

CANADA / JUDGMENT

Bandpey v. Talebpourazad

2019 BCSC 2059

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 2059 Bandpey v. Talebpourazad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bandpey v. Talebpourazad,

2019 BCSC 2059

Date: 20191129

Docket: E192002

Registry: Vancouver

Between:

Marzieh Bandpey also known as Siva Bandpey

Claimant

And

Mohammad Talebpourazad also known as Mike Talebpourazad

also known as Mike Pourazad

Respondent

On Appeal from reasons of a Master of the Supreme Court
of British Columbia, released October 4, 2019.

Before: The Honourable Madam Justice MacNaughton

(In Chambers)

Reasons for Judgment

Counsel for the Claimant:

M. Ellis, Q.C.

Counsel for the Respondent:

D. Joyce

Place and Date of Hearing:

Vancouver, B.C.

November 21 and 22, 2019

Place and Date of Judgment:

Vancouver, B.C.

November 29, 2019

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Introduction

- [1] These reasons deal with two interim issues. First, the claimant appeals an order of Master Elwood awarding her \$3,000 a month in interim spousal support. She seeks an order that her interim support be raised to \$4,700 a month. Second, the claimant seeks an order that the respondent pay her an interim distribution of \$200,000 pursuant to s. 89 of the Family Law Act, S.B.C. 2011, c. 25.
- [2] For the reasons that follow, I would dismiss the appeal, but grant the application for an interim distribution of \$200,000.

The Appeal

- [3] On October 4, 2019, Master Elwood made an order following the claimant's application for interim spousal support. He awarded her \$3,000 a month in interim support.

- [4] The claimant appeals from that order on the basis that the master erred in awarding a level of interim support insufficient to meet the claimant's reasonable needs, despite the respondent's means which could meet her needs, and erred in giving undue weight to the risk the claimant would be unable to repay an award of interim spousal support.

The Master's Decision

- [5] On the application for interim support, on a without prejudice basis, the claimant sought an order for support of \$4,700 per month. Her Form F8 financial statement ("F8"), which was before the master on the application, set out monthly expenses totalling \$4,360. With the exception of the debt payments she said she was making, totalling \$1,000 per month, her expenses were not in dispute. They may be fairly described as modest.
- [6] In his decision, the master set out the history of the parties' relationship, the circumstances under which they married, and the circumstances surrounding the execution of a disputed marriage agreement. On its terms, the marriage agreement purports to disentitle the claimant to spousal support and to property division. The master also referred to the terms of a separation agreement, which the parties entered into in 2015.
- [7] At para. 6, the master said that it was a live issue between the parties whether the marriage agreement and/or separation agreement precluded the claimant's application for spousal support. He set out the applicable factors for making an interim support order in the face of a marriage agreement which purports to disentitle the applicant from support. In line with these factors, he then summarized the principles from the cases providing guidance as to whether or not a marriage agreement can be successfully impeached. Neither party in this appeal disagreed with his statement of the law.
- [8] At paras. 11-13, the master concluded that on the facts in this case, there was a reasonable prospect that the claimant would successfully impeach the marriage and/or separation agreement.
- [9] In para. 14, the master expressed some concern about the claimant's ability to repay the interim support should she be required to do so after trial, in light of the claimant's age and her limited income-earning capacity. However, he said that "all things considered", he was satisfied that the claimant could repay an appropriate level of support over time and turned to an assessment of her "evident need" for support.
- [10] As to the claimant's need, he concluded that she was not currently earning income and that there was some evidence that she suffered from depression. He said that she was currently training for a new job without pay in the expectation of obtaining a job with relatively low pay, should she meet all of the requirements.

- [11] At para. 17, the master said that "[a]part from the marriage agreement", there did not appear to be any disagreement as to the claimant's entitlement to spousal support. He then cited Master Keighley's decision in *Robles v. Kuhn*, 2009 BCSC 1163, setting out the factors to be considered on an interim support application.
- [12] The master considered the respondent's means and the claimant's position that his financial statement disclosing an income of \$45,000 was not credible. At paras. 22 and 24, he concluded that the means available to the respondent to pay interim support included his ability to access substantial capital assets, registered solely in his name, for that purpose.
- [13] At para. 25, the master concluded that, based on a Spousal Support Advisory Guidelines calculation, the respondent's stated income in his financial statement would result in support that was too low given the claimant's needs and the respondent's means.
- [14] At para. 26, he said:
- The claimant seeks \$4,700 per month in support. No evidentiary basis is provided for this number. In my view, it is too high on the evidence of the respondent's means at this time. It is also too high, in my view, in light of the risk the claimant would be unable to repay an award of that magnitude should she be required to do so at trial.
- [15] To put the master's comments in context, his reference to "at this time" was a reference to the fact that the interim support application was being brought before examinations for discovery had occurred and while disclosure was ongoing. That is often the timing for an interim application for support, particularly where, as here, the claimant has no other sources of income.
- [16] At paras. 27 and 28, applying the rough justice approach set out in *Robles*, and on what he described as a "somewhat arbitrary" basis, the master set interim spousal support of \$3,000 a month on an interim, without prejudice basis. He said the parties were free to alter this amount by agreement or further court order before trial, and awarded the claimant her costs of the application in the cause.

The Standard of Review on an Appeal from a Master's Order

- [17] The parties agree that the applicable standard of review on an appeal from an interim support order involves deference to the master's decision, which will only be overturned if shown to be "clearly wrong". I agree that that is the applicable standard of review on this appeal: *McDonald v. McDonald*, 2015 BCSC 1285 at paras. 2-3. Thus, in order to succeed on this appeal, the claimant must demonstrate that the master's decision is clearly wrong.
- [18] This is not a re-litigation of the issue that was before the master. Another presider, on the same evidence, might have arrived at a different quantum for interim support. This is particularly the case where the application is brought early in family proceedings and in circumstances where there are concerns about the financial disclosure, as there were here.

- [19] The "clearly wrong" standard of review is met where the findings made by the first-instance decision maker are unsupported by the evidence: *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 55-56. It is also met if the decision maker applies the wrong test, fails to consider a part of the test, gives weight to a factor that is not properly considered on the application before them, or rejects undisputed evidence without giving an explanation for doing so: *Ma v. Zhao*, 2019 BCCA 248 at paras. 24-28.
- [20] However, if the decision maker applied the correct legal test and there is an evidentiary basis to support the finding made, the "clearly wrong" threshold is not met: *Raj v. Khosravi*, 2015 BCCA 49 at paras. 6, 48. It is improper for the reviewing court to substitute its view of the evidence in order to find that the decision was unreasonable: *Raj* at para. 48.
- [21] In *Nestor v. Nestor*, 2019 BCCA 203, the Court of Appeal considered an appeal from a chambers judge's decision on interim support. The Court explained, at para. 19, that appeals from interim support orders are to be discouraged. Interim support orders should not be overturned unless the reasons disclosed an error in principle, a significant misapprehension of the evidence, or that the award was clearly wrong. This standard of review closely mirrors the standard applied to masters' decisions. Further, interim support orders should only be interfered with if the court is convinced that the sum awarded is inordinately high or low: *Nestor* at para. 19.

Analysis

- [22] The claimant's first argument is that the master erred in awarding a level of interim support insufficient to meet the claimant's reasonable needs, despite the respondent's ability to pay. She argues that the master's decision effectively required her to produce evidence above and beyond the Form F8 financial disclosure she provided, which she says meets the threshold of being "clearly wrong".
- [23] I disagree with the claimant's first argument. The master's comment that there was "no evidence" to support the level of support claimed must be read in the context of his reasons as a whole.
- [24] The claimant's financial statement, which was before the master on this application, set her expenses at \$4,360 per month. Counsel for the claimant explained in her submissions before me that the figure of \$4,700 reflected a tax gross up as any support the claimant would receive would be taxable in her hands. She advised the master that the amount for expenses set out in her financial statement was net of tax, but she did not provide an explanation for how she came to the amount of \$4,700.

- [25] From his comment at para. 22 that it was "not [his] role in this application to make findings of credibility or to reject sworn financial evidence", the master appears to have accepted the evidence in the claimant's financial statement. Although an explicit statement to this effect would have been helpful, I interpret his comment that there was "no evidence" to support the \$4,700 figure to be a comment on the discrepancy between the expenses listed in the claimant's financial statement and the amount of support claimed.
- [26] The master was clearly aware of the claimant's "evident need for support". He acknowledged that the amount of interim support suggested by the respondent would be insufficient to meet the claimant's needs, but was of the view that the amount sought by the claimant was too high based on the evidence that was before him of the respondent's means and the claimant's ability to repay the support, if necessary.
- [27] In my view, it cannot be said that this decision imposed an onus on the claimant to provide more evidence than the information that was contained in the financial disclosure that was before him, or that the decision was "clearly wrong". Rather, the "somewhat arbitrary" amount of support he awarded was an attempt to achieve a compromise between the claimant's needs and the respondent's means based on the evidence that was before him.
- [28] It is apparent that the master understood the evidence before him, was alive to the applicable principles, and applied them to the facts he found in exercising his discretion to award \$3,000 a month in interim spousal support. I would not accede to the claimant's first argument on the appeal.
- [29] The claimant's second argument is that the master erred in giving undue weight to the risk the claimant would be unable to repay an award of interim spousal support.
- [30] I do not agree that the master unduly weighed the issue of the claimant's ability to repay an interim award if ordered to do so at trial. At para. 26 of his decision, he acknowledged the concern about repayment ability and said why, in the claimant's circumstances, such a concern existed. However, this comment has to be read in light of his reasons at para. 14, where he said he was satisfied that the claimant could repay an appropriate level of support over time. In the same paragraph, he held, "given the circumstances of this case, any risk that she [could] not fully repay [the respondent] should not defeat her evident need for support at [that] time". Reading paras. 14 and 26 together, it cannot be said that the master over-emphasized the claimant's ability to repay.
- [31] In my view, the master appropriately balanced the evidence before him in support of the claimant's stated needs and the respondent's stated means and crafted what was inherently a discretionary interim order. It is not my role to re-weigh the factors appropriately considered by the master or to substitute my view of the evidence on appeal.
- [32] I cannot conclude that an error in principle was made, that the master significantly misapprehended the evidence, or that the interim support order was clearly wrong. The sum awarded is low, but not inordinately so.

Application for an Interim Distribution

- [33] In addition to the appeal, the claimant sought an order that the respondent pay her an interim distribution of \$200,000 to be applied towards her legal expenses in advancing her claims in these matrimonial proceedings.
- [34] This proceeding was commenced on July 23, 2019. A 15-day trial is currently set for January 2021.
- [35] Although the evidence about the family assets, and their value, is still being gathered, based on his current F8, the respondent owns real property in West Vancouver, North Vancouver, Saskatchewan, Dubai, and Turkey. His F8 indicates that the property is valued at \$7,768,505. With respect to the Canadian properties, the assigned values are based on assessments for tax purposes. None of the properties have been appraised.
- [36] The respondent also has a 2017 Mercedes Benz to which he has assigned a value of \$65,000.
- [37] The F8 does not include the value of any personal jewellery owned by the respondent or any household possessions, and the claimant asserts that he owns other assets. Since the commencement of these proceedings, the respondent has acknowledged the existence of two other bank accounts that do not appear on the respondent's F8 and rental income he earns in Dubai, which is not included on his Canadian tax return.
- [38] As against the assets disclosed, the respondent has secured debts of \$1,527,751.28 and unsecured debts of \$6,595.70. The net equity, on the current record, is over \$6,000,000.
- [39] The issues in dispute in this proceeding include:
- (a) the validity and effect of a marriage agreement that was entered into in 1999 around the time of the parties' marriage and whether it disentitles the claimant to a claim to family property and spousal support;
 - (b) to a lesser extent, the validity and effect of a separation agreement entered into in 2015;
 - (c) the extent of the respondent's property in in Dubai and Turkey and bank account records from those countries;
 - (d) the valuation of foreign and domestic property owned by the respondent;
 - (e) the respondent's income from all sources;
 - (f) the respondent's excluded property claims; and
 - (g) the claimant's entitlement to spousal support and the quantum of any such support.

[40] The litigation so far has been contentious. The parties argued a contested interim spousal support application, the decision from which was the subject of the above appeal. I expect that, given the claimant's view that the respondent has more assets than he disclosed, disclosure applications will be required. Examinations for discovery will be complex. Properties will have to be appraised in at least three different countries and documents will have to be translated.

[41] Counsel for the claimant has provided the following budget for this proceeding based on her hourly rate of \$575.00:

Spousal support application: \$5,000

Spousal support appeal: \$5,000

Application for an advance: \$5,000

Valuations, translations, and other disbursements: \$15,000

Document discovery and review: \$20,000

Examinations for discovery: \$15,000

Trial preparation: \$40,000

Trial: \$75,000

Taxes: \$20,000

[42] After hearing the parties' submissions, and in light of the fact that it could not seriously be disputed that this was a case in which all of the assets in dispute were in the hands of the respondent, and that the claimant could not meaningfully pursue her entitlement without an advance, I ordered a \$200,000 advance pursuant to s. 89 of the Family Law Act. I was satisfied that doing so would not be harmful to the respondent's interests.

[43] In light of the December 17, 2019 examination for discovery of the respondent, I ordered the advance to be paid by December 15, 2019. The advance is to be paid to the claimant's counsel in trust and used for the purposes of this litigation. To the extent required, the claimant will facilitate refinancing of property in the respondent's name by lifting any Certificates of Pending Litigation required.

[44] Costs of the application for an advance were awarded fixed and inclusive of disbursement and taxes, in the amount of \$1,300.

"MacNaughton J."

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