
CANADA / JUDGMENT

A.C. v. A.A.

2013 BCSC 354

COURT

Supreme Court of British Columbia

DECIDED

5 March 2013

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2013 BCSC 354 A.C. v. A.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.C. v. A.A.,

2013 BCSC 354

Date: 20130305

Docket: SE64426

Registry: Nanaimo

Between:

A. C.

Appellant

And:

A. A.

Respondent

Before: The Honourable Mr. Justice R.A.M. Baird

On Appeal from the Order of the Provincial Court, made on March 26, 2012,

Court File No. F64426, Nanaimo Registry

Reasons for Judgment

Counsel for the Appellant:

B. Soloway

Counsel for the Respondent:

M. Screech

Place and Date of Hearing:

Nanaimo, B.C.

January 8, 2013

Place and Date of Judgment:

Nanaimo, B.C.

March 5, 2013

Introduction

- [1] This is an appeal brought under s. 16 of the Family Relations Act, R.S.B.C. 1996, c. 128, and Rule 18-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009, from an order of a Provincial Court Judge made on March 26, 2012, that the appellant and respondent "shall attend forthwith for DNA testing for the purpose of establishing the paternity of [the respondent], said testing to be paid for by [the respondent]."
- [2] The order was made on authority of s. 95.1(2) of the Family Relations Act which reads:
- 95.1 ...
- (2) If a male person denies responsibility under section 88(1) on the basis that he is not the father of the child, the court may order putative parents and the child to have tissue or blood samples, or both, taken by a medical practitioner or other qualified person so that paternity tests can be done on the samples.
- [3] In addition, Rule 15 of the Provincial Court Family Rules B.C. Reg. 417/98 reads:
- (1) In this rule, "paternity tests" include human leukocyte antigen tissue tests and tests of the deoxyribonucleic acid (DNA) in tissue or blood to identify the inheritable characteristics of the tissue or blood

Judge may order samples to be taken for paternity test

- (2) If the parentage of a child is denied in a proceeding for a maintenance order for the child, a judge may order putative parents and the child to have tissue or blood samples, or both, taken by a medical practitioner or other qualified person so that paternity tests can be done on the samples.

Order may include conditions

- (3) An order under subrule (2) may include any terms or conditions the judge thinks proper and may require a putative parent to pay all or part of the cost of the paternity tests.

Evidence of the test results

- (4) The results of paternity tests done under subrule (2) may be introduced as evidence.

Consequences of not complying

- (5) If a putative parent named in an order under subrule (2) fails to comply with the order, the judge may draw any inference from that failure that the judge considers appropriate.

Application by notice of motion

- (6) An application for an order under subrule (2) must be brought by notice of motion under rule 12.
- [4] Section 1(1) of the Family Relations Act defines "child" as a person who is under the age of 19 years, but that definition is expanded or modified by s. 87 of the Act which provides that:

"child" includes a person who is 19 years of age or older and, in relation to the parents of the person, is unable, because of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

- [5] Section 88(1) of the Family Relations Act provides:

88(1) Each parent of a child is responsible and liable for the reasonable and necessary support and maintenance of the child.

Background

- [6] The respondent was born on March 23, 1990. On October 18, 2011, she filed an application in Provincial Court pursuant to s. 91 of the Family Relations Act for maintenance from the appellant, her putative natural father. At the time of filing the application she was 21 years of age.
- [7] The appellant and the respondent's mother never married or cohabitated, and the appellant has never acknowledged paternity or been found by a Canadian court of competent jurisdiction to be the respondent's father. Thus none of the presumptions contained in s. 95 of the Family Relations Act are applicable.
- [8] In support of her application, however, the respondent filed an affidavit of her natural mother in which she deposed that, for reasons set out in some detail, the respondent's natural father could only be the appellant.
- [9] The appellant denies paternity, hence the respondent's Provincial Court application for an order compelling him to take paternity testing.

- [10] The record reveals that an application for the respondent's maintenance was brought by the respondent's mother in 2007. At that time, of course, the respondent was a minor. The appellant voluntarily submitted to paternity testing but, inexplicably, the respondent's mother did not pursue the matter, and ultimately her application was dismissed.
- [11] Because of this, an argument was raised in the court below that the question of paternity testing was *res judicata*. The learned trial judge rejected this argument and there is no appeal from that decision.
- [12] The appellant conceded in argument that, had the respondent been under 19 years of age when she made her application for maintenance, there would have been no grounds for opposing an order for paternity testing.
- [13] This appeal is based on the sole proposition that, because the respondent was 19 years of age or older at the time she brought her application for maintenance, she has no standing to seek an order for paternity tests unless she first establishes that she is a "child" within the modified or expanded definition of that term contained in s. 87 of the Family Relations Act.
- [14] The learned Provincial Court Judge's reasons for rejecting this argument were succinct and may conveniently be set out in full as follows:

With regards to the issue that there is a lack of standing, there appears to be a triable issue as to whether child support would be ordered or not under the extended definition, and I do not think it is helpful for the parties to embark upon that process without first of all having the paternity testing done. I think there is enough of an issue having been raised in the material to cross that threshold, so to speak.

Paternity testing, of course, can have a number of ramifications. While the only relevant ramification immediately is one about whether or not [A.A.] is eligible to claim for support from [A.C.], there is the potential in the future for a parental support claim, and there can be issues of estate concerns.

It is to the credit of [A.C.] that he was in agreement in the past with complying with the request. It is understandable that having been through the process and it not having been followed through by others -- that he takes the position that he does today, but I do not think his position is ultimately sustainable.

I am going to direct that the paternity testing take place, particularly on the terms that have been suggested, and that is that the initial cost for such testing shall be borne by [A.A.], with liberty to apply for a further hearing about either sharing of the costs or for the costs to be placed at the feet of [A.C.], once the results are known.

I think that is sufficient for the time being.

- [15] In short, the learned Provincial Court Judge concluded that it was preferable to determine the issue of parentage before embarking on a trial addressing the merits of the appellant's entitlement to child support given her age.
- [16] The principles applicable to the appellate review of discretionary orders were recently confirmed by our Court of Appeal in *Dhillon v. Pannu*, 2008 BCCA 514, per Tysoe J.A. at paras. 26, 27, and 28 as follows:
26. The order under appeal was a discretionary order. The appellate standard of review in respect of discretionary orders has been expressed in slightly varying ways. One of the expressions of the standard of review is contained in the authority primarily relied upon by the plaintiff on this appeal, *House of Sga'nisim v. Canada (Attorney General)*, 2007 BCCA 483, 286 D.L.R. (4th) 557 ("Chief Mountain"):
- [20] In order to succeed on an appeal of an order made in the exercise of discretion, this Court must be satisfied that the trial judge erred in the exercise of his discretion in that no weight or not sufficient weight has been given to relevant considerations: *Friends of the Old Man River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-77, 88 D.L.R. (4th) 1. In other words, this Court will not interfere with the exercise of discretion simply because we might have exercised the discretion in a different fashion.
27. In the relatively recent decision of *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 123, the Supreme Court of Canada adopted the expression of the standard of review contained in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1375, 37 B.C.L.R. (2d) 145, that an appellate court should interfere with the exercise of discretion by a judge only if he "misdirects himself or if his decision is so clearly wrong as to amount to an injustice".
28. An appellate court should not substitute its opinion in place of the opinion of the trial judge or chambers judge under the guise that the judge did not give sufficient weight to a relevant consideration. It is incumbent upon an appellant to demonstrate error on the part of the judge, and an appellate court should not interfere with the exercise of discretion by a judge simply because the judge failed to mention a relevant consideration: see *Garda v. Osborne* (1996), 72 B.C.A.C. 101 at para. 31, and *E.T. v. K.H.T.* (1996), 27 B.C.L.R. (3d) 347, 83 B.C.A.C. 267 at para. 29 (Lambert J.A. dissenting in the result). If the judge's decision is not so clearly wrong as to amount to an injustice, it must be manifest from the judge's reasons that he or she misdirected himself or herself, or gave no weight, or insufficient weight, to a relevant consideration.
- [17] In this case, I am a long way from being satisfied that the learned trial judge erred in the exercise of his discretion, gave no weight or insufficient weight to relevant considerations, misdirected himself, or that his decision was so clearly wrong as to amount to an injustice.

- [18] As a person over the age of 19 years, s. 87 of the Family Relations Act requires the respondent to show that, in relation to her parents, she is unable to withdraw from their charge or obtain the necessities of life. In order to be able to make such a claim, she must establish who her parents are.
- [19] In my view, she is in the same position as a person under the age of 19 in like circumstances. The only basis upon which the respondent claims entitlement to support from the appellant is the biological fact of paternity based on the evidence of her mother. The appellant disputes this evidence by denying paternity. The only way to determine the matter is through testing.
- [20] The order of the learned Provincial Court Judge is hereby confirmed.
- "The Honourable Mr. Justice R.A.M. Baird"

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