

CANADA / JUDGMENT

Dini v. Kahusi

2020 BCSC 1979

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1979 Dini v. Kahusi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dini v. Kahusi,

2020 BCSC 1979

Date: 20201214

Docket: E201146

Registry: Vancouver

Between:

Bahram Dini

Appellant

And:

Behnaz Kahusi

Respondent

On appeal from: A decision of the Judge of the Provincial Court of British Columbia dated February 25, 2020 (File No.: 8704)

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Appellant, appearing by teleconference:

A. Grewal

Counsel for the Respondent, appearing by teleconference:

D. Labun

Place and Date of Hearing:

Vancouver, B.C.

November 24, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 14, 2020

Introduction

- [1] The appellant father appeals an order of the Provincial Court of British Columbia made by the Honourable Judge Challenger on February 25, 2020 after a four-day hearing (the "2020 Order").
- [2] The 2020 Order sets out the appellant's spousal and child support obligations, both retroactive and prospective. It also grants leave to the respondent mother to pursue a final order for retroactive and ongoing section 7 Special and Extraordinary Expenses ("s. 7 expenses").
- [3] The appeal is brought pursuant to s. 233 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].

Background

The 2015 Trial

- [4] In July 2015, after eight days of trial spanning the period from July 30, 2013 to February 16, 2015 Judge Challenger, also made orders regarding the guardianship and parenting of the parties' now 14-year-old child as well as the payment of s. 7 extraordinary expenses ("2015 Order").
- [5] The appellant appealed the 2015 Order. His appeal was dismissed by Justice N. Smith of this court on January 30, 2017 under Vancouver Supreme Court Action E152202.

The 2020 Hearing

- [6] The appellant submits that the learned trial judge, in making the 2020 Order, made numerous errors of law and fact, impugning virtually every aspect of that order. As best as I have been able to decipher from the appellant's written and oral submissions, the alleged errors of law include:
 - a) making findings of fact that were outside the jurisdiction of the Provincial Court;
 - b) making rulings in respect of which the court was functus officio;

- c) misapplication of the law to the findings of fact; and
- d) errors in the exercise of judicial discretion.

[7] For the reasons that follow, I find that there is no merit to the appeal. Accordingly, it is dismissed.

Standard of Review

[8] In *Galpin v. Galpin*, 2018 BCSC 1572, Justice Riley summarized the standard of review on such appeals:

[25] This is an appeal pursuant to s. 233(1) of the FLA, from a final order of the Provincial Court in a family law matter. Under s. 233(3) of the FLA, the Court has the power to affirm, set aside, or vary the Provincial Court order. However, the Court will only intervene where the trial judge is found to have erred in law or in principle, misapprehended the evidence, or reached a conclusion that was manifestly wrong. The standard of review for alleged legal errors, or alleged errors in principle, is correctness. The standard of review for alleged factual errors is palpable and overriding error, meaning the error must be "both obvious on the record, and material to the outcome": *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 13, citing *Housen v. Nikolaisen*, 2002 SCC 33.

[26] The necessary corollary of all of this is that deference is owed to the trial judge's findings of fact, and in the application of the law to those facts. Thus, "it is not for an appellate court to re-weigh the evidence or interfere on the basis that it would have decided the issue differently": *MacCarthy v. MacCarthy* at para. 15. This level of defence is important because it "promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge": *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12.

[9] An appellate court is required to give a high degree of deference to trial judges in relation to family law matters generally (*Hsieh v. Lui*, 2017 BCCA 51 at para. 38), in relation to support orders specifically (*Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12) and in relation to findings of credibility (*R. v. Jackman*, 2013 BCCA 157 at para. 54). An appellate court is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently: *Hickey* at para. 12.

[10] The task of an appellate court is not to substitute its own findings of fact for those of the trial judge. Such findings of fact may only be interfered with when they are unsupported by the evidence or were based on a misapprehension of the evidence and where such error has affected the outcome of the case: *Lu v. Mao*, 2007 BCCA 609 at para. 11, citing *Housen v. Nikolaisen*, 2002 SCC 33.

Analysis

- [11] While the appellant's written submissions raise numerous grounds of appeal, his primary focus during oral argument was on the following issues raised on appeal which will be dealt with in these reasons seriatim:
- a) the respondent's imputed income for the purposes of spousal support;
 - b) the finding that the respondent was entitled to retroactive support;
 - c) whether the court below was functus officio in respect of the order granting the respondent leave to pursue a final order for retroactive and ongoing section 7 Special and Extraordinary Expenses without the need to establish she had the appellant's consent to incur them.
- [12] With respect to all other issues raised by the appellant on appeal, I agree entirely with the submissions of counsel for the respondent, set out in her written submissions found at tab 23 of the Appeal Record. Each of those grounds of appeal is dismissed.

Respondent's imputed income for the purpose of spousal support

- [13] The appellant submits that, in determining the respondent's income for support purposes, the trial judge failed to consider the evidence regarding the respondent's age, health, education, skills and work history. He submits that the trial judge conducted no analysis regarding whether the respondent had been deliberately underemployed or ought to have been able to obtain self-sufficiency. He submits that, instead, the trial judge was overly focused on his misconduct in determining his support obligations.
- [14] I disagree. The trial judge expressly found that the appellant's "bad conduct" was not a factor to be considered in determining the issue of support. Rather, the appellant's conduct was considered only in the context of the impact "the many years of cruel and callous conduct had had on [the respondent]'s emotional well-being and, in turn her ability to become self-sufficient": Judge Challenger's Reasons for Judgment dated February 25, 2020, at para. 49.
- [15] There is no question that a former spouse/parent has an obligation to earn what she is reasonably capable of earning in the circumstances: *Hanson v. Hanson*, 1999 CanLII 6307 at paras. 7-18.
- [16] The trial judge considered the respondent's work history (para. 16) as well as the steps she had taken towards improving her fluency in English and to become self-sufficient (paras. 17-18). The trial judge accepted the respondent's evidence that she had made her best efforts in that regard and found that there was no reliable or credible evidence to support the appellant's suggestion to the contrary (at para. 34). The appellant was unable to point to any evidence to suggest that the respondent ought to have been able to work longer hours than she had. The trial judge found as a fact that the respondent's inability to earn a higher income was a direct result of stress, her fear of the appellant, and the toll the litigation had taken on her energy and psychological wellbeing (para. 47).

- [17] The trial judge went on to find that the appellant "has been and continues to be the author of [the respondent]'s inability to become self-sufficient" (para. 49).
- [18] The appellant has failed to show any basis justifying the intervention of this appellate court, let alone a palpable or overriding error made by the trial judge in her determination of the respondent's income for the purpose of spousal support.

Respondent's entitlement to retroactive support

- [19] The appellant submits that the trial judge made three reviewable errors in determining the respondent's entitlement to retroactive child and spousal support:
- a) in finding that effective notice of the respondent's claim for retroactive support was given in 2013 when she filed a claim in Iran;
 - b) in failing to consider the required factors in determining whether a retroactive award appropriate; and
 - c) in failing to consider the respondent's failure to produce records of her bank account in Iran.

Effective Notice

- [20] With respect to the date of retroactivity, in *D.B.S. v. S.R.G.*, 2006 SCC 37, the Supreme Court of Canada established a general rule that awards should be retroactive to the date of effective notice and, in any event, no more than three years prior to formal notice. The Supreme Court of Canada provided guidance to lower courts regarding the determination of "effective notice" for the purposes of retroactive support:
- [121] Choosing the date of effective notice as a default option avoids this pitfall. By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the status quo is fair, and his/her interest in certainty becomes less compelling.
- [21] This presumptive date of retroactivity may not apply in some situations, most notably where the payor party has engaged in blameworthy conduct: *Gil-Eldh v. Branyik*, 2018 BCCA 98 at para. 24.

- [22] The appellant submits that the trial judge erred in law by awarding retroactive support to January 2010 because the respondent did not formally seek retroactive support until June 21, 2018, when she filed her counterclaim in the Provincial Court action. Hence, the appellant submits that any retroactive award should not have been granted for any period more than three years prior to the date the respondent sought retroactive support, that is, prior to June 21, 2015.
- [23] I note that the respondent first sought child and spousal support in proceedings she commenced in Iran in November 2009. Despite the appellant's protestations that he was not served with those proceedings, the trial judge determined (at para. 50) that the appellant had been well aware of them as well as of the respondent's intention to seek support going back to the date the parties separated. Indeed, the Iranian court refused to allow the appellant to dispose of the parties' apartment in Iran until such time as the appellant had paid support. The appellant subsequently paid monthly support payments of the equivalent of less than CDN \$100 into the Iranian court and was thereafter able to dispose of the apartment in Iran. Those funds were never received by the respondent.
- [24] The respondent next sought support in 2013 when she commenced the proceedings in the court below on February 4, 2013. At that time, she was self-represented and completed a pre-printed form entitled "Application to Obtain an Order" on which she checked boxes to indicate she was applying, inter alia, for "maintenance for a child" and "spousal maintenance". There was no "box" on the form that allows an applicant to check off or to alert him or her that retroactive support was not considered part of the "maintenance" being sought.
- [25] The pre-printed form completed and filed by the respondent on June 20, 2018 had been amended to provide a separate section to be completed by the applicant if retroactive support was being claimed. No such separate section was provided in the 2013 pre-printed form.
- [26] The trial judge found (at para. 50) that exceptional circumstances existed in this case such that fairness supported a finding that the effective date of retroactivity sought should be three years prior to the respondent's filing her claim for support in 2013. Those exceptional circumstances included the fact that the appellant had abandoned the respondent and their child in Iran in 2009 without passports or any means to return to Canada for almost three years, as well as the finding that the appellant had been well aware of the respondent's claim for support in 2010.
- [27] The appellant has failed to demonstrate a reviewable error in respect of the trial judge's finding of the date of retroactivity.

Consideration of the Required Factors

- [28] The law is clear that, in determining whether an award of retroactive support is appropriate, four factors are to be considered:

- a) whether there is a reasonable excuse for why support was not sought earlier;
- b) the conduct of the payor;
- c) the circumstances of the child or recipient spouse; and
- d) any hardship occasioned by a retroactive award on the payor spouse.

See D.B.S.; *Kerr v. Baranow*, 2009 BCCA 111 at para. 87, aff'd on this point 2011 SCC 10 at para. 207.

- [29] None of these factors is decisive. The court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix: D.B.S. at para. 99.
- [30] Counsel for the appellant conceded that the trial judge considered the needs and circumstances of the child and recipient spouse (the respondent) as well as the reasons for any delay in not formally seeking retroactive support in Canada prior to filing her counterclaim. However, appellant's counsel strenuously submitted that the trial judge failed to consider or weigh the hardship that would be occasioned on the appellant by such an award.
- [31] The Reasons for Judgment in the court below set out the parties' respective incomes for the years 2010 to 2017, inclusive. Due to "oversight", the court was not provided with evidence of the parties' incomes for the years 2018 and 2019. Nevertheless, the trial judge found that, at least with respect to ongoing support, the appellant "has the ability to pay an amount at the high end of the range". It is noteworthy that the trial judge considered the appellant's evidence regarding his property dealings to have been less than satisfactory, which undoubtedly led, at least in part, to her factual finding in this regard.
- [32] Appellant's counsel was unable to point to any evidence that was before the court below of particular hardship that would be occasioned to the appellant by a retroactive support award. A review of the transcripts of the proceedings below shows that there was merely a bare assertion of hardship during closing submissions.
- [33] In my view, the appellant's submissions amount to an attempt to re-try the case below. The appellant has not persuaded me that a reviewable error was made by the trial judge in respect of the factors that ought to have been considered. In my view, her decision was a proper exercise of her judicial discretion.

Respondent's failure to produce records from an Iranian Bank Account

- [34] The respondent's uncontradicted evidence in the court below was that she was unable to produce her Iranian bank account records because the law in the country was such that she was required to attend at the bank in person. The appellant led no evidence to the contrary.
- [35] I find this ground of appeal is without merit.

Was the Court below functus officio with respect to s. 7 expenses?

[36] The appellant argues that the court below was functus officio because the issue of s. 7 expenses was res judicata, having been previously determined by the court below by way of the 2015 Order.

[37] The constituent elements of estoppel by res judicata were set out by this court in *Telus Communications Inc. v. TWU et al*, 2005 BCSC 264 at para. 23:

- a) that the alleged judicial decision was such in law and was pronounced;
- b) the tribunal pronouncing the decision had competent jurisdiction to do so;
- c) the decision was final;
- d) the decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which estoppel is raised; and
- e) the same parties to the decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies.

[38] The appellant raises the third and fourth of those elements as issues in this appeal.

[39] The appellant submits that the 2015 Order was a final order regarding the matter of the payment of s. 7 expenses and that the court below was therefore functus officio when it made an order relating to s. 7 expenses in the 2020 Order.

[40] Each of the 2015 and the 2020 Orders is described on its first page as a "Final Order". However, the mere fact that they are so titled does not mean that all matters in the orders were disposed of in a final way. Rather, each of the orders made must be viewed in light of the words used both in the order itself and as expressed by the court when making it. Regardless, s. 151(1) of the FLA provides for the variation of child support orders, both prospectively and retroactively where the circumstances warrant.

[41] Regarding s. 7 expenses, the orders provide as follows:

2015 Order

18. The [appellant] shall bear the full costs of reasonable extraordinary expenses until such time as the [respondent] obtains full time employment. The [respondent] will advise the [appellant] in advance of such expenses she intends to incur and will provide details of them to the [appellant]. It [sic] the parties are unable to agree on such expenses they will meet with a Family Justice Counsellor to attempt to reach such agreement. If they are unable to reach agreement either may apply to Court. If the [appellant] is found to have unreasonably failed to agree to these expenses he will pay a fine of \$500.00 for each such expense;

2020 Order

4. The [respondent] is granted leave to pursue a final order for retroactive and ongoing section 7 Special and Extraordinary Expenses. The period of retroactive application is from January 1, 2010 to the time the application is heard. The [respondent] need not establish she had the consent of [the appellant] to incur those expenses. The [respondent] must however establish the expenses are properly section 7 Special and Extraordinary expenses and were reasonable in the circumstances;

[42] Each of the respective Reasons for Judgment of Judge Challenger that led to the 2015 Order and 2020 Order makes it clear that the orders made were not intended to be final:

2015 Reasons for Judgment

[69] .As such, the terms of [the earlier Interim Order] will continue on an interim basis. I will grant leave to the parties to apply to the Court for a Final Order for retroactive or ongoing spousal or child support or extraordinary expenses.

[Emphasis added.]

2020 Reasons for Judgment

- [3] The issue of s. 7 expenses payable over the entire time since separation remains outstanding and will not be dealt with in these reasons.
- [65] [The respondent] is granted leave to pursue a final order for retroactive and ongoing s. 7 expenses. The period of retroactive application is from January 1, 2010 to the time the application is heard. [The respondent] need not establish she had the consent of [the appellant] to incur those expenses. She must however establish the expenses are properly s. 7 expenses and were reasonable in the circumstances.
- [43] A reading of both sets of Reasons for Judgment as well as the orders flowing from them make it clear that the court was contemplating the receipt of evidence in the future regarding the quantum of the amount payable by the appellant in respect of s. 7 expenses.
- [44] I find the nature of the 2015 Order was to provide for a mechanism for the parties to resolve disputes as to s. 7 expenses that would potentially help them avoid further court applications.
- [45] I further find the nature of the 2020 Order was an adjournment of the issue of the payment of s. 7 expenses. Neither order dealt with the quantum of s. 7 expenses that were payable. It remains open for the appellant to challenge the necessity and reasonableness of the expenses.
- [46] In my view, the 2015 Order was not a final order regarding s. 7 expenses. This ground of appeal is dismissed.

Conclusion

[47] The appeal is dismissed.

Costs

[48] Subject to any submissions the parties wish to make, the respondent is entitled to her costs at scale B.

"G.C. Weatherill J."

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