

CANADA / JUDGMENT

Zhao v. Zhou

2020 BCSC 516

COURT

Supreme Court of British Columbia

DECIDED

3 April 2020

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2020 BCSC 516 Zhao v. Zhou IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Zhao v. Zhou, 2020 BCSC 516 Date: 20200403 Docket: E160671 Registry: Vancouver Between: Lan Zhao also known as Zhao Lan Claimant And Jianping Zhou also known as Zhou Jianping Respondent Before: The Honourable Justice Branch Reasons for Judgment Counsel for Claimant: D. Sue-A-Quan Counsel for Respondent: T. Mah. Place and Date of Hearing: Vancouver, B.C. March 11, 2020 Place and Date of Judgment: Vancouver, B.C. April 3, 2020 Table of Contents I. Introduction.. 3 II. Background.. 3 III. Information on Respondent's Income.. 4 IV. Status of the Proceeding.. 7 V. Position of the Parties.. 8 VI. Analysis.. 8 VII. Conclusion.. 12 I. Introduction

- [1] This is an application by the claimant to adjust the respondent's income level used for the purposes of calculating interim child support. This request is based primarily on the information gathered in a recent forensic accounting report.
- [2] For the reasons expressed below, I find that the respondent should be attributed an income level of \$200,000, up from the previous \$100,000. II. Background
- [3] The parties were married on August 8, 2007 in China.
- [4] There are two children of the marriage: K, born June 16, 2008; and Q, born October 14, 2011.
- [5] There is a dispute as to the date of separation. The claimant says the parties separated on December 20, 2014. The respondent says the parties separated on December 11, 2015.
- [6] The respondent was arrested as a result of an alleged assault of the claimant, and did not return to the family home thereafter. The respondent did not see the children between December 11, 2015 and December 2017. There was a probation order restricting the respondent from contacting the claimant and the children for a period of 18 months. The respondent had a few limited visits with the children between December 2017 and February 2018. There was an incident in February 2018 during one of these visits. The respondent has not seen the children since that incident. The claimant obtained sole interim custody pursuant to an order of Master Harper dated June 13, 2018.

- [7] The respondent says that he has been employed as a realtor for the past several years. He says he does not have a consistent salary. The affidavit he filed for this application provides virtually no explanation of his education, skills, business experience, or long term historical employment pattern. III. Information on Respondent's Income
- [8] The claimant believes that the respondent has significant assets in Asia that he has not fully disclosed. She has been making substantial efforts to determine the respondent's full financial picture, beginning with seeking and obtaining a document production order from Master Dick on June 26, 2017 (the "Production Order").
- [9] On July 10, 2018, the claimant brought an application before Master Muir, who granted an order providing inter alia that:
- a) the respondent has income imputed to him in the amount of \$100,000 per year;
 - b) the respondent pays child support commencing May 1, 2018, and monthly thereafter pursuant to the Federal Child Support Guidelines;
 - c) the respondent pays spousal support commencing on May 1, 2018 and monthly thereafter at the mid-range amount of the Spousal Support Advisory Guidelines ("SSAG") based on the claimant having an annual income of \$25,000 and the respondent having the imputed annual income of \$100,000;
 - d) a forensic accountant with offices in Vancouver and China be appointed for the purposes of auditing and determining the extent and details of the respondent's worldwide historical and present financial assets. (the "Imputation Order")
- [10] In her oral reasons, Master Muir described the respondent's response to the Production Order as "limited". The court also noted the following concerns:
- [10] [The] disclosure showed, for example, in 2013, in Canadian dollars, the respondent charged almost \$78,000 worth of credit card purchases and made almost \$74,000 worth of payments. In 2014, the purchases were almost \$59,000 and the payments were \$60,000. In 2015, the purchases were \$42,456 and payments were \$45,266. In 2016, purchases were \$56,773 and payments were \$65,875. And in January to June, 2017, purchases were \$20,344 and payments were \$24,500.
- [15] The claimant also points to evidence that she has managed to garner that the respondent had significant assets in China. The claimant says that she is unaware of what became of those assets. However, she notes that on January 4, 2010, the respondent made a wire transfer of 700,000 USD from one account to an account of the Zhuhai Sunbird Yacht Manufacturing Company.

- [16] The claimant also says that the respondent has two stock accounts. The first is the China Investment Securities Company Limited account ending in [number redacted] showing that he had net assets in that account and another account in the amount of \$608,655.42 CAD as of June 10, 2015. However, that balance was reduced to zero shortly thereafter.
- [17] The second account ends in [number redacted] in which the respondent had \$134,173. This account was fully defunded by July 6, 2016.
- [18] The claimant brings evidence of an account ending in [number redacted] whose balance was \$592,912 CAD on December 14, 2015. The activity on that account slowed and was dramatically reduced. By June 16, 2016, there were only a few pennies left in the account.
- [21] The respondent said that, overall, he wired approximately \$1 million CAD to the claimant's account from its opening in 2013 to the end of 2015.
- [31] With respect to the order sought for the appointment of a forensic accountant, I am satisfied that the financial affairs of the respondent are sufficiently unclear that it is prudent that an expert be appointed for the purposes of auditing and determining the extent and details of his worldwide financial assets [Emphasis added.]
- [11] It was subsequently discovered that the claimant had neglected to include a claim for spousal support in her original Notice of Family Claim. On August 31, 2018, the respondent and claimant brought cross-applications heard by Justice Murray, who ordered, inter alia, that:
- a) the term of the Imputation Order respecting interim spousal support be struck;
 - b) the claimant be granted leave to file an Amended Notice of Family Claim;
 - c) Grant Thornton LLP be appointed as the forensic accountant (the "Accountant").
- [12] On October 22, 2018, an Amended Notice of Family Claim in which the claimant sought spousal support was filed. On April 10, 2019, the claimant brought forward an application before Master Vos, who granted an Order that, inter alia, the respondent pay interim spousal support of \$776.00 per month starting April 1, 2019, based on the respondent's imputed income of \$100,000 and the claimant having an imputed income of \$25,000.
- [13] On November 26, 2018, all of the documents received from the respondent were provided to the Accountant. The claimant and the respondent both met with the Accountant to address questions that the Accountant had regarding the respondent's worldwide income and assets. On June 26, 2019, a consent order was entered under which the respondent was to provide additional financial documentation from his Chinese bank accounts and stock accounts by July 12, 2019. On July 15, 2019, certain further documents were provided. On August 30, 2019, the Accountant provided counsel for the claimant and the respondent with a copy of their draft report. Between September 11, 2019 and February 18, 2020, the claimant and the respondent communicated with the Accountant providing comments on the draft report. Additional documents were also provided by the respondent. On February 18, 2020, the

Accountant issued their report (the "Report").

[14] The Report concludes that the respondent had the following annual income as of the following dates:

- a) date of marriage (August 8, 2007): \$638,275 (at least);
- b) date of separation pleaded by the claimant (December 20, 2014): \$374,893 (at least);
- c) date of separation pleaded by the respondent (December 11, 2015): \$948,973 (at least); and
- d) 2019: \$101,406 (at least).

[15] In the respondent's Form F8 Financial Statements, he deposed that he had the following income for child support purposes:

- a) October 29, 2016: \$30,000.00
- b) May 24, 2018: \$18,468.95
- c) April 25, 2019: \$10,455.72

[16] The respondent's Canadian tax returns declare the following Line 150 income levels:

- a) 2014: \$38,151.26
- b) 2015: \$17,379.67
- c) 2016: \$925.07
- d) 2017: \$36,000
- e) 2018: \$11,505.72

[17] In his April 25, 2019 Financial Statement, the respondent reported \$58,956 in after tax expenses. IV. Status of the Proceeding

[18] The original trial date was September 11, 2017. This was adjourned by consent. A second trial date was scheduled to commence on September 30, 2019 for ten days. On September 3, 2019, at a trial management conference held before Master Muir, the respondent submitted that there was insufficient time scheduled to hear the case. Master Muir adjourned the trial.

[19] After the respondent retained new counsel on September 6, 2019, the parties agreed to schedule another trial for 15 days after April 2021. However, no trial date has yet been secured. V. Position of the Parties

[20] The claimant seeks to have income imputed to the respondent in the amount of \$948,973 per annum, or such lesser amount as ordered by the court. In oral argument, the claimant suggested that a reasonable alternative approach would be to average the most recent three years assessed by the Accountant. This would yield an imputed figure of \$475,090.

- [21] The respondent argues that there has been no material change justifying a change to the presently imputed \$100,000 per year. VI. Analysis
- [22] I agree that the "material change in circumstances" test should be applied. However, the application of this test must be sensitive to the context in which the Imputation Order was granted. Specifically:
- a) Master Muir determined that she was not in a position to determine the respondent's actual income;
 - b) The best that she determined that she could do in the circumstances was assess an imputed amount based on the limited information before her; and
 - c) Master Muir clearly appreciated that more information was required from an expert in order to sort out the respondent's complex financial situation. Hence the appointment of the Accountant.
- [23] A material change in circumstances is a change that, if known at the time, would likely have resulted in different terms: *Janmohamed v. Janmohamed*, 2014 BCSC 107 at paras. 29-46 and *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688.
- [24] Here, the claimant relies primarily upon the provision of the Report to support the requested order. I agree that the receipt of the Report alone qualifies as a material change. If the Report had been available at the time of the Imputation Order, it would likely have resulted in different terms. Indeed, it is due to a lack of information such as that in the Report that Master Muir was only able to roughly estimate an imputed income, and ordered the production of the Report in order to secure better information.
- [25] The court may consider a number of matters in deciding whether to vary an interim support order, including:
- a) the completeness of the information on the application;
 - b) the proximity of the trial date;
 - c) whether the trial has been adjourned;
 - d) the length of time since separation;
 - e) the provision of correct, better or additional financial information; and
 - f) a change in the means or needs of the payor and payee spouse respectively. *Koivumaki v. Lusan*, 2014 BCSC 1198 at para. 11.
- [26] Here I rely primarily on factors (b) and (e) to support my decision.
- [27] As to (b), I am concerned that the trial is now more than a year away. Leaving the support at a level no longer supported by the evidence for such an extended period could create financial hardship for the claimant.

- [28] As to (e), we now have better and more complete information than that which was available to Master Muir. The historical income pattern found by the Accountant in the Report strongly suggests to me that the \$100,000 figure is no longer appropriate:
- a) The average of the most recent three years analyzed by the Accountant is \$475,090, well in excess of the \$100,000 imputation.
 - b) The Report raises that there are still unexplained facts that could further increase the appropriate income assessment, in particular flowing from the respondent's relationship with YaGuang Technology Group Co. Ltd. and Zhuhai Hong An Insurance Agency Co. Ltd.
 - c) The Accountant's analysis yields income levels well above the amount claimed by the respondent in both his F8 Financial Statements and his income tax returns, creating concerns about the respondent's credibility.
 - d) The concerns about the respondent's capacity to earn income are now heightened, and heightened from concerns already a factor in Master Muir's decision. Specifically:
 - i. The respondent earned enough in his prior career to amass at least \$1 million in assets above those required for daily living, such that, on his own evidence, he was able to transfer this amount to the claimant from 2013 to 2016. ii. The respondent chose a new career as a Canadian real estate agent that he says now earns him approximately \$10,000 per year. There was no adequate explanation for why the respondent could (or can) no longer work at whatever position he had used previously to amass his fortune, which the claimant suggests was primarily stock trading. While the respondent is fully entitled to make his own career choices, including to make less money than he is capable of making, he is not entitled to visit the financial implications of such a choice on his children: *Ferguson v. Ferguson*, 2019 BCSC 1946 at paras. 26-31; *Hathaway v. Hathaway*, 2015 BCSC 1485 at para 59. The respondent sought to explain his choice on the basis that he wished to be closer to his children in Canada, and hence, it was not reasonable to expect him to continue his work in China. However, his lack of parenting time since separation undermines that explanation.
 - e) As noted by Master Muir, the respondent reports expenses far in excess of his declared income, all with after tax dollars: *Osanlo v. Onghaei*, 2012 ONSC 2158 at paras.31-44. The Report notes and discusses this inconsistency:
37. We note that expenses are incurred by Mr. Zhou on multiple credit cards (in Canada and China) in the range of at least \$2,000 to \$9,000 per month. It appears that from 2012 to 2016, Mr. Zhou was paying his credit card off three to four times per month (almost on a weekly basis). In 2017 payments seem to be larger and less frequent (approximately once every two weeks).

38. Examples of expenditures noted on credit cards include items such as: sporting goods, alcohol, restaurant, toys, groceries, gas, gun, travel agency, car payments, jewelry, electronic devices, golfing, flights, Dr. Herman Shen (optometrist), Rona, Hugo Boss, Juenesse health/beauty products (thousands of dollars), etc...
- [29] That said, any modification to the imputed figure must be moderated by the following factors:
- a) The most recent income reported by the Accountant is closer to the \$100,000 imputed figure; and
 - b) The respondent does raise certain concerns about the methodology of the Report that will need to be fully canvassed at trial, including that certain inflows found to be income may in fact have been the repayment of loans. The respondent has indicated an intention to apply for the right to file his own expert report to challenge the conclusions of the Report.
- [30] The unsatisfactory nature of the production of documents necessarily requires a "rough and ready" approach for this interim period leading up to trial. However, I am comfortable that the information in the Report, coupled with what little we know of the claimant's capacity, are sufficient factors to justify a material increase in the imputed amount. I find that a reasonable figure is \$200,000. While this is a material increase, it is well below the \$475,090 three-year average calculated above, in order to reflect that the trend appears to be decreasing from the high water mark in 2015. VII. Conclusion
- [31] Interim child and spousal support should be modified to reflect an increased imputed income to the respondent of \$200,000 starting with the next payment, and using the mid-point SSAG figure for spousal support.
- [32] If the parties are unable to determine the amounts payable arising from these reasons, I direct that there be a reference to the Registrar for the purpose of a determination of same. The Registrar shall certify his or her findings and the Registrar's certificate shall be binding without further order of this court. If requested by either party or the Registrar, the parties shall attend a pre-hearing conference in advance of the hearing of the reference. Unless there are factors of which I am unaware, the claimant shall have her costs in the cause as the substantially successful party. "Branch. J"

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