

CANADA / JUDGMENT

Kasapoglu v. Kasapoglu

2020 BCSC 1810

COURT

Supreme Court of British Columbia

DECIDED

19 November 2020

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2020 BCSC 1810 Kasapoglu v. Kasapoglu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kasapoglu v. Kasapoglu,

2020 BCSC 1810

Date: 20201119

Docket: E182730

Registry: Vancouver

Between:

Angie Neco Kasapoglu a.k.a. Necmiye Kasapoglu a.k.a.

Necmiye Gencer

Claimant

And

Emin Tan Kasapoglu, Kasapoglu Family 2017 Trust,

Confidex Holdings Ltd., Certus Enterprises Ltd.,

Igenius Incorporated, West Quay Offices Inc. a.k.a.

Butcherson Investments Inc.

Respondents

And

Nurdan Ozel

Respondent

Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Judgment

Counsel for the Claimant:

K. Heinrichs

Counsel for the Respondent Emin Tan Kasapoglu:

J. Werb

Application Proceeded by Way of Written Submission:

Vancouver, B.C.

November 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 19, 2020

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Direction Sought

- [1] In an application that proceeded by way of written submission, the respondent Emin Tan Kasapoglu seeks a direction pursuant to R. 13-4(3) of the Supreme Court Family Rules [SCFR]. In particular, he seeks direction as to whether an expert report from a Turkish family lawyer on the enforceability of a prenuptial agreement, signed by the parties and dated March 2, 2010, must be from a joint report pursuant to R.13-3(2), or whether the report can be submitted as an expert report pursuant to R. 13-3(3). In these reasons, I will refer to the prenuptial agreement as the Turkish Agreement.

Background

- [2] The parties are Turkish citizens. They met in Turkey, and their native language is Turkish. English is their second language. The claimant is 34 years old, and the respondent is 49 years old.

- [3] There is a dispute about when the parties began to live together in a marriage-like relationship. The respondent says the date was November 2009. The claimant says the date was August 2005. The parties married on March 7, 2010, in Izmir, Turkey.
- [4] Before marrying, the parties signed the Turkish Agreement. It sets out a regime under which their property would be divided on a marriage breakdown. In her affidavit sworn on November 10, 2020, the claimant says that she did not receive independent legal advice prior to signing the Turkish Agreement and did not have disclosure from the respondent about the extent of his property. She also says that she signed under duress as a result of her father's threats of violence if she continued to live with the respondent as an unmarried woman. She says that the respondent knew of her father's threats and he said he would not marry her unless she signed the Turkish Agreement.
- [5] The parties have a daughter who is eight years old. The respondent has a sixteen-year-old daughter from a previous relationship. The parties moved to Canada with their daughter in November 2011 and, in 2016, the respondent's daughter came to Canada to live with the parties.
- [6] The parties separated on September 28, 2018.
- [7] On September 2, 2020, the respondent's counsel wrote to the claimant's counsel about a number of issues, including the issue of expert reports (the "September Letter"). As it relates to the issues in this application, the September Letter proposed that the parties retain a joint expert to assist the parties with understanding Turkish family law, and proposed a number of lawyers who could assist.
- [8] The claimant did not respond to the September Letter.
- [9] On September 25, 2020, the respondent filed an application seeking an order pursuant to R. 13-4, that the parties jointly retain Ipek Bozkurt, from the law firm Bozkurt Cobanoglu, to provide a legal opinion on the enforceability of the Turkish Agreement (the "Respondent's Application").
- [10] On October 5, 2020, the claimant responded to the application opposing the appointment of a joint expert. The application was adjourned, and on October 8, 2020, the respondent filed a requisition re-setting it to be heard on November 19, 2020.
- [11] There is no dispute that the enforceability of the Turkish Agreement under Turkish law will be an issue at trial. The respondent says that receiving this Court's direction sought in this application will likely resolve the Respondent's Application, thus avoiding a hearing.
- [12] An 18-day trial is set to begin on March 29, 2021. The 84-day deadline for filing expert reports is December 31, 2020.

- [13] The respondent submits that there should be a joint appointment of an expert in Turkish family law. Expert evidence is required to determine the enforceability of the Turkish Agreement, and the enforceability will have a major impact on the issue of property and debt division which are financial issues under Parts 5 and 6 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [14] On September 2, 2020, the respondent provided the claimant with a list of three Turkish legal experts, together with their contact details and websites, who could prepare a legal opinion on the enforceability of the Turkish Agreement. The respondent also proposed that the parties share equally the cost of a Turkish legal expert's report.
- [15] The claimant submits that the enforceability of the Turkish Agreement under Turkish law is purely a legal opinion that relates only tangentially to the claims brought by the parties under Part 5 of the FLA, and is not a "financial issue" pursuant to R.13-3.

The Applicable Law with Respect to Joint Experts

- [16] The object of the SCFR is to help parties resolve the legal issues in a family case fairly and to secure the just, speedy, and inexpensive determination of every case on its merits.

- [17] Rule 13-3 sets out the rules governing the appointment of joint expert witnesses. It provides:

Definition

- (1) In this rule, "financial issue" means
- (a) an issue arising out of a claim under Part 5 or 6 of the Family Law Act or out of an application for a FHRMIRA order,
 - (b) a claim for an interest in property based on unjust enrichment or other trust claims, or
 - (c) a claim for compensation based on unjust enrichment.

Joint appointment on financial issues

- (2) If any party wishes to present to the court expert opinion evidence on a financial issue,
- (a) that evidence must be presented to the court by means of a jointly appointed expert unless the court otherwise orders or the parties otherwise agree, and
 - (b) Rule 13-4 applies.

Other appointments on non-financial issues

- (3) If a party wishes to present to the court expert opinion evidence on an issue other than a financial issue,
- (a) the parties may present that evidence by means of a jointly appointed expert under Rule 13-4, or

- (b) any one or more of the parties may appoint his or her own expert.
- [18] The sole issue to be determined in this application is whether, pursuant to R. 13-3, the expert opinion evidence sought by the respondent is with respect to a financial issue. If it is, then barring a court order or agreement between the parties, the expert opinion evidence must be presented in the form of a jointly appointed expert report. If it is not in respect of a financial issue, the respondent may appoint his own expert to present that opinion evidence.
- [19] Rule 13-4(3) provides that if the parties do not agree that a joint expert is required, or do not agree on any matter relating to the appointment of a joint expert, any party may apply to the court in accordance with R. 10-5 for an order appointing a joint expert, and settling any matter relating to the appointment of the joint expert.
- [20] In *Bartch v. Bartch*, 2017 BCCA 94 at para. 24, the Court of Appeal considered, the specific provisions in the SCFR concerning joint experts, in particular Rules 13-3(2), and 13-4(3), (5)-(8) and (10). After citing the Rules, the court summarized the intent and effect of R. 13-3(2):
- [25] Family Rule 13-3(2) dictates that if a party wishes to present to the court evidence on a financial issue, that evidence must be presented through a jointly appointed expert unless the court otherwise orders or the parties otherwise agree. Financial issue is defined in Family Rule 13-3(1) and includes issues arising out of a claim under Part 5 or 6 of the [FLA].
- [26] Family Rule 13-3(2) makes the joint appointment of financial experts the default procedure. This differs from the process in civil actions. While the Supreme Court Civil Rules (the Civil Rules) give a judge or master at a Case Planning Conference the power to appoint a joint expert (Civil Rule 5-3(1)(k)), absent such an appointment or agreement of the parties, parties to an action may each appoint their own expert to tender opinion evidence (Civil Rule 11-4). Similarly, the parties in a family law action are free to appoint their own experts on non-financial issues (Family Rule 13-3(3)).
- [21] The Court of Appeal in *Bartch* signalled that the scope of what is "an issue arising out of a claim under Part 5 or 6 of the FLA" should be a financial one; one to be dealt with by a financial expert as opposed to a legal, medical, or other expert.
- [22] In *Aquilini v. Aquilini*, 2012 BCSC 1616, Justice N. Smith set some of the legislative policy reasons for the default position of using jointly-appointed financial experts in family cases:
- [10] In making those Family Rules, the Lieutenant Governor in Council has stated a strong policy preference for the use of jointly appointed financial experts in family cases. That policy decision responds to common features of family cases that are not necessarily present in other kinds of litigation. These include:
- (a) The central importance of the division of family assets and the corresponding need for valuation or accounting evidence;

- (b) The cost of obtaining such expert evidence in many cases;
 - (c) The fact that the parties frequently do not have equal ability and resources to retain experts;
 - (d) The fact that while separately appointed valuation or accounting experts may disagree on some matters, they frequently find a great deal of common ground, resulting in needless duplication of costs (this, of course, assumes that all experts, whether jointly or separately appointed, have proper regard to their duty to assist the court and not act as advocates for either party); and
 - (e) The overly adversarial nature of some family cases, which can put in issue matters on which the parties should be able to agree.
- [23] In each of his listed common features of family cases, Justice N. Smith referred to expert opinion evidence in the fields of valuation or accounting. In other words, expert evidence which is truly financial in nature. I agree with Justice N. Smith that the intent of R. 13-3 is that the value of assets subject to division should be jointly presented.
- [24] Pursuant to R. 13-3(2)(a), the court may make an order relieving a party of the requirement to present financial evidence through a joint expert. In Aquilini, Justice N. Smith suggested that, before making such an order, the court must be satisfied that there are circumstances in the case that make use of a joint expert inappropriate or impracticable. In Bartch, the Court of Appeal said that the discretion was broader.
- [25] In both Aquilini and Bartch, there was no issue about whether the expert evidence sought was with respect to a financial issue. Both dealt with expert valuations of business assets.
- [26] This Court has consistently concluded that factual issues of a financial nature relating to property division, like valuations, appraisals, accounting assessments, and actuarial issues, be addressed by a joint expert. That, in my view, is what Justice N. Smith was referring to in Aquilini when he referred to financial experts at paras. 9-10 and what the Court of Appeal was referring to in Bartch at para. 26.
- [27] Rule 13-3(2) does not, in my view, express a legislative intent that expert evidence on the binding nature of a family law agreement in a foreign jurisdiction needs to be from a joint expert. In a case like this one, the parties disagree about the validity of the Turkish Agreement. Although the validity of the Turkish Agreement may tangentially affect property division under Part 5 and, possibly, Part 6 of the FLA, at its core, the issue is not financial but about foreign law. I see no basis in R. 13-3(2) for requiring a disputing party to agree to a joint opinion on issues of foreign law even where the outcome of that legal analysis may affect financial entitlements in Canada.

- [28] The claimant is right that a Canadian court, determining the legal effect of the Turkish Agreement, a foreign marriage agreement, will require expert evidence from an expert in Turkish family law. That view was expressed in obiter in *Mendez v. Demos*, 2014 BCSC 2047 at para. 66. However, the necessity of that opinion evidence does not change its character from evidence about applicable foreign law to evidence that is of a financial nature. The Canadian court will decide the financial issues based on its application of Turkish law.
- [29] In my view, each party should have the right to retain counsel of their own choosing to voice their position with regard to the legal effect of the Turkish Agreement. The issue is a question of law that, if the agreement were a Canadian one, would be determined by the trial judge. As the agreement is not a Canadian one, the trial judge will need the assistance of an expert in Turkish law.
- [30] Foreign experts were relied on in *Aleong v. Aleong*, 2013 BCSC 1428. There, the court heard an application for leave to serve a notice of family claim for division of family property in BC and abroad. The court accepted opinion evidence, filed by way of two affidavits from two experts in the law of the foreign jurisdiction as to the likelihood of the foreign court taking jurisdiction over the financial claims, including the property division claims. One expert was retained by the claimant, the other by the respondent. The court allowed the evidence and relied on both expert opinions in making its decision. The question asked of the experts in *Aleong* was not financial, although the opinions had financial implications for the issues to be litigated in Canada.
- [31] Similarly, in *Tezcan v. Tezcan*, [1992] B.C.J. No. 30 (C.A.), the Court of Appeal dismissed an appeal from a trial judge's decision dividing matrimonial property under the Family Relations Act, R.S.B.C. 1979, c.121. The court found that "an implied contract can arise as a result of the law under which parties have been married". In *Tezcan*, the parties were citizens of Turkey, married there, and had lived there for most of their marriage. They lived in British Columbia for several years, during which they bought immovable property here. The Court of Appeal found that Turkish law must be applied to determine if an implied contract existed. In that case, an expert in Turkish law testified that no implied contract existed, and the court accepted that evidence. The BC court determined financial issues based on its application of Turkish law.
- [32] I am satisfied that R. 13-3(2) was not intended to apply in the circumstances of this case and, should they choose to do so, the parties are free to call their own experts on the validity of the Turkish Agreement.

"MacNaughton J."

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