
CANADA / JUDGMENT

C.M.R. v. L.F.R.

2019 BCCA 371

COURT

British Columbia Court of Appeal

DECIDED

25 October 2019

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2019 BCCA 371 C.M.R. v. L.F.R.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

C.M.R. v. L.F.R.,

2019 BCCA 371

Date: 20191025

Docket: CA45902

Between:

C.M.R.

Respondent

(Claimant)

And

L.F.R.

Appellant

(Respondent)

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated

January 28, 2019 (C.M.R. v. L.F.R., Kamloops Docket D33038).

Counsel for the Appellant:

D.E. Komori

Counsel for the Respondent:

M.A. Koochin

Place and Date of Hearing:

Kamloops, British Columbia

September 30, 2019

Place and Date of Judgment:

Vancouver, British Columbia

October 25, 2019

Written Reasons by:

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Harris

Summary:

Appeal from an order in chambers dismissing an application to have a motion seeking to terminate child support obligations moved to the trial list. Held: appeal allowed. The question before the chambers judge should not have been whether the application can be decided on conflicting affidavit evidence or must be referred to the trial list. Whether the judge is able to find the facts necessary to decide issues of fact or law on the evidence before the court is the issue when determining the suitability of a matter for summary trial under Supreme Court Family Rule 11-3(15). Whether a matter should be heard by summary trial is a completely different question than whether a matter should be put on the trial list. The proper question on an application to have the court order that a chambers proceeding should go to trial pursuant to Rule 10-3(7)(d) is: does the application raise a triable issue? Once a family law case has been transferred to the trial list, only then may either party apply for a summary trial. Given that the chambers application in this case raises a triable issue, it must be referred to the trial list.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

- [1] The Supreme Court Family Rules (the "Rules") mandate that in a defended family law case commenced by the filing of a notice of family claim, a final order can only be obtained at trial or on application by way of summary trial (Rule 10-11(1)). Because of ongoing childcare and support issues, family law litigation often continues long after final orders are made at trial. This appeal concerns how such ongoing issues are to be resolved.

BACKGROUND

- [2] The parties, who I will refer to as the Father and Mother, were married on August 28, 1993, separated on May 18, 2002 and divorced on June 16, 2004. They have two daughters, now aged 23 and 20, who are attending post-secondary school. Pursuant to the consent order made at the time of the divorce, the Mother (the respondent in this appeal) was awarded permanent sole custody of the children with reasonable and generous access to the Father. The Father was ordered to pay bi-weekly child support of \$400 based on a guideline income of \$62,206.12 for so long as the children remained children of the marriage as defined in the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
- [3] Since June 2011, the daughters have refused to see or communicate with the Father. Between June 2011 and August 2016 the father made sporadic unsuccessful attempts to communicate with his daughters. Given the age of the children and their clear refusal to communicate, the Father has not in the last three years made any further attempts to contact them.
- [4] On August 27, 2018, the father filed a notice of motion seeking to terminate his obligation to pay child support. The foundation of the application is that his daughters are now both over the age of 19, have refused to have any relationship with him and have failed to provide information concerning their educational plans. In his affidavit filed in support of the application the Father says that he is prepared to provide ongoing support if his daughters are willing to have a relationship with him and provide information establishing they are still dependant.
- [5] The Mother filed an application response and affidavit opposing the Father's application. Both the daughters filed affidavits alleging that they have been estranged from their Father since they were aged 15 and 12. They say that he was emotionally, physically and sexually abusive towards them. In their affidavits, the daughters also state that they both suffer significant mental health challenges and are struggling to pay for their post-secondary education.

- [6] On December 7, 2018, the Mother filed her own application seeking retroactive and ongoing child support, as well as contributions to retroactive and ongoing special expenses, including expenses associated with post-secondary education. She asked that her application be heard concurrently with that of the Father. In her application the Mother notes that there has been no increase in child support since the initial order of June 2004 and that the Father has never contributed to the daughters' extraordinary expenses.
- [7] In responsive affidavits, the Father, who I note is employed as a police officer, and his present partner, with whom he has been in a relationship since 2003, vehemently deny all allegations of abuse set out in the daughters' affidavits. The Father says the allegations of abuse have caused suspensions and lost opportunities with his employer and generally damaged his reputation. He says there should be a full trial so he can clear his name. The Father also says that prior to the present application the Mother had never requested financial information from him.

THE APPLICATION

- [8] The two applications were initially set on the assize list. By requisition dated January 16, 2019, the parties, by consent, asked that the matter be removed from the assize list and put on the chambers list to speak to whether the matter should go to trial or proceed by way of chambers. The chambers judge phrased the issue before him as:
- [3] whether the parties' competing applications can be decided on conflicting affidavit evidence or must be referred to the trial list.
- [9] The chambers judge gave brief oral reasons. After outlining the background circumstances, including the daughters' allegations of sexual abuse and the father's denial of that abuse, he said:
- [5] Ordinarily where conflicting affidavits render a judge unable to make critical findings of fact or where it would otherwise be unjust to determine the issues raised in an application, the judge should decline to hear an application in chambers and refer the matter to the trial list.
- [6] In my view, in the circumstances of this case, while it may be impossible to make certain findings of fact on the conflicting affidavits, these facts will not be "critical" to the outcome, and there is no other reason which would make it unjust to determine the competing applications on the evidentiary record currently before the court. I say this because:
1. the fact that a mature child has unilaterally terminated a relationship with the parent from whom support is sought, is only one of the eight so-called Farden factors typically considered on applications to determine whether the pursuit of education is sufficient cause to render a child over the age of majority unable to withdraw from a parent's charge;
 2. the quality of a mature child's relationship with a payor parent is generally not a significant factor: *Shaw v. Arndt*, 2016 BCCA 78 at para. 29;

3. the conduct of an estranged, mature child is generally only relevant in cases of truly egregious misconduct by a child against a parent: Shaw at para. 29;
 4. in this case, even if the allegations made by the children are not accepted by the court, it is most likely that such a conclusion would be reached based on frailties in their memories or perceptions, rather than on the basis of "egregious misconduct"; and
 5. referring this file to the trial list would be time consuming and expensive for the parties, and subject the children to the prospect of being cross-examined, which would not be in their best interests and likely kill whatever hope, however faint, remains to re-establish a relationship between the children and L.F.R.
- [7] The bottom line is a determination on the current materials, is the proportionate and appropriate way to resolve the financial issues in dispute. Very little would be gained by referring the matter to the trial list.
- [8] I, therefore, dismiss L.F.R.'s application to refer these applications to the trial list. That said, L.F.R.'s position was understandable and, on that basis, the parties will bear their own costs.
- [10] The father now appeals. In his factum he submits that the trial judge erred by:
- a. Failing to properly consider the conduct of the children towards the respondent as being truly egregious.
 - b. In finding a mature child unilaterally terminating the relationship with the parents from whom support is sought is only one of the eight Farden factors as a basis for denying the respondent's application for a trial of the matter and thereby erred in law by incorrectly identifying the issues that would be tried.
 - c. In determining on the materials before him that if the children's allegations against their father are not accepted, this would be reached based upon frailties in their memories or perceptions, rather than on the basis of "egregious misconduct".
 - d. In finding that having [the daughters] being cross-examined would not be in their best interest and would likely kill whatever hope to re-establish a relationship between the father and children as the basis to deny his request for a trial.

DISCUSSION

- [11] As I will set out, both the application before the chambers judge and the appeal were argued on an erroneous premise. At this stage of proceedings, the question before the chambers judge was not whether the applications could be decided on conflicting affidavit evidence or must be referred to the trial list. The proper question was whether the applications raise a triable issue. If the applications raise a triable issue they must be referred to the trial list: British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P., 2017 BCCA 247 [Saputo]; Kerfoot v. Richter, 2018 BCCA 238; and Robertson v. Dhillon, 2015 BCCA 469.

- [12] This conclusion follows from a consideration of the relevant Rules. As noted in the introduction, in defended family law cases that are brought by the filing of a notice of family claim, final orders can only be obtained at a trial or by way of summary trial. If a party subsequently seeks to change a final order he or she must do so by way of application. An application to change or set aside a judgment is by definition a chambers proceeding (Rule 10-3(1)(b)(i)).
- [13] Rule 10-3(7) sets out the powers of the court on the hearing of a chambers proceeding. Rule 10-3(7)(d) gives the court the power to order a trial of the chambers proceeding. That subrule reads:
- (7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may
- (d) order a trial of the chambers proceeding, either generally or on an issue, and order a pleading to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.
- [14] The ordering of a trial of a chambers proceeding does not necessarily mean that a full trial with witnesses is required. Pursuant to Rule 11-3(2)(b) either party may apply for a summary trial in a family law case that has been transferred to the trial list. See also Saputo at para. 47.
- [15] While I note that Saputo concerned a petition, the same principles apply in relation to an application to change a final order. Such applications are of vital importance to the parties, and if they raise a triable issue, must be determined at a trial or summary trial.
- [16] The test as to whether an application should be converted to trial was set out in Saputo at para. 44:

In Robertson, the Court set out the test to determine whether a petition should be converted to a trial:

- [55] On the hearing of a petition, a judge must be satisfied that there is no dispute as to the facts or law which raises a reasonable doubt or which suggests that there is a defence that deserves to be tried: *Douglas Lake Cattle Co. v. Smith* (1991), 54 B.C.L.R. (2d) 52 (C.A.) at 59. If such a dispute exists, the judge may refer the matter to the trial list, pursuant to R. 22-1(7) (former R. 52(11)(d)).
- [56] The test is not that used to determine a summary trial. Rather it is akin to that on an application for summary judgment under R. 9-6. Mr. Justice Lambert summarized the task in *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137 (C.A.) at 138-39:

We were referred by counsel for T & A Holdings Ltd. to the judgment of Esson J. (as he then was) in *Progressive Const. Ltd. v. Newton*, 25 B.C.L.R. 330, [1981] 2 W.W.R. 741, 117 D.L.R. (3d) 591 (S.C.), and particularly at p. 334. There Esson J. summarizes, in my opinion, accurately, the law in relation to establishing a defence on an application for summary judgment in these words [pp. 334-35]:

The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether, on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.

[Emphasis added in original.]

- [17] In this case both the application of the Father and the Mother raise triable issues. They should be referred to the trial list. If the parties cannot agree on the conduct of pre-trial procedures, they should seek directions in the Supreme Court.
- [18] In fairness to the chambers judge, I should point out that it appears, from discussion with counsel at the appeal, who were also counsel in the court below, that the chambers judge was misled in regards to the nature of the application before him. Both counsel proceeded in the court below on the basis that the issue for determination was whether the matter should be heard by way of trial or summary trial. Whether a matter should be heard by summary trial, however, is a completely different question than whether a matter should be put on the trial list.
- [19] Suitability of a matter for summary trial can only arise in the context of an application brought under Rule 11-3(2)(b) after the family law case has been transferred to the trial list. If an application for summary trial is brought, the judge hearing the summary trial application may grant judgment in favour of either party unless on the evidence the judge is unable to find the facts necessary to decide the issues of fact or law or is of the opinion it would be unjust to decide the issues on the application (Rule 11-3(15)). In this case it appears that the judge was attempting to answer those questions as opposed to the question as to whether the matter should be put on the trial list. As I have endeavored to explain, the judge appears to have been led astray by counsels' submissions.
- [20] In the result, therefore, I would allow the appeal, set aside the order of the chambers judge and direct that the two applications be set on the trial list. If further directions are required the parties should make an application in the Supreme Court.

[21] Because of the manner in which this proceeding came forward, I would order that each side pay their own costs both of the appeal and in the court below.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Harris"

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Prepared on 26 October 2026 · Esheria