [11] After determining that the children and Ms. Fang were entitled to support, the judge went on to address the imputation of income. Ms. Fang's position was that Mr. Zhao's income should be imputed at \$150,000. Mr. Zhao, while asserting that he received an income of \$1,000 and rental income of \$1,200 a month, was agreeable to a continuation of the July 11, 2016 interim order imputing his income at \$60,000: at paras. 123, 140.

- [12] Based on evidence of Mr. Zhao's historical earnings and assets since 2000, the judge found that he had considerable wealth and income and had not made full disclosure. This, he stated, left him "to speculate on what should only be a straightforward exercise": at para. 138. He concluded that the July 11, 2016 interim order imputing Mr. Zhao's income at \$60,000 should stay in place until December 31, 2017, and thereafter his income was imputed at \$100,000: at paras. 145-146.
- [13] The judge also found that the children and Ms. Fang were entitled to retroactive support and he made an order for child and spousal support "retroactive" to January 2018, the start of the trial. Based on Mr. Zhao's imputed income of \$100,000, he set "ongoing" child and spousal support at \$1,234 and \$1,194 respectively.
- [14] The remainder of the judge's reasons address issues that are not relevant to this appeal.

On appeal

- [15] Ms. Fang asserts that the trial judge erred in:
- 1) finding that the funds used to purchase the townhouse and the Nissan Quest were gifted by Mr. Zhao's mother and constituted excluded property;
 - 2) failing to divide \$700,000 of investment funds which had been returned to Mr. Zhao after separation;
 - 3) relying on the July 11, 2016 interim order to impute income to Mr. Zhao at \$60,000 up to December 31, 2017.
- [16] Ms. Fang seeks orders dismissing Mr. Zhao's excluded property claim, equally dividing these assets as well as the \$700,000, and calculating child and spousal support from the date of separation on the basis of an imputed income of \$100,000. Alternatively, she seeks an order remitting these matters back to trial on the basis that the trial judge provided insufficient reasons to explain his findings and conclusions in respect of (1) and (3), and no explanation for failing to divide the funds in (2).
- [17] Mr. Zhao contends that this appeal is an attempt to relitigate purely factual issues without establishing any palpable and overriding errors by the trial judge. He says that the judge was alive to credibility issues and his findings regarding excluded property were properly based on the evidence. With respect to the \$700,000 of investment funds, he suggests that the judge implicitly made findings contrary to Ms. Fang or alternatively, the reasons are insufficient to permit appellate review. Finally, Mr. Zhao says that the judge's reliance on the July 11, 2016 interim order to impute income prior to trial was appropriate given the state of the evidence.

The record

- [18] The record before us in this appeal does not include transcripts of the oral submissions made to the trial judge or the written submissions of counsel that we are advised were put before him. The written submissions were not marked at trial and counsel was unable to retrieve the final version. This gap in the record was problematic for Ms. Fang because some of her submissions rely on what she argued before the trial judge.
- [19] Mr. Cote, who was also counsel for Ms. Fang at trial, advised that the absence of the transcripts of the oral submissions was his oversight, and he sought leave at the hearing of the appeal to order and file them. We declined to do so on the basis that we would accept counsel's submissions as to what was argued at trial.

Standard of review

- [20] The scope of review in family law cases is narrow and an appellate court may only intervene where there is a material error, a serious misapprehension of the evidence or an error in law. In the absence of an error of law or a palpable and overriding error of fact, deference is "vital": *Barendregt v. Grebliunas*, 2022 SCC 22 at paras. 100-104.
- [21] This highly deferential standard of review, which applies to all family law matters, including issues of property division, is necessary to promote finality and to recognize the importance of the appreciation of the facts by the trial judge: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 14; *Jean Louis v. Jean Louis*, 2020 BCCA 220, leave to appeal ref'd [2021] S.C.C.A. No. 513 at para. 24.

Sufficiency of reasons

- [22] There is no free-standing right of appeal on the basis of the sufficiency of a trial judge's reasons. Appellate intervention is only justified where the reasons, when considered along with the record, do not permit meaningful appellate review. This occurs where the reasons are both inadequate and inscrutable: see *R. v. Gagnon*, 2006 SCC 17; *Shannon v. Shannon*, 2011 BCCA 397; *Ecobase Enterprises Inc. v. Mass Enterprise Inc.*, 2017 BCCA 29.
- [23] Reasons must be read generously and as a whole, bearing in mind the presumption that trial judges know the law: *Barendregt* at para. 104, citing *R. v. G.F.*, 2021 SCC 20 at para. 79. In *G.F.*, the Supreme Court described the task of appellate courts in assessing the sufficiency of reasons, which can be summarized as follows:
- The task of appellate courts is not to finely parse a trial judge's reasons but rather to assess whether the reasons, read in context and as a whole and in light of the live issues at trial, explain what the trial judge decided and why in a manner that permits effective appellate review: at para. 69.

- If the reasons do not explain the "what" and the "why", but the answers to those questions are clear in the record, there will be no error: at para. 70.
- Reasons must be both factually sufficient and legally sufficient. Factual sufficiency, which is ordinarily a very low bar, is concerned with what the trial judge decided and why. Legal sufficiency requires that the aggrieved party be able to discern the viability of an appeal and appellate courts be able to determine whether an error has occurred; this is highly context specific and must be assessed in light of the live issues at trial: at paras. 71, 74.

Analysis

1) Excluded assets and findings of a gift

[24] Family property is defined in s. 84(1) of the Family Law Act, S.B.C. 2011, c. 25:

- (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:
 - (g) the amount by which the value of excluded property has increased since the later of the date
 - (i) the relationship between the spouses began, or
 - (ii) the excluded property was acquired.

[25] Excluded property, defined in s. 85(1), includes "gifts to a spouse from a third party". Under s. 85(2) the spouse making this claim has the burden of demonstrating that property is excluded property. The standard of proof is on a balance of probabilities (as in any civil case), but the evidence must be clear and cogent. If documentary evidence is not available, a party's testimony on this issue is to be scrutinized for credibility. However, the judge is permitted to draw reasonable inferences from evidence that is less certain or precise in order to do justice between the parties: *Shih v. Shih*, 2017 BCCA 37 at paras. 43-44; see also *Pisarski v. Piesik*, 2019 BCCA 129 at para. 24.

- [26] A gift is "a gratuitous transfer made without consideration". For a gift to be legally binding, the donor must have intended to make a gift and must have made the transfer to the donee: see *McKendry v. McKendry*, 2017 BCCA 48 at para. 31.
- [27] Ms. Fang's primary complaint is that the trial judge simply accepted Mr. Zhao's evidence that the \$520,000 transferred in 2008 was a gift from his mother without considering her submissions to the contrary or Mr. Zhao's lack of credibility, inconsistencies in his evidence, and his failure to make full disclosure. She says Mr. Zhao's testimony was no more than a bare assertion, unsupported by evidence from his mother or any documents. She suggests that the judge was under a misapprehension that this issue was not in dispute, as he referred only to Mr. Zhao's position that the townhouse and the vehicle were excluded assets:
- [95] Given the Surrey townhouse and the Nissan Quest were funded by his mother, he asserted pursuant to section 85(1)(b.1) of the Family Law Act , and s. 84(2)(g) only the amount of the excluded property that had increased was family property.
- [28] Mr. Zhao acknowledges that the judge did not state the standard he was applying but submits that this Court must presume he applied the correct standard because trial judges are presumed to know the law, citing *F.H. v. McDougall*, 2008 SCC 53 at para. 54.
- [29] The evidence of the gift was Mr. Zhao's testimony asserting that his mother gave him \$520,000 and an "Application for Telegraphic Remittance", which stated that "Kun Lan Lui (mother) grants to Zhi Dong Zhao (son)" this amount of money on May 23, 2008. The transfer itself was made, not by the mother but by a friend of Mr. Zhao, and there was no evidence as to who wrote the "grant" statement, a translated term. This document does not establish the intention of Mr. Zhao's mother but it does establish that this transfer of funds occurred on the date written. There was also evidence that Mr. Zhao paid a deposit of \$20,000 on the purchase, obtained a mortgage on the townhouse of \$285,600, and paid out that mortgage in full on February 10, 2010. Mr. Zhao testified that he used the funds from his mother to do so.
- [30] In cross-examination, Mr. Zhao was challenged as to his truthfulness in listing these funds as a debt in his June 2017 financial statement. He testified that the funds were a "conditional" gift as his parents "waived" the debt after June 2017, stating that the money was "eventually" given to him, whether it was called "a gift or assets allocation". He also testified that his parents wanted to "take back" this property because they were angry that they had not had any meaningful contact with their grandchildren.
- [31] The trial judge did not review the remittance document, the bank statements or Mr. Zhao's evidence, nor did he make clear findings. He simply accepted that the evidence was that \$520,000 was provided by Mr. Zhao's mother and used to make the down payment on the townhouse: at para. 97. There is nothing in the reasons indicating the amount of the down payment but the judge was satisfied that Mr. Zhao paid out the mortgage on the property in 2010 "using the balance of funds which Mr. Zhao had been investing from time to time": at para. 98. He made no specific finding that the mortgage was paid out with the gifted funds but Mr. Zhao's evidence was that they were. When the reasons are considered along with the

record and the order, it is evident that the judge was satisfied that the entire purchase price for the townhouse, as well as the vehicle, had been gifted by Mr. Zhao's mother. The order stated:

32. Pursuant to s. 85 of the Family Law Act, the Claimant [respondent] is entitled to \$408,000 which is his excluded property from the value of the Townhouse. Thereafter the increase in equity shall be shared equally between the parties.

33. The Respondent shall return the 2008 Nissan Quest to the Claimant, which is excluded property, and the Respondent shall waive and release any and all claims to the 2008 Nissan Quest.

[32] It is possible the judge misapprehended that Mr. Zhao's excluded property claim was disputed. The record shows that Ms. Fang's counsel cross-examined Mr. Zhao on the inconsistencies between his financial statement, in which he characterized these funds as a loan, and his testimony, in which he said the funds were a gift or a "conditional gift". Mr. Cote advised the Court that he argued the townhouse and vehicle were not excluded property because Mr. Zhao did not establish sufficient proof of a gift, as his evidence about this was of a similar pattern to all of his evidence and was unreliable. No mention was made of this submission in the reasons.

[33] The reasons do not explain why the judge found the purchase price of the townhome to be excluded property, but the answer to that question is apparent in the record. There was evidence that these funds were provided by Mr. Zhao's mother, and I do not understand this to be disputed. There was also evidence, albeit from Mr. Zhao alone, that the funds were given to him by his parents and he had no intention of asking Ms. Fang to repay any of it. Despite the inconsistencies in his evidence regarding the gift as "conditional", Mr. Zhao maintained that he was not obliged to repay his parents and there was no evidence to the contrary.

[34] In my view, when the reasons are read as a whole and in context with the record, they are sufficient to permit effective appellate review. Although the judge ought to have scrutinized Mr. Zhao's evidence and provided more complete reasons, there was evidence to support his conclusion on the excluded property claim.

[35] I would therefore not accede to this ground of appeal.

2) Failing to divide \$700,000 of investment funds

[36] There was evidence from Mr. Zhao that in early 2014, he had received 3.5 million yuan (approximately \$700,000) in stocks from investments returned to him but he did not list this as an asset for the purposes of property division. The trial judge referred to this evidence in his reasons but considered it only in relation to a submission by Ms. Fang that these funds be taken into account in determining Mr. Zhao's income for the eight years prior to trial: at paras. 70, 128, 132.

- [37] Ms. Fang submits that these funds should simply be divided as family property. Mr. Cote advises that submissions were made about these funds at trial in relation to both property division and income. He explained that the only way Ms. Fang could demonstrate Mr. Zhao's income was through his receipt of funds over the years, but that did not exclude consideration of these funds as family property.
- [38] Mr. Zhao submits that the judge either implicitly accepted that the funds were not beneficially owned by him or may have understood that these funds constituted property in China.
- [39] I do not accept Mr. Zhao's submission, as it is speculative to suggest that the judge made any implicit findings. The judge did not consider whether this asset should be included in the family property to be divided. This omission may be explained by the judge's reliance on Mr. Zhao's schedule of property and Ms. Fang's submission on income. Mr. Zhao did not claim that these funds were excluded property.
- [40] Despite this omission, the judge acknowledged that Mr. Zhao received these funds in the form of stocks in 2014, and the record clearly shows that this asset was derived from investments held during the marriage. Mr. Zhao testified that he suffered a loss in the stock market in 2012 and decided to take his remaining funds, about 3 million Yuan, out of the market. He entrusted these funds with two friends who he considered knowledgeable and asked them to see if they could "regain" some money for him. Unfortunately, they were not successful and they returned the funds to Mr. Zhao in 2014.
- [41] I agree with Ms. Fang that the trial judge erred in failing to divide this asset. Although the reasons provide no explanation, this Court is in a position to determine the facts from the record, which shows that these funds constituted family property.
- [42] I would therefore accede to this ground of appeal and order equal division of this asset.
- 3) Imputation of income and retroactivity
- [43] Ms. Fang contends that she claimed support retroactive to the date of separation in July 2013, or at least to August 27, 2014 when she filed her counterclaim. She submits that the trial judge erred in confining his determination of Mr. Zhao's imputed income at \$100,000 to the period from January 1, 2018, the start of the trial, without explaining why the July 11, 2016 interim order, which imputed his income at \$60,000, should stay in place to December 31, 2017. She says that relying on the interim order results in support orders that are contrary to the Federal Child Support Guidelines and the Spousal Support Advisory Guidelines.

- [44] Mr. Zhao contends that the trial judge clearly understood that he was required to revisit the July 11, 2016 interim order and his decision to leave it in place to the pre-trial period was based on his dissatisfaction with the evidence. He says that it was not possible for the judge to make a clear finding on his actual pre-trial income and Ms. Fang has not pointed to any evidence allowing this Court to do so.
- [45] The trial judge found that Ms. Fang and the children were entitled to retroactive support on the following basis:
- [147] Ms. Fang has consistently asked Mr. Zhao pay child and spousal support. Her circumstances are as a single mother who moved to a new country likely in reliance on a financial plan securing hers and the children's support, i.e. accrued savings in China, without any expectation that she maintain income to support the family. She now has the primary care of two children and her earnings power has been set back, causing the children to suffer. Mr. Zhao is clearly able to pay support commensurate with income of \$100,000 and will not suffer hardship as contemplated at s. 10 of the Guidelines. Mr. Zhao has refused to pay support, been aggressive, and his disclosure obligations are wanting.
- [46] He then purported to make a retroactive award:
- [148] The retroactive award covers the year and one half that has elapsed since January 2018. The interim award took the parties to the month before trial, the retroactive portion reflects my assessment that Ms. Fang made it known to Mr. Zhao through trial-related documents that she would be seeking judicial determination of support in conjunction with her income imputation arguments.
- [149] The retroactive award reflects my assessment that Mr. Zhao's income is properly set at \$100,000 based on the historical evidence.
- [Emphasis added.]
- [47] There are several problems with the judge's reasoning. First, this award was based on the premise, incorrect in my view, that the support ordered from the start of trial was a retroactive order. Second, the judge's assessment that Mr. Zhao's income was properly set at \$100,000 "based on the historical evidence" is inconsistent with his earlier conclusion that the July 11, 2016 interim order, which set his income at \$60,000, "should stay in place to 31 December 2017": at para. 145. Given that the \$100,000 income was based on evidence of Mr. Zhao's earnings and access to funds from 2000 to 2014, there was no basis to impute his income at an amount lower than \$100,000 for a period of time prior to January 2018.
- [48] Therefore, it is my view that the judge erred in concluding that the awards for child and spousal support based on Mr. Zhao's imputed income of \$100,000 should be "retroactive" only to January 2018, and in failing to vary the amount of imputed income in the July 11, 2016 interim order.

- [49] I am not convinced, however, that the judge erred in concluding that the July 11, 2016 interim order should stay in place for other purposes. As I interpret his reasons as a whole, he was satisfied that the entitlement to retroactive support was met by his order along with the interim order, which awarded child and spousal support effective May 1, 2016.
- [50] I say this because the judge was clearly aware of the jurisprudence regarding retroactive support awards, having referred to the principles established in *D.B.S. v. S.R.G.*, 2006 SCC 37, as well as the underlying differences between child and spousal support discussed in *Kerr v. Baranow*, 2011 SCC 10: at para. 112. He cited the D.B.S. principles as summarized at paras. 267-269 of *S.J.L. v. J.A.R.*, 2019 BCSC 534:
- [267] In *D.B.S.*, the Supreme Court of Canada emphasized, among other things, that: (1) child support is the right of the child; (2) pursuant to the Guidelines, the specific amount of child support will vary as the income of the payor parent fluctuates; and (3) retroactive awards of child support need not be seen as exceptional. The court listed the following factors to be considered in determining whether a retroactive award of child support is appropriate:
- a) whether there is a reasonable excuse why support was not sought earlier;
 - b) the conduct of the payor parent;
 - c) the circumstances of the child, including the child's needs at the time the increased support ought to have been paid; and
 - d) any hardship that would be occasioned by a retroactive award.
- [268] Where the court concludes that a retroactive award is appropriate, the general rule is that it will run from the date of effective notice to the payor, which may be when the recipient broaches the topic about a proposed change to child support: *D.B.S.* at paras. 124-125. It will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent, but the date may be earlier if there is blameworthy conduct on the part of the payor: *D.B.S.* at paras. 123-124.
- [269] When assessing the conduct of the payor, the court should take an expansive view of what constitutes "blameworthy conduct". The court in *D.B.S.* characterized it as anything that privileges the payor parent's own interests over the children's right to an appropriate amount of support: *D.B.S.* at para. 106. Failure to disclose income that one would expect to alter the amount of child support payable under the Guidelines has been established as blameworthy conduct: *D.B.S.* at para. 124.
- [51] Despite the lack of clarity in the judge's reasons, it is apparent that he did not consider an award retroactive to the date of separation to be warranted. I take this from his statement at para. 148 of his reasons, cited above, that "Ms. Fang made it known to Mr. Zhao through trial-related documents that she would be seeking judicial determination of support in conjunction with her income imputation arguments". It is not clear what "trial-related documents" the judge was referring to, but the record shows that Ms. Fang included claims

to child and spousal support in her counterclaim that were not retroactive, and did not seek an interim support order based on imputed income until the spring of 2016. Aside from the question of Mr. Zhao's imputed income, the judge effectively made awards retroactive to May 1, 2016 by confirming the July 11, 2016 interim order. This is consistent with his findings and with the principles in D.B.S. It is also consistent with the final order made in this case, which characterizes as "retroactive" only the child and spousal support arrears as at December 31, 2017.

- [52] I would accede to this ground of appeal to the extent that the trial judge erred in confining his determination of Mr. Zhao's imputed income at \$100,000 to the period from January 1, 2018 and in confirming the July 11, 2016 interim order without increasing the imputed income to \$100,000.

Disposition

- [53] For all of these reasons, I would allow the appeal in part. I would vary the order below by adding an order that Mr. Zhao pay to Ms. Fang 50% of the value of the \$700,000 fund. I would also vary paragraphs 27(a) and 28 as follows:

27(a) The claimant shall pay \$1,234 in child support to the Respondent on the basis that [one child] is shared between the parties, retroactive to May 1, 2016 and continuing on the 1st day of each month thereafter so long as there is an obligation to pay child support;

28 The Claimant shall pay the Respondent spousal support in the amount of \$1,194, retroactive to May 1, 2016, until varied by the Court or by the parties' mutual consent.

- [54] In addition, paragraphs 30 and 31, which set the amount for child and spousal support arrears from May 1, 2016 to December 31, 2017, are to be varied to set the amounts based on the imputed income of \$100,000.

"The Honourable Madam Justice Fisher"

I agree:

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Mr. Justice Abrioux"

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