

APK v APL
[2011] SGHC 255

Case Number : DT No 765 of 2008 (Summons No 3877 of 2011)
Decision Date : 28 November 2011
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Peter Ezekiel (Peter Ezekiel & Co) for the applicant/defendant; Raymond Yeo (Raymond Yeo) for the respondent/plaintiff.
Parties : APK — APL

Family Law – Matrimonial Assets

Family Law – Custody

28 November 2011

Tan Lee Meng J:

1 The applicant, APL, the former husband of the respondent, APK, did not appeal against the ancillary orders made on 12 August 2009 with respect to the division of matrimonial assets and custody of children (“the ancillary orders”) within the time prescribed for filing an appeal. His application for an extension of time to file an appeal was dismissed by Kan Ting Chiu J (“Kan J”). He appealed against Kan J’s decision but he allowed his appeal to lapse. Subsequently, on 31 August 2011, he filed Summons No 3877 of 2011, the application presently being considered for a variation of the ancillary orders. I dismissed his application and now give the reasons for my decision.

Background

2 The applicant, a Malaysian aged 66, resides in Ipoh, Malaysia, while the respondent, aged 55, and their children live in Singapore. Two of the children are adults while the remaining two, who are living with the respondent, are now aged 19 and 13 respectively.

3 On 19 February 2008, the respondent commenced divorce proceedings on the ground of the applicant’s unreasonable behaviour. She complained about his financial irresponsibility and lack of interest in the welfare of their children. She also asserted that the applicant returned to the matrimonial home only once every 6 to 9 months.

4 The divorce was uncontested and on 15 August 2008, interim judgment was entered against the applicant.

5 On 21 January 2009, the respondent served her Affidavit of Assets and Means on the applicant’s Malaysian solicitors, Chong & Poh. Subsequently, Chong & Poh informed the respondent’s solicitors that it did not have instructions from the applicant to appear in court with respect to the ancillary matters and that the applicant had been informed to attend the hearing of the ancillary matters. Thereafter, the respondent’s solicitors corresponded with the applicant at his Malaysian address.

6 The applicant did not file his Affidavit of Assets and Means and did not appear at the hearing on the ancillary matters on 12 August 2009. On that day, the court made a number of orders. Two of them are relevant to the present proceedings.

7 The first order concerned [address redacted] ("the property"), which was in the joint names of the parties. The applicant was ordered to transfer the property to the respondent without any consideration. The property was subsequently registered in the respondent's sole name on 23 October 2009.

8 The second order which the applicant sought to vary concerned custody of two children. As the applicant's former solicitors, Chong & Poh, had indicated in a letter to the respondent's solicitor on 17 June 2008 that the applicant agreed that the respondent should have custody as well as care and control of the two minor children, the court granted the respondent custody as well as care and control of the children ("the custody order").

9 Three months after the ancillary orders were made, the applicant, wrote to the Registrar of the Supreme Court on 11 November 2009 to state that he did not agree with the ancillary orders. On 17 November 2009, the Registrar informed the applicant that the proper course of action for a litigant who is not satisfied with a decision of the High Court is to appeal to the Court of Appeal.

10 As it was too late to file an appeal with respect to the ancillary orders, the applicant filed an application on 12 February 2010 for an extension of time to file his notice of appeal. Kan J found that the delay in filing the appeal was substantial and that the applicant was to blame for the delay as he had failed to read his mail and communicate properly with his solicitors. He also found that the chances of the applicant succeeding in the intended appeal were low because the custody order was identical to what his lawyers had stated to be his position in their letter of 17 June 2008. As for the transfer of the property, Kan J noted that the applicant had furnished no evidence at the hearing of the ancillary matters and the facts set out in his affidavit in support of his application for an extension of time to file his notice of appeal were unlikely to be admissible under the test laid down in *Ladd v Marshall* [1954] 1 WLR 1489.

11 The applicant appealed against Kan J's refusal to grant him an extension of time to file his notice of appeal against the ancillary orders. However, as has been mentioned, he allowed his appeal against Kan J's decision to lapse.

12 On 31 August 2011, the applicant filed the application presently being considered to vary the ancillary orders in two ways. First, he wanted a half share of the property to be transferred to him without consideration and for the property to be sold in the open market so that he can have half of the sale proceeds. Secondly, he wanted to have joint custody of the children.

Varying the order on division of matrimonial property

13 While an order on custody and care of children or maintenance may be reviewed when circumstances change, an order on the division of matrimonial property stands on a totally different footing. As such, why the applicant sought to vary the order made on 12 August 2009 regarding the division of matrimonial property when he did not appeal against the order within the time permitted for an appeal and failed to obtain from Kan J an extension of time to file an appeal cannot be fathomed.

14 In his affidavit in support of his application, the applicant pointed out that since 2009, the value of the property has increased significantly. In the meantime, his financial position had deteriorated and he was having difficulty maintaining himself in Ipoh. He argued that even if the

respondent was ordered to give up a half share of the property to him, she will still have a tidy sum for herself. He added that even if the court gave him a third of the proceeds of sale of the property, he will have enough money to restart his business. While a change in financial circumstances may be relevant for a variation of maintenance orders, such a change cannot be relied on to vary an order on the division of matrimonial property.

15 Having allowed his appeal against Kan J's decision to lapse, the applicant's attempt to reopen the issues regarding the division of matrimonial property by means of the present application is a blatant attempt to circumvent the requirement of having an appeal filed on time. As such, the applicant's prayer for a variation of the 2009 order on the division of matrimonial property need not be considered any further.

Custody of the children

16 In so far as the application for a variation of the custody order is concerned, it may be noted at the outset that s 128 of the Women's Charter (Cap 353, 2009 Rev Ed), provides:

The court may at any time vary or rescind any order for the custody of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or *where there has been any material change in the circumstances*.

[emphasis added]

17 In custody cases, the court's paramount consideration is the welfare of the children. In *Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430, the Court of Appeal stressed (at [25]) that the court "should look at all the circumstances of the case and come to a decision on the issue of custody, always bearing in mind that the welfare of the child should be given paramount priority".

18 The applicant did not allege that the custody order that was made in 2009 was based on any misrepresentation or mistake of fact. As such, the only basis for varying the custody order is a material change in the circumstances.

19 The party who applies for a variation of a custody order on the basis of a material change in the circumstances has the burden of proving such a change. Furthermore, even if there has been a material change in the circumstances, the primary consideration remains the welfare of the child. In the present case, the applicant's affidavit in support of his application to vary the ancillary orders was primarily concerned with the division of matrimonial property and he did not explain why there has been a material change in the circumstances so that it is now in the interest of the children's welfare to have the court vary the custody order that had been made in 2009 in accordance with his own wishes. This was not surprising because the relevant circumstances had not changed. The applicant, who was living in Malaysia when the custody order was made, continues to live in Ipoh while the respondent and the children in question continue to live in Singapore. As it was not established that there was a material change in the circumstances, there was no reason for the custody order to be varied.

Conclusion

20 For the reasons stated, the applicant's application for a variation of the ancillary orders was dismissed with costs.