
CANADA / JUDGMENT

D.K.H. v. M.M.H.

2005 BCSC 1003

COURT

Supreme Court of British Columbia

DECIDED

30 June 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

D.K.H. v. M.M.H.,

2005 BCSC 1003

Date: 20050630

Docket: E011533

Registry: New Westminster

Between:

D.K.H.

Plaintiff

And

M.M.H.

Defendant

Before: The Honourable Madam Justice Fisher

Reasons for Judgment

Appearing on his own behalf:

D. K. H.

Appearing on her own behalf:

M.M.H.

Date and Place of Trial/Hearing:

June 24, 2005

New Westminster, B.C.

- [1] The plaintiff, Mr. H., seeks an order under s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443, requiring that Mrs. H obtain leave of the court before instituting any further proceedings against him in respect of this action. He submits that Mrs. H.'s constant applications subsequent to their family law trial in 2003 are vexatious.
- [2] Mrs. H. opposes this application. She says that all of her actions are in respect of assertions of legitimate legal rights in family law proceedings.
- [3] Section 18 of the Supreme Court Act provides:

If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

Background

- [4] The parties have been involved in these proceedings for many years. In May 2003, they had a three-week trial, where the major issues of dispute between them were resolved. This trial was preceded by much acrimonious litigation. Unfortunately, not much has changed since, except that both parties no longer have counsel.
- [5] The trial concluded with an order of this court awarding custody of the parties' two youngest children to Mr. H., joint guardianship, an equal division of assets and a compensation order against Mrs. H. Madam Justice Humphries noted that the trial

"became one of personalities, and during the three weeks of evidence, far too much unpleasant detail was canvassed." She counted approximately 20 matters over which the parties expressed strongly critical views of each others' behaviour. She referred to complaints made by Mrs. H. about Mr. H. to his detachment of the RCMP and to the Ministry of Children and Families, all of which were investigated and none of which were substantiated. She also referred to Mrs. H.'s complaint of assault against her older son and her behaviour toward her older daughter, both of whom testified against her at the trial, and from whom she is estranged.

- [6] She awarded custody to Mr. H. because the parties could not communicate well enough to make joint custody work, and she found that Mr. H. was more likely than Mrs. H. to make accommodations, facilitate access and exercise a balanced role as custodial parent. However, it was also her view that the children should spend as much time as possible with each parent. She said the issue of primary residence was not, in practical terms, significant. Since the parties were unable to agree and were in constant conflict, she referred the

question of access to the Registrar and directed a schedule that gave Mrs. H. the children 40 to 50% of the time.

- [7] Subsequent to the trial, Mrs. H. filed an appeal, which she later abandoned. She also sought a re-opening of the trial or reconsideration or variation of a number of issues, as set out in a lengthy notice of motion. In supplemental reasons dated September 5, 2003, Madam Justice Humphries clarified and amended certain parts of her order but declined most of the requests. She also made an order that each party bear his or her own costs for the trial. This latter order was based on her assessment of the conduct of both parties in the litigation.

Subsequent proceedings

- [8] Since then, the parties have continued to have serious difficulty. Mrs. H. has launched a number of applications, many to vary provisions of the orders made. With very limited exceptions, which I will outline below, she has been unsuccessful.
- [9] In November 2003, only two months after Madam Justice Humphries made her order, Mrs. H. sent Mr. H. a notice of motion dated November 3, 2003, where she sought a variation of spousal support and child support, an order for contempt and an order for payment of \$5,156 arising from the order. That motion was not filed.
- [10] On November 10, 2003, Mr. H. sought and obtained an order providing for peace officer assistance for him to obtain access to the children. He said he did this because Mrs. H. was continually denying him access to the children during his access times. On November 12, 2003, Mrs. H. filed a motion seeking to set aside the order of November 10, 2003, an order preventing Mr. H from attending at her residence and other relief relating to access, to be reinforced by police if necessary. Mr. H. sought an order permitting him to take the children on a holiday in Alberta for five days, as Mrs. H. refused to allow the children to travel with him. On November 19, 2003, Mrs. H.'s motion was dismissed and Mr. H.'s was allowed.
- [11] On December 3, 2003, Mrs. H. filed a motion, with short leave, seeking a restraining order, with police reinforcement, against Mr. H., an order for payment of specified monies and an order that Mr. H. pay for a ski program for one of the children. This motion was dismissed.
- [12] On February 17, 2004, Mrs. H. filed a notice of abandonment of her appeal of Madam Justice Humphries' order in the B.C. Court of Appeal. On February 19, 2004, she made another motion to vary spousal and child support and seeking similar relief as that set out in the motion she sent to Mr. H. in November 2003 (the "February 19th Application"). She also sought again to set aside or vary the order made November 10, 2003, regarding peace officer assistance. This motion was filed March 12, 2004.
- [13] By way of an order dated April 30, 2004, Mr. Justice Williams made a number of procedural directions relating to the disclosure and exchange of information prior to the hearing of the February 19th Application. Subsequently, in June 2004, Mrs. H. sent another motion to Mr. H. demanding production of documents. This motion was not filed.

[14] The February 19th Application was eventually heard by Mr. Justice Grist on July 2, 2004. Mr. Justice Grist dismissed the application, with the exception of child support, which he increased from \$440 per month to \$490 per month, based on a modest increase in Mr. H.'s income. He also gave some directions regarding settlement of certain property issues.

[15] In the course of his reasons, Mr. Justice Grist expressed some concerns:

Unfortunately, this is a matter that has seen far too much contest over its life and it seems, to my observation, that Ms. H. has made this action a consuming part of her life.

[16] Mrs. H. appealed the order of Mr. Justice Grist to the B.C. Court of Appeal. On February 16, 2005, that court ordered a new hearing on the issue of spousal support.

[17] Meanwhile, Mrs. H. filed a number of requisitions seeking to re-set the hearing of the February 19th Application. It appears this was in respect of the issue arising from the property division and payment of monies by the parties. This matter was eventually heard by Mr. Justice Joyce on April 6, 2005. He determined that Mr. H. owed Mrs. H. \$1,544.84.

[18] At about this time, Mrs. H. requested that one judge be assigned to all applications related to this matter. I was assigned to this task.

[19] On March 29, 2005, following the order of the Court of Appeal, I heard Mrs. H.'s application to vary spousal support. On April 4, 2005, I dismissed the application. I noted that

Mr. and Mrs. H. have been involved in a protracted dispute for many years, which has had a significant impact on their respective financial and emotional resources. None of this has benefited them. Despite their long trial two years ago, Mrs. H. has continued to challenge the judge's decision through applications for reconsideration, variations and an appeal.

Where there has been a marriage breakdown, and here a divorce, the goal of the parties and the court should be to settle the disputes and resolve the issues between the parties so that they may move on with their lives. At some point the parties must accept the decisions that

have been made. Mrs. H. must take whatever steps are necessary to attain self-sufficiency.

[20] Mrs. H. has appealed from this order, as well as the April 6, 2005 order of Mr. Justice Joyce. She brought an application in the Court of Appeal to be granted indigent status on both matters. On May 31, 2005, Mr. Justice Hall, in Chambers, dismissed her application on the basis that the appeals lack merit and have no reasonable possibility of success. Nevertheless, I was advised by Mr. H. that Mrs. H. is still proceeding with those appeals.

[21] Mrs. H. has also made an application to vary the custody order made by Madam Justice Humphries. She prepared a notice of motion, dated January 21, 2005, and filed materials on March 17, 2005. These materials were filed after a case management conference I held with the parties. I reviewed these materials and I advised Mrs. H. that there does not appear to be evidence of a material change of circumstances that would permit a court to vary the custody order. Mrs. H. indicated that she still wished to proceed with that application. It has

not yet been heard.

- [22] Mrs. H. advised the court that she has recently made a further application regarding s. 7 expenses under the federal Child Support Guidelines. There have also been hearings before the Registrar regarding the access schedule and costs.

Mr. H.'s submission

- [23] Mr. H. submits that Mrs. H. will not accept the orders made against her and as a result she continues to launch a series of proceedings to challenge them, without any grounds or merit. He says her continuous applications are virtually the same, and she relies on the same or similar affidavit material each time. She does not put forward evidence of a material change in circumstances to support her applications for variation. Further, she has continually sought production of personal, medical and financial information from him despite the fact that all of these issues were addressed in detail at the trial, which concluded over two years ago.
- [24] Mr. H. says that Mrs. H.'s continued litigation is not in the best interests of the children or either party. She continues to make allegations against Mr. H., which he says are unfounded, to demonstrate that he is an unsuitable custodial parent. He describes her behaviour towards him as harassing and intimidating. He says she has become obsessed with her continued litigation and there is a troubling pattern of persistent, vexatious proceedings. He submits that Mrs. H. is abusing the court process and she will not relent until she obtains the orders she wants.
- [25] Mr. H. says that all of this is taking a toll on his health, his emotional well being and the quality of his relationship with his children. He is constantly responding to Mrs. H.'s applications, whether filed or not, and preparing for court appearances. He has been on stress leave from his employment since early June, but hopes to return to work at the end of the month.
- [26] Mr. H. referred to the principles established by Mr. Justice Henry of the Ontario High Court of Justice in *Re Lang Michener et al. and Fabian* (1987), 59 O.R. (2d) 353:
- a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
 - b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
 - c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

- d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
 - e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
 - f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
 - g) the Respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.
- [27] Applying these principles, Mr. H. submits that the proceedings brought by Mrs. H. are vexatious, as she has brought and continues to bring applications regarding matters that the court has already dealt with and which have little or no likelihood of success. She continues to raise issues of credibility that were determined at trial. She is consumed by this litigation and is not willing to accept the court's direction. He is mindful that an order under s. 18 is a drastic measure, but he submits this is a drastic situation.
- [28] He submits that the only option is to put some sort of control on a situation that is out of control. He does not know what else to do. He does not seek to limit Mrs. H.'s ability to raise legitimate legal rights, but he does ask that she be required to obtain leave of the court before she brings on any applications in this matter.

Mrs. H.'s submission

- [29] Mrs. H. submits that Mr. H.'s affidavit contains false statements and misleading information. She says that several exhibits attached to Mr. H.'s affidavit are draft orders or motions only, and this gives a false impression of the number of applications that have gone forward. She says that since the trial, she has had difficulty getting Mr. H. to sign orders, which causes her to write letters to the Court Registry. She also cites problems with the access schedule.
- [30] Mrs. H. submits that the parties have spent extensive time in court because Mr. H. insisted on proceeding to trial, when she wanted to settle. She said Mr. H. blew this out of proportion and she had to defend herself before and at trial against his accusations and threats. She said his actions prevented the trial from being fair and as a result, the court did not have a chance to hear her points. She says it was a "big mistake" that Mr. H. was awarded custody of the two youngest children.
- [31] Despite this, Mrs. H. says that she accepted the court's decision. She said she abandoned her appeal because she was scared, she had no money and no lawyer.

- [32] She pointed out that Mr. H. did not include in his material applications that he made. She stressed that he made the first court application after the trial. She referred to his application of November 10, 2003, regarding police assistance and his application for permission to take the children to Alberta. She also referred to a motion dated September 26, 2004, which was not filed and did not proceed to court, and a few other matters regarding costs or that relate to the Court of Appeal.
- [33] Essentially, Mrs. H. submits that none of her applications are vexatious and that her purpose is to assert legitimate legal rights. She says she is acting in the best interests of her children. She also relied upon the principles enunciated in *Re Lang Michener*, supra, and she referred to *Koyama v. Leigh*, 2001 BCSC 164, a decision of this court that applied the principles to a family law proceeding.
- [34] Mrs. H. argues that while some of her applications have been heard many times, she has not brought any one application more than once. She emphasized that the issues in family law matters are never final. She pointed out that her application to increase child support, based on a change of circumstances, was successful, as was her appeal regarding spousal support. She says she has no vexatious intention and she does not harass Mr. H. She submits that the court must look at the whole history of the matter, not just what has occurred after the trial. She referred to the comments of Mr. Justice Bauman in *Koyama v. Leigh*, supra, at paragraph 98, that an order under s. 18 is a drastic measure, and a power that should be exercised with great caution.

Analysis

- [35] I agree with Mrs. H. that an order under s. 18 of the Supreme Court Act is a drastic measure, and it is a power to be exercised with great caution, particularly in family law proceedings. I also agree with Mr. H. that the current situation is one that requires a drastic measure. I have considered the whole history of this matter, much of it described by Madam Justice Humphries in her reasons for judgment dated May 29, 2003, and her supplementary reasons dated September 22, 2003, and the continued litigation since then. Based on all of the evidence before me, I am satisfied that Mrs. H. has habitually, persistently and without reasonable grounds, instituted vexatious proceedings in this court against Mr. H.
- [36] In my opinion, Mrs. H. has persisted in bringing numerous applications to determine issues that have already been determined by this court. In almost all instances, it is obvious that her applications cannot succeed or no reasonable person could expect to obtain relief. With the exception of clear financial information related to child support, she has no grounds to allege material changes in circumstances that would permit a judge to vary the orders made two years ago. While I am of the view that Mrs. H. sincerely believes that she is asserting legitimate legal rights, she is really bringing these applications because she does not accept the orders made by this court. She stated during her submission that she believes the trial was unfair and the court was wrong to award custody to Mr. H. Rather than proceed with an appeal, she has launched applications to re-hear, reconsider or vary the orders, and she has

sought restraining orders and orders for contempt against Mr. H. She makes the same allegations against Mr. H. as she made at trial, offering no proper evidence to support her allegations. In my view, this is not a proper purpose. This, combined with the constant and unrelenting pattern of serving and filing motions, whether those motions are draft or final, constitutes harassment of Mr. H. as a party in this litigation. Further, she continues to pursue her appeals of my order and the order of Mr. Justice Joyce despite Mr. Justice Hall's comments that they lack merit and have no reasonable possibility of success.

- [37] Based on the principles established in *Re Lang Michener*, *supra*, the proceedings taken by Mrs. H. since the trial are vexatious. These principles have been applied by this court in a number of cases: *British Columbia (Attorney General) v. Morrow*, [1988] B.C.J. No. 1147 (S.C.), *British Columbia (Public Trustee) v. McGreal*, [1993] B.C.J. No. 873 (S.C.), *Hoban v. Draymond*, [1996] B.C.J. No. 2506 (S.C.), *British Columbia (Public Guardian and Trustee) v. Brown*, 2002 BCSC 1152, *Hnidan v. Smith* (1992), 70 B.C.L.R. (2d) 51 (S.C.), *Koyama v. Leigh*, *supra*, *M.S. v. P.I.S.*, [1997] B.C.J. No. 2216 (S.C.), *aff'd* (1998), 60 B.C.L.R. (3d) 232 (C.A.) and *K.K.S. v. C.S.S.*, 2004 BCSC 1011.
- [38] In *British Columbia (Public Guardian and Trustee) v. Brown*, *supra*, Mr. Justice Halfyard set out two distinct elements that must be established on a s. 18 application. The first is that the proceedings taken must be "vexatious". This means that the proceedings are annoying, irritating, distressing or harassing and include as an essential aspect that they are taken without reasonable grounds.
- [39] The second element is that there must be a knowing and deliberate repetition or continuation of the vexatious conduct. It is not necessary that the respondent on such an application knows that his or her conduct is vexatious, but rather that the conduct would be viewed as such on an objective basis. In other words, would a reasonable person in the same circumstances believe that Mrs. H.'s conduct was vexatious?
- [40] In my opinion, both of these elements are present in this case.
- [41] I have carefully considered these principles in the context of family law proceedings. In *Koyama v. Leigh*, *supra*, Mr. Justice Bauman found that the family law litigation was out of control. In 1995, the parties had a five day divorce trial before Mr. Justice MacDonald. Mr. Leigh refused to settle the order, and he appealed the decision to the Court of Appeal. His appeal was dismissed. He also applied to vary the order for child maintenance. That application was dismissed, and the security for maintenance was increased from \$20,000 to \$200,000. Mr. Leigh then sought variation of other aspects of Mr. Justice MacDonald's original order. He was unsuccessful, except that the security was reduced to \$75,000. Mr. Leigh appealed that order. The Court of Appeal directed that the parties attempt mediation through the offices of the Family Advocate, who observed that there were issues that could not be resolved by mediation.

[42] Mr. Leigh then sought variation of the child support order, variation or elimination of the security order and relief against Ms. Koyama's lawyer. In response, Ms. Koyama brought on a s. 18 application. Mr. Justice Bauman concluded that Mr. Leigh did not establish any material change in circumstances such as to justify a variation in child maintenance. He also dismissed the motion

seeking relief against the lawyer. He granted the order under s. 18. He recognized what Madam Justice Ryan (then of this court) said in *Hnidan v. Smith*, supra, that such an order is a "drastic measure" and a power to be exercised with great caution. However, he concluded that this was an appropriate case to make an order restraining Mr. Leigh from instituting a legal proceeding against Ms. Koyama or the lawyers named, without leave of the court.

[43] *Hnidan v. Smith*, supra, involved protracted proceedings in both this court and Provincial Court. The father brought an action seeking relief under the Family Relations Act. Before this, there had been a plethora of applications in Provincial Court. All of the applications involved issues of custody and access to the parties' child. There were also allegations of sexual abuse against the father. The father also made various complaints to professional bodies about the conduct of the doctors and lawyers involved in the case.

[44] Madam Justice Ryan made the following comments about s. 18 applications in the family law context:

The complicating factor in this matter is that matters of custody and access to children are never closed. In *Foote v. Foote*, [1988] B.C.J. No. 278, the Court of Appeal said that:

One cannot foresee the future and it should always be open to a parent to apply for custody or access in the light of changed circumstances and in the best interests of the child.

It is a difficult task to determine the point when a parent has crossed the line between genuine concern for his child in seeking to change terms of custody and access and where the applications to the court have become the vindictive acts against the other parent. In this case Judge d'A Collings has determined in the Provincial Court that Mr. Hnidan's acts have crossed that line. As I mentioned the judgment is under appeal to this court.

An order pursuant to s. 16 of the Supreme Court Act is a drastic measure. It should only be made in the clearest of cases. In *Household Trust Company v. Golden Horse Farms Inc.*, [1992] B.C.J. 652, No. CA012331, March 27, 1992, Southin, J.A. said: (p. 12)

... That it is a jurisdiction to be exercised with great caution, I have no doubt. But not to exercise it where there is no other way to bring reason into proceedings is, in effect, to deprive the plaintiff or petitioner of justice according to law. The court if it fails to act becomes but a paper tiger.

- [45] Madam Justice Ryan agreed that Mr. Hnidan's behaviour in the past appeared to fit within the first, third and fourth propositions outlined in *Re Lang Michener*, supra. However, she noted that s. 16 (now s. 18) is meant to govern future proceedings. Because she was advised that Mr. Hnidan was ready to abandon this action, she was not convinced that he would not behave reasonably in the future. Accordingly, in those circumstances, she declined to make the order.
- [46] Matters of custody and access to children are never closed. However, that does not mean that the issues in family law matters are never final. While it is open to a parent to apply for custody or access in light of changed circumstances and in the best interests of the children, it is not open to a parent to make continuous applications where circumstances have not changed.
- [47] In my view, the circumstances of this case are similar to those in *Koyama v. Leigh*. This litigation is out of control. Mrs. H. has crossed the line between genuine concern for her children and making applications that have become vindictive acts against Mr. H. She does not recognize the futility of her persistent applications and there is no evidence that she is prepared to abandon her pending application to vary custody, despite a lack of grounds, or to refrain from bringing on more applications.
- [48] In my view, there is no other way to bring reason into these proceedings. In Madam Justice Southin's words, not to exercise the jurisdiction of this court under s. 18 will deprive Mr. H. of justice according to the law.
- [49] Accordingly, there will be an order that Mrs. H. must not, without leave of the court, institute any further applications or proceedings against Mr. H. in respect of this action. This does not mean that Mrs. H. is prevented from asserting legitimate legal rights. However, she may only do so if leave is first granted. Mrs. H. will not be required to give notice to Mr. H. of any leave application unless I otherwise order. This order will apply to all pending and future applications.
- [50] Mr. H. is entitled to the costs of this application on Scale 2.

"B. Fisher, J."

The Honourable Madam Justice B. Fisher

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