IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cho v. Kim,*
2023 BCSC 780

Date: 20230510
Docket: E211722
Registry: Vancouver

Between:

Jee Hyun Cho

Claimant

And

Kang San Danny Kim

Defendant

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Claimant:	E. Walker A. Mihajlovic
Counsel for the Defendant:	F. MacLean
Counsel for the Attendee, Sun Hwa Gea:	D.L. Cayley
Place and Date of Hearing:	Vancouver, B.C. January 13, 2023 February 17, 2023
Place and Date of Judgment:	Vancouver, B.C. May 10, 2023

INTRODUCTION

[1] On July 7, 2022, the claimant, Jee Hyun Cho (Ms. Cho), obtained a final order (the "Final Order") in an undefended family case, in which she was transferred Kang San Danny Kim's (Mr. Kim) half interest in a property in Langley (the "Langley Property"), that was registered jointly in the names of Mr. Kim and his mother, Sun Hwa Gea (Ms. Gea).

[2] In separate applications, the respondents, Mr. Kim and Ms. Gea, seek to set aside that order pursuant to Rule 14-7(77) of the *Supreme Court Family Rules*, B.C. Reg. 169/2009 [*SCFR*], which permits the court to set aside a judgment if a party does not attend trial.

[3] Mr. Kim and Ms. Gea argue that the order should be set aside for two reasons:

1) The court lacked the jurisdiction to make the order under the summary judgment R. 11-3; and, alternatively,

2) The respondents did not wilfully fail to attend court, they have a defence worthy of investigation, and they brought this application promptly, per the *Miracle Feeds* test.

[4] For clarity and ease of reference, throughout these reasons I will refer to the respondent applicant as Mr. Kim, his father as Mr. Kim Sr., and Mr. Kim's parents, Ms. Gea and Mr. Kim Sr., collectively as "the parents". I mean no disrespect in doing so.

BACKGROUND

[5] By way of brief background, Mr. Kim and the claimant, Ms. Cho, were married in 2009 and separated in 2016. There are two children of the marriage, aged 13 and 10, who live with their mother on Vancouver Island. Mr. Kim lives primarily in South Korea but has remained an involved parent and sees the children on holidays. He

pays child and spousal support as per court orders, as well as the children's private school tuition, and the lease on a vehicle for Ms. Cho.

[6] As mentioned above, Ms. Gea is Mr. Kim's mother. In 2012, Ms. Gea and her husband, Mr. Kim Sr., purchased the Langley Property. Although Mr. Kim contributed nothing to the purchase of the property, the parents put him on title as a joint owner. They had done the same with other properties they purchased in British Columbia.

[7] According to Ms. Gea, she and Mr. Kim Sr. bought the Langley Property with the intention of retiring there. Ms. Gea moved into the Langley Property after purchase and still lives there. Mr. Kim Sr. presently lives primarily in South Korea but plans to live in the Langley Property when he retires.

[8] In 2017, the parents paid off the mortgage on the Langley Property through the net proceeds of the sale of the two other properties they owned in B.C. They then, on advice of their accountant, removed Mr. Kim Sr.'s name from the title, and transferred title of the Langley Property to Mr. Kim and Ms. Gea.

[9] Ms. Gea attests that she and Mr. Kim Sr. put Mr. Kim on title, as they intend to give the property to him in the future. She insists that Mr. Kim does not presently have, nor has he ever had, a beneficial interest in the Langley Property. Likewise, Mr. Kim attests that he never believed that he had a beneficial interest in the Langley Property or any of his parents' properties, notwithstanding being on title.

[10] In 2021, the claimant, Ms. Cho, advised Mr. Kim that she wished to proceed with a divorce. She said nothing to him about claiming an interest in the Langley Property.

[11] On July 22, 2021, Ms. Cho commenced a family proceeding. She amended her notice of family claim in February 2022. Of note, Ms. Cho has never named Ms. Gea as a respondent, nor is she suggesting that Ms. Gea was aware of the proceeding until she, Ms. Cho, told her about it in a phone conversation in March 2022. In that conversation, Ms. Cho advised Ms. Gea that she intended to

divorce Mr. Kim, and would be claiming an interest in Mr. Kim's assets, including his share of the Langley Property. Ms. Gea, who was surprised by this news of the divorce, did not understand what Ms. Cho meant about the Langley Property. Ms. Gea did not want to discuss it with her husband, as it was for Mr. Kim to tell him that his marriage was ending, not her.

[12] In accordance with a series of court orders, Ms. Cho served Mr. Kim the notice of family claim and the amended notice of family claim via email to his gmail address.

[13] On June 13, 2022, Ms. Cho filed a notice of application seeking a number of orders, including that the matter be referred to the trial list and that Mr. Kim's interest in the Langley Property be transferred to her. Ms. Gea was personally served with the notice of application on June 14, 2022.

[14] On July 30, 2022, counsel for Ms. Cho attended in Chambers and obtained the Final Order from Madam Justice Burke. Neither Mr. Kim nor Ms. Gea were represented at the hearing.

[15] Mr. Kim submits that he was never served with a notice of family claim or notice of application. He further submits that while Ms. Cho told him that she wanted a divorce, she never mentioned that she was claiming an interest in the Langley Property. Mr. Kim believes that Ms. Cho always knew that the Langley Property belonged to his parents.

[16] While Ms. Gea told him in mid-June 2022 that she had been served with documents, Mr. Kim attests that he never saw these documents until after he learned of the Final Order. In late July 2022, when he saw that the documents were related to a family action, he immediately retained counsel. In August 2022, when Mr. Kim learned through counsel of the Final Order, he instructed his counsel to apply to set it aside, and instructed his mother to obtain counsel to do the same.

ISSUES

[17] This court must determine whether the Final Order should be set aside:

1) Pursuant to the *Miracle Feed* test; or alternatively

2) For lack of jurisdiction.

[18] I will begin by considering the *Miracle Feed* route to dismissal.

ISSUE 1: SHOULD THE FINAL ORDER BE SET ASIDE PURSUANT TO THE *MIRACLE FEED* TEST?

The Law

[19] Section 200(2) of the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*] provides, *inter alia*, that an order made in the absence of a party may be set aside by this court.

[20] The test for setting aside a final order made in the absence of a party to a family law case is a modified version of the well-known test in *Miracle Feeds v. D. & H. Enterprises Ltd*. (1979), 10 B.C.L.R. 58 (Co. Ct.), for setting aside a default judgment in a civil case. The test requires that:

1) The respondent did not wilfully and deliberately fail to respond to the application;

2) The respondent responded in a timely fashion when learned of the order; and

3) The respondent has a meritorious defence or at least a defence worthy of investigation.

See *Batool v. Siddiqui*, 2022 BCSC 1220 [*Batool*] at para. 62, citing *Nichol v. Nichol*, 2015 BCCA 278 [*Nichol*] at paras. 27–28.

[21] The test is flexible. Failure to meet one factor is not necessarily fatal: *Batool* at para. 64, citing *Nichol* at para. 37. The relative strength in one factor may

overcome the weakness or failure in another: *J Power Excavating & Trucking Ltd. v. Icon Projects Ltd*., 2020 BCSC 1327 at para. 13.

Analysis

[22] Ms. Cho concedes that both respondents, Mr. Kim and Ms. Gea, responded in a timely fashion. As such, I need only consider the first and third prongs of the *Miracle Feeds* test.

Did the respondents wilfully and deliberately fail to respond to the application?

[23] The first test is focussed on the party's intention. The failure to respond must be blameworthy, as opposed to solely negligent: *Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2020 BCCA 341 [*Forgotten Treasures*] at paras. 19–20.

[24] It is not in issue that Ms. Gea was served. I accept, however, that she did not understand what Ms. Cho meant about the Langley Property. I further accept that because of Ms. Gea's lack of fluency in English, both oral and written, she did not understand what the document was and that she depended on Mr. Kim to explain them to her. Given these findings, I am satisfied that, Ms. Gea did not wilfully and deliberately fail to respond.

[25] The analysis respecting Mr. Kim is less clear. Ms. Cho attempted to serve Mr. Kim at his home, at his office and via his Gmail account. Mr. Kim denies receiving anything. His explanations are less than compelling. While I suspect that he was evading service, I can not be sure. Accordingly, I am left in doubt as to whether Mr. Kim wilfully and deliberately failed to respond to the application.

Do the respondents have a meritorious defence or at least a defence worthy of investigation?

[26] I now turn to the third factor, which asks whether there is a defence worthy of investigation.

[27] In *Forgotten Treasures*, at paras. 26–29, our Court of Appeal discussed what is necessary to establish a defence "worthy of investigation", concluding that, except

in the most straightforward cases, it is necessary for the party seeking to set aside a default judgment to provide some evidence to support the defence it wishes to advance.

[28] As outlined above, both Ms. Gea and Mr. Kim's defence, is that Mr. Kim holds his interest in trust for his parents. Accordingly, the Langley Property is not family property, and is therefore not subject to division. In support of this defence, in her affidavit, Ms. Gea details the sources of funds used to acquire the Langley Property. All of the funds came from Ms. Gea and Mr. Kim Sr.

[29] Where it is established that a transfer was made for no consideration, a resulting trust is presumed. The onus is on the party seeking to rebut the presumption to prove on a balance of probabilities that it does not apply by demonstrating that a gift was intended: *Suen v. Suen*, 2013 BCCA 313 at paras. 35–38; *Fuller v. Fuller Estate*, 2010 BCCA 421 at paras. 43–46, citing *Pecore v. Pecore*, 2007 SCC 17. As stated by Mr. Justice Cromwell in *Kerr v. Baranow*, 2011 SCC 10, the transferor's intention is key to the court's analysis:

> [17] Resulting trusts arising from gratuitous transfers are the ones relevant to domestic situations. The traditional view was they arose in two types of situations: the gratuitous transfer of property from one partner to the other, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. In either case, the transfer is gratuitous, in the first case because there was no consideration for the transfer of the property, and in the second case because there was no consideration for the contribution to the acquisition of the property.
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> [18] The Court's most recent decision in relation to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore,* 2007 SCC 17, [2007] 1 S.C.R. 795, at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore,* where a gratuitous transfer is being challenged, "[t]he trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention" (emphasis added [by Cromwell J.]).
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> [19] As noted by Rothstein J. in this passage, presumptions may come into play when dealing with gratuitous transfers. The law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate. As Rothstein J. explained, a presumption of a resulting trust is the general rule that applies to gratuitous transfers. When such a transfer is made, the onus will be on the

> person receiving the transfer to demonstrate that a gift was intended. Otherwise, the transferee holds the property in trust for the transferor. This presumption rests on the principle that equity presumes bargains and not gifts (*Pecore,* at para. 24).
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> [Emphasis added.]

[30] While Ms. Cho argues against this presumption by, for example, pointing to the fact that Mr. Kim claimed the Langley property on his tax return for a farming deduction, I am satisfied that it is a defence worth investigating.

[31] If I am wrong, I am further satisfied that the Final Order is a significant deviation from the division of property scheme in the *FLA*, and is thus a defence worthy of investigation.

[32] The *FLA* stipulates that family property is to be divided equally unless the party seeking unequal division can prove that an equal division would be "significantly unfair": ss. 81, and 95–96 of the *FLA*.

[33] *Prasad v. Prasad*, 2021 BCSC 430, involved an application to set aside an undefended final order that included, among other things, an unequal division of property. Justice Forth succinctly set out the law as follows:

> [63] Despite the presumption of equal division, the court may order an unequal division of family property if it would be significantly unfair to divide family property equally: *FLA*, s. 95(1). Significant unfairness requires something "objectively unjust, unreasonable, or unfair in some important or substantial sense" having regard to the factors set out in s. 95(2) of the *FLA*: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 42.
>
> [64] A two-stage analysis is used to determine whether an unequal division of family property would be significantly unfair: *Polard v. Polard*, 2017 BCSC 1963 at para. 19. At the first stage, the court must determine the extent of family property in accordance with ss. 84–86 of the *FLA* and undertake the notional exercise of dividing property equally. The second stage requires the court to determine whether the equal division would be significantly unfair, taking into account the factors in s. 95(2) of the *FLA*.
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> [65] The Court of Appeal summarized the approach that should be taken in *Singh v. Singh*, 2020 BCCA 21 at paras. 130-134:
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> > [130] In *Jaszczewska v. Kostanski*, 2016 BCCA 286, Justice Harris, for the Court, engaged in an extensive analysis of s. 95. He first noted that the Legislature sought to increase certainty, fairness, and predictability in property division

matters with the *FLA* by reducing the discretion of the courts to depart from equal division: at para. 36. The test in the previous legislation (Family Relations Act, R.S.B.C. 1996, c. 128) only required unfairness, whereas the *FLA* requires "significant unfairness." In addition, the legislature more precisely specified the factors to be considered in applying this threshold.

[131] Justice Harris agreed with the analysis in *Remmem v. Remmem*, 2014 BCSC 1552, in which Justice Butler (as he then was) defines "significant" as "extensive or important enough to merit attention" and something that is "weighty, meaningful or compelling," concluding that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": at para. 41, citing para. 44 of *Remmem*. Justice Harris then noted that it would be unwise to attempt to define the meaning of "significant unfairness" but found that reapportionment under s. 95 would require "something objectively unjust, unreasonable or unfair in some important or substantial sense": at para. 42. He said:

> [44] … in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion.

…

[133] In *V.J.F. v. S.K.W.*, 2016 BCCA 186, Justice Newbury described s. 95 as requiring a high threshold of "significant unfairness" to depart from equal division: at para. 81. Other cases have reached similar conclusions about the high threshold necessary to reapportion assets under s. 95. In *Khan v. Gilbert*, 2019 BCCA 80, for example, Justice Fenlon noted that cases in which unequal contribution was found to reach the significantly unfair threshold have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: at para. 32.

[134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczewska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must

> be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.

[34] After considering the law, Justice Forth set aside the final order regarding property for the following reasons:

> [66] There was no evidence before the Court in support of the Final Order that would permit the Court to exercise its discretion to depart from an equal division. The factors in s. 95 were not analyzed and no evidence existed to support that an equal division would be "significantly unfair." In my view, this factor alone requires that the Final Order respecting the division of family property should be set aside.

[35] That is precisely the situation here. The only justification for deviation presented to Burke J. was an inference that Mr. Kim may own assets in Korea. No analysis of that proposition was undertaken by Burke J., who heard the application at the end of the day, and gave no reasons other than that she was satisfied on the basis of counsel's submissions that the orders sought should be granted.

[36] In conclusion, I am satisfied that the respondents have two defences worthy of investigation: resulting trust and unfair distribution. Accordingly, I am satisfied, pursuant to the test in *Miracle Feeds*, that the Final Order should be set aside, and the parties be put back in the position they were prior to it being made.

[37] Having come to that conclusion, it is not necessary to consider the jurisdictional argument, but I will briefly review it for completeness.

ISSUE 2: SHOULD THE FINAL ORDER BE SET ASIDE FOR LACK OF JURISDICTION?

[38] Ms. Gea argues that the Final Order was made without jurisdiction.

[39] Ms. Cho relied on R. 11-3 of the *SCFR*, which governs summary trials, as providing the jurisdiction for her application for Final Order. Rule 11-3(2) provides as follows:

> **Application**
>
> (2) A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:

> (a) a family law case in which a response to family claim has been filed;
>
> (b) a family law case that has been transferred to the trial list under Rule 10-3 (7) (d);
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> (c) a family law case by way of counterclaim in which a response to counterclaim has been filed.

[40] At the time of the application, none of these preconditions had been met. Neither a response nor a counterclaim had been filed. In order to have a chambers matter remitted to the trial list, the court must conclude that there is a triable issue. Only after that is done does the court have jurisdiction to remit the matter to the trial list.

[41] That was not done in this case. As none of the preconditions were met, the court was without jurisdiction to make a final order.

CONCLUSION

[42] I make the following orders:

1) The Final Order is set aside;

2) The Registrar of Land Titles on production of a certified copy of this Order shall convey title to the Langley Property into the joint names of Sun Hwa Gea and Kang San Danny Kim;

3) The claimant be at liberty to reregister her certificate of pending litigation against the Langley Property after the Langley Property has been registered in the names of Sun Hwa Gea and Kang San Danny Kim; and

4) The respondents are entitled to the costs of this application in the cause.

"The Honourable Madam Justice Murray"