In the Court of Appeal of Alberta

Citation: Alpugan v Baykan, 2014 ABCA 152

Date: 20140502
Docket: 1201-0170-AC
Registry: Calgary

Between:

Handan Alpugan also known as Handan Baykan

Appellant (Plaintiff)

- and -

Ahmet Baykan

Respondent (Defendant)

The Court:

The Honourable Mr. Justice Clifton O'Brien
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice J.D. Bruce McDonald

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice W.P. Sullivan
Dated the 4th day of June, 2012
(2012 ABQB 364, Docket: 4801 123064)

Memorandum of Judgment

The Court:

I. Introduction

[1] This appeal follows a family law trial which dealt exclusively with child support, spousal support and division of matrimonial property. The appellant, Handan Alpugan, submits the trial judge erred in calculating child and spousal support, in dealing with the pension entitlements of the respondent, Ahmet Baykan, and in failing to take the respondent's properties in Turkey into account when distributing the matrimonial property. For the reasons that follow, we allow the appeal, in part.

II. Background

[2] Ms. Alpugan and Mr. Baykan were married on April 4, 1980 in Ankara, Turkey. They have since resided in Canada. The respondent was described by the trial judge as being both a successful engineer and a successful investor: *HB v AB*, 2012 ABQB 364 at para 3. They have four children – triplets, born July 18, 1995, and another child born February 23, 2000. At the time of the trial, all of the children were under the age of 18, although one of the triplets had left his mother's home and was self-supporting (para 33).

[3] The parties separated on December 25, 2004 after 24 years of cohabitation. Ms. Alpugan filed a statement of claim for divorce and division of matrimonial property in early 2005. Their divorce was granted thereafter and before the trial of the corollary issues.

[4] After the separation, the children remained living with their mother. On April 10, 2006, a chambers judge awarded her sole custody of the children.

[5] On September 28, 2006, the case management judge made an interim order with respect to corollary relief. She ordered Mr. Baykan to pay $5,000 per month in base child support, $500 per month in orthodontic expenses until the orthodontic bills were paid, and 84 per cent of the section 7 expenses. She also ordered him to pay $4,000 per month in spousal support, retroactive to January 2005.

[6] On April 5, 2007, the case management judge made an interim order requiring the respondent to transfer, by way of spousal rollover, half of the net market value of an investment portfolio that he maintained. This direction, as clarified by a further order made on May 8, 2007, resulted in the appellant receiving securities with a before tax value of $2,131,369. The half retained by the respondent included Stock Appreciation Rights (SARS) and stock options with an estimated fair market value of $524,278.00

[7] The interim orders providing for the division of the investment portfolio were expressed to be made on a "without prejudice basis regarding the ultimate distribution of matrimonial property". Rather than a valuation and division at trial, the trial judge effectively treated the interim division as a final division. No appeal is taken from this part of the judgment.

[8] Since separating from Mr. Baykan, the appellant has remarried. At the time of trial, the appellant, her new husband, and the three children remaining in their mother's home were dependent upon Mr. Baykan for income support.

[9] The ten day trial commenced on November 15, 2011 but was interrupted because of serious illness suffered by the respondent. It was completed in May 2012. The appellant was represented by counsel; the respondent represented himself. He did not testify. On June 4, 2012, the trial judge delivered his decision.

III. The Trial Decision

[10] The trial judgment is reasonably lengthy and not all parts of it are in dispute. We summarize the material findings as follows.

A. Matrimonial Property

[11] The parties owned two homes – a house in Scenic Acres and a house in Silver Springs. The trial judge agreed with the respondent that these properties should be divided by giving each party sole ownership of one of the homes. He ordered the Scenic Acres home transferred to the appellant, for her sole use and benefit, and the Silver Springs home transferred to the respondent, free and clear of any dower or other claim. No appeal is taken from this direction.

[12] The trial judge turned to the investment portfolio. He held, relying on a spreadsheet prepared by the respondent, and which was entered as Exhibit 10 for identification only, but which the court found "reliable", that the original split of the investment portfolio did not take the after tax value of the portfolio into account, with the result that the appellant received $81,535 more than the respondent. After adjusting for the joint payment of a consultant's report, he ordered that the appellant pay the respondent $63,535, and that a charge be placed upon the Scenic Acres property until this amount was paid, or offset by the agreement of the parties. The adjustment taking taxes into account is not challenged by the appellant.

[13] The last item of property the trial judge considered was the respondent's pension entitlement. The respondent was already receiving one pension from a previous employer, Unical/Chevron. The respondent disclosed at trial that he was entitled to a further pension, on retirement from his current employer, Nexen. Appellant's counsel submitted that the pension already in pay had to be treated as income, and that it might well be best to treat the previously undisclosed Nexen pension the same way. She stated:

> And what you might choose to do to address that, Sir, would be to just keep that undisclosed pension asset in mind when you're looking at the rest of my arguments about what should be on for Mr. Baykan to Ms. Kamphuis at this point in time, because at the end of the day, all the law aside, what – what my client certainly wants is simply to have a reasonable – reasonably close to 50 percent of the total assets and reasonable ongoing support based on income and what income should be. So if we can come up with a number that does that, regardless of exactly how we get there I don't know that it would matter a great deal.

[14] The trial judge chose, with these circumstances, to treat both pensions as income, rather than property, and to take account of them in ordering present and future spousal support.

B. Spousal Support

[15] The trial judge was particularly concerned about the appellant's lack of financial management skills, given that she was still totally dependent on the respondent for support despite having already received half the value of the investment portfolio. He noted that the interim award of spousal maintenance, granted by the case management judge in 2006, had taken into account the producing value of the investment portfolio, an asset the appellant had "essentially destroyed". He was also concerned that the appellant should not be allowed to "double dip" by benefitting from the distribution of the investment portfolio, and then receiving further spousal support derived from the income created by the respondent's portion of the division. The case management judge had ordered interim spousal support of $4,000 per month, and the judge found that awarding the appellant more under strict application of the Spousal Support Guidelines would be unfair. He continued permanent support in the same amount as the interim award. This would be replaced, when the respondent retired, by an on-going obligation, on the part of the respondent, to share his pension income 50/50 with the appellant.

C. Child Support

[16] The trial judge relied upon the respondent's spreadsheet once again, even though it had merely been marked as an exhibit for identification, in calculating the respondent's actual earned income. In these calculations, the respondent adjusted his Line 150 income by subtracting dividend gross up, interest expenses, and income allegedly received from SARS and stock options. Relying upon the respondent's calculation, the trial judge found that the respondent was $39,869 in arrears at the date of trial. Given his concern over the appellant's financial planning abilities, he ordered this sum placed in an RESP.

IV. Grounds of Appeal

[17] The appellant advanced seven grounds of appeal in her factum, as follows:

1. The Respondent's representations and materials were not properly in evidence – they were inadmissible. The learned trial judge erred by basing his decisions regarding support on them.
2. The learned trial judge erred by excluding from the Respondent husband's Guideline income, the employment income earned from stock options and stock appreciation rights (SARS). This led to an error in calculating proper retroactive child support arrears.
3. The learned trial judge erred in determining that the Respondent husband overpaid child support in 2004 by the amount of $5,904.
4. The learned trial judge erred by directing that child support arrears not be paid to the Appellant but rather into an RESP.
5. The learned trial judge erred in failing to vary spousal support.
6. The learned trial judge erred in failing to divide the pensions as property.
7. The learned trial judge erred by ignoring foreign owned properties beneficially owned by the Respondent husband.

V. Standard of Review

[18] It is trite law that absent an error of law or principle, a trial judge's decision with respect to the corollary relief in a divorce action, or a decision with respect to the division of matrimonial property, is entitled to considerable deference.

VI. Analysis

A. Ground One - Admissible Evidence

[19] The first ground of appeal is that the trial judge erred by (a) relying on oral statements made by the appellant in the course of the trial, even though he did not take the stand, and (b) by relying upon documents prepared by the respondent, despite the fact that they were never proven or otherwise admitted into evidence. In oral argument, however, the appellant took the practical position that the income information set out by Mr. Baykan in the spreadsheet, marked as Exhibit 10 for identification, was accurate and could be relied upon for purposes of the appeal. However, she maintained her position that statements, comments, and representations made by the respondent during the trial were inadmissible and considered improperly.

[20] The appellant's argument must succeed. During the course of the trial, appellant's counsel made it abundantly clear that she objected to Mr. Baykan's unsworn statements and observations, fearing that they might be treated, ultimately, as admissible evidence. Although it was anticipated that the respondent would testify, subject himself to cross-examination, and have

the documents he was relying on admitted into evidence, none of these things occurred. Thus, in the end, the respondent did not place any admissible evidence before the court, and to the extent that the trial judge treated his statements, observations, and unproven documents as evidence, he did so in error. It is unfortunate that the trial judge did not point out to the respondent that, as a self-represented litigant, his statements and representations could not be treated as admissible evidence, and that documents were required to be proved. As already observed, the respondent was not misled by the appellant whose objections to reception of any of his "informal" evidence were voiced throughout the trial. These rules of evidence are not matters of mere technicality or formality but are fundamental rules of long standing. Whether evidence is admissible is a question of law and reviewable on the correctness standard: *Catholic Charities Clothes Bank of Lethbridge v Roman Catholic Diocese of Calgary*, 2012 ABCA 390 at para 6.

[21] It follows that this Court can only consider the properly admissible evidence tendered by the appellant as well as any admissions made by the respondent, including any documents submitted by the respondent that the appellant now concedes are accurate. We acknowledge that this may cause Mr. Baykan some disadvantage, but that is a consequence of his decisions to represent himself at trial and not to testify. Having said this, the error is now of diminished consequence, given the appellant's concession with respect to the respondent's income spreadsheet. Nonetheless, the effect of the respondent's failure to testify can be seen in the resolution of the appellant's seventh ground of appeal, discussed later in these reasons.

B. Ground Two - Child Support and income attributable to SARS and options

[22] In calculating the respondent's earned income for purposes of both child and spousal support, the trial judge accepted Mr. Baykan's submission, based upon his income spreadsheet, that his Line 150 income should be reduced to take into account the dividend gross-up, interest expense, and income attributable to SARS and options. The appellant now concedes that the deductions for dividend gross-ups and interest expense were appropriate. However, she submits that there should be no reduction for the amounts earned through SARS and options.

[23] The trial judge found that the respondent's Line 150 income included amounts attributable to SARS and options which were "deemed as income to him" but which amounts were not actually received by him (para 29). The trial judge misapprehended the evidence in that regard. The respondent admitted at trial that the income from SARS and stock options was earned and actually received by him during the years in question.

[24] On appeal, Mr. Baykan submits, nonetheless, that the trial judge was correct to have excluded the income earned from the SARS and stock options on the ground that they had been valued, and taken into account, at the time of the interim division of property. He submits that it would be "double counting" to consider this income once again when assessing his support obligations.

[25] This submission fails on two grounds with respect to the respondent's child support obligations. First, with regard Mr. Baykan's income for 2006, he received $137,745 in taxable

benefits attributable to SARS. The interim division of property occurred in May 2007. As the 2006 income was earned prior to the division of property, any argument concerning "double counting" is misconceived.

[26] Second, and any event, the "double counting" argument is usually not compelling in the context of child support. As Ross J pointed out in *Shields v Shields*, 2006 ABQB 368, "the division of matrimonial property was between the parents, and was not linked to child support in any way" (para 18). Mr Baykan earned the income derived from SARS and options in each of the subject years and there is no logical reason for excluding such income for purposes of determining his child support obligations in this case.

[27] In our view, therefore, retroactive child support must be recalculated based on a Guideline income that includes the income attributable to the SARS and options. We note that the Guideline income exceeds $150,000 for each of these years. While the court is not compelled to follow the Guidelines strictly in these circumstances, there is a presumption in favour of the Guideline amounts, and there is no compelling evidence before us to justify departing from them when calculating child support.

C. Ground Three - The alleged child support over-payment in 2004

[28] The Trial judge credited Mr. Baykan $5,904 for child support over payments in 2004. There were *no* child support payments in 2004. Mr. Baykan is candid in admitting this credit was given in error. An appropriate correction is required at the time the child support arrears are recalculated.

D. Ground Four - To whom should the child support arrears be paid?

[29] The trial judge was not satisfied that the appellant was capable of proper financial planning and management and he directed payment of the child support arrears into an existing RESP. In doing so, he did not take into account that the appellant had already paid over $100,000 into the children's RESP from her share of the matrimonial property. We are of the view that payment into an RESP is unnecessary and inappropriate in these circumstances. The child support arrears are payable to the appellant.

E. Ground Five - Spousal Support

[30] The trial judge ordered that spousal support of $4,000.00 per month be paid to the appellant until Mr. Baykan's retirement. This level of support had been set in 2006 by the case management judge who noted that the respondent's Guideline income in 2005 was $244,557.

[31] Mr. Baykan's Guideline income was substantially greater in subsequent years but the trial judge made no adjustment to increase the spousal support ordered earlier on an interim basis. His reasons for declining to make the adjustment were based on the interim division of property pursuant to the orders made by the case management judge on April 5 and May 8, 2007. The judge

found it would be "double counting" to take the investment income earned by Mr. Baykan on his share of the property into account after the appellant had received her share. Secondly, in addressing the appellant's needs the court took into account that she would have received a substantial stream of investment income if she had managed her share of the divided investment portfolio prudently.

[32] With the exception of the spousal support payable for 2006, which we will discuss further below, we would not interfere with the trial judge's award of spousal support for the years after division of the property took place. In our view, he properly applied the decision of the Supreme Court in *Boston v Boston*, [2001] 2SCR 413, which pointed out that "double counting" would occur if a former spouse, having obtained his or her share of the property, could also obtain support based on what the other party earned from his or her share of the divided property. This situation was described as being "inherently unfair" (para 35).

[33] Further, the trial judge was correct in considering the income that would have been available to her if she had invested the capital property that she received prudently. In *Lane v Lane*, 2012 ABCA 2, this Court observed that a trial judge "did not err in taking into account the wife's failure to earn income from a portion of her matrimonial assets" (para 22). Here the trial judge found that the appellant had "essentially destroyed" her share of the investment portfolio which he characterized as having been "an income producing asset of the marriage" (para 13). He estimated that prudent investment of her share of the portfolio, based upon a 4 per cent return, would have yielded her annual income of $64,000.00.

[34] The appellant concedes she is not entitled to double count for purposes of spousal support, but submits that even if the income attributable to SARS and options earned by Mr. Baykan over the subject years was excluded from his income calculation, he still earned more than the $244,559 used to set the interim spousal support of $4,000.00 per month. It appears, however, if one refers to the spread sheet, which the appellant conceded was accurate for the purposes of the appeal, as well as the description of the investment portfolio divided pursuant to the orders of the case management judge, that the respondent's investment income from his share of the portfolio after division was greater than merely the income derived from SARS and options. In other words, the investment income from his share of the portfolio included income from other investments as well as from SARS and options. In any event, it appears that the trial judge had regard to the means, needs and circumstances of the appellant such that his award of spousal support after the division of the property is entitled to deference.

[35] This reasoning does not apply to 2006, before the division of the investment portfolio. The respondent's guideline income for 2006 was $457,646 from which we would deduct $39,175.00 for the dividend gross-up and interest expense. Retroactive spousal support is payable to the appellant for 2006, based upon an income of $418,471, at the mid-range of the Spousal Support Advisory Guidelines.

F. Ground Six - Division of pensions as property

[36] In accordance with the submissions of the appellant's counsel at trial, the trial judge found that the respondent's pension entitlements should be treated as income, rather than property, and he directed that following Mr. Baykan's retirement from Nexen he was to divide his pension income equally with the appellant. By the time of the appeal, the respondent had retired, and it was acknowledged that he is currently sharing his pension income from both Unical/Chevron and Nexen with the appellant, as ordered.

[37] The appellant now says the court erred by failing to recognize that the pensions were matrimonial property and that they should have been divided in that context. This complaint is unfair to the trial judge who recognized that pensions could be treated as property, and who asked the appellant, specifically, why she was not seeking a division of the pensions. The appellant's counsel gave her reasons, described above, and the trial judge made his order reflecting the appellant's wishes at trial. Given these circumstances, we are not prepared to make a different order on appeal.

G. Ground Seven - Claim to divide, or otherwise taken into account foreign owned properties

[38] The appellant testified at trial that Mr. Baykan owned four apartment units in Turkey, which he had placed in the names of resident family members to avoid what she called "tax implications in Turkey". She testified that the units were "in a small city in Turkey, and they were not very good quality houses". When asked in examination-in-chief whether she had "any idea how much the real estate might be worth", the appellant estimated that the cost of each of the units, including their purchase and subsequent renovations, was between $40,000 to $50,000 (U.S.) dollars. The trial judge did not address these properties in his judgement. The appellant submits that they were simply "overlooked", and ought to have been included in the matrimonial property division.

[39] Mr. Baykan interjected during the course of the appellant's examination to advise the court that he had not purchased the properties for investment purposes but had purchased them, instead, to give to his brother and sister for having looked after their parents. He elaborated further in his factum with respect to the circumstance in which these properties were purchased. We reiterate our finding with respect to the appellant's first ground of appeal: we can only rely upon the record of admissible evidence before us. Mr. Baykan did not take the stand and subject himself to cross-examination. His comments during the appellant's examination-in-chief essentially were an admission that he purchased the properties during the course of the marriage. The appellant was not cross-examined on her evidence concerning the value of the property, or concerning her evidence that he retained the beneficial ownership of it.

[40] In our view, the appellant is entitled to compensation for the division of these assets. There was no direct evidence of the value of the units at the time of the trial, and the evidence regarding

their cost was of a vague and general nature. If they were of inferior construction, as suggested by the appellant, then it seems reasonable to infer that their depreciated values may be less than the original outlay. However, there is no doubt that the units have some value, which we fix at $150,000.00 (Canadian).

[41] Mr. Baykan must bear the consequence of his failure to testify, or otherwise refute the only evidence before the court regarding the properties. While the trial judge made it clear that he regarded the appellant as a poor financial manager, he did not say he disbelieved her evidence.

[42] The appellant is entitled to an additional $75,000 for her share of the foreign properties.

VII. Conclusion

[43] The appeal is allowed, in part, as follows:

1. Retroactive child support, from January 1, 2006 to the date of the trial judgment in the case of three children, will be reassessed to reflect the inclusion of income earned from stock options and SARS in the calculation of the respondent's Line 150 income. Retroactive support for the child who is self-supporting, calculated in the same fashion, will be reassessed to the date that the child became self-supporting.

2. The direction at trial crediting the respondent with a $5,904 "overpayment" of child support is vacated.

3. The direction that Child support arrears be paid into an RESP is vacated; the respondent is to pay all child support arrears to the appellant.

4. The respondent will pay the appellant retroactive spousal support, for 2006 only, based upon an earned income of $418,471.00. The amount will be based on the mid-range of the Advisory Guidelines.

5. We award the appellant an additional $75,000 to account for her share of the foreign properties purchased during the marriage.

VIII. Further Direction

[44] The Court is concerned about the length of time these proceedings have been in progress. In order to achieve some degree of finality, as soon as practicable, we direct that the parties attempt forthwith to settle the terms of the Judgment Roll. If they are unable to agree on any of the amounts owed within 30 days of the issue of this Memorandum of Judgement, we direct that they contact the court's Case Management Officer. She will arrange for a member of this panel to provide such

further directions as may be required to calculate the amounts in question, and otherwise facilitate the entry of a formal Judgment Roll.

Appeal heard on April 01, 2014

Memorandum filed at Calgary, Alberta
this 2nd day of May, 2014

O'Brien J.A.

Rowbotham J.A.

"As authorized" McDonald J.A.

Appearances:

A.A. Fares
for the Appellant

Respondent Ahmet Baykan in Person