
CANADA / JUDGMENT

D.L.T. v. K.K.M.

2019 BCCA 212

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 212 D.L.T. v. K.K.M.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

D.L.T. v. K.K.M.,

2019 BCCA 212

Date: 20190401

Docket: CA45704

Between:

D.L.T.

Appellant

(Claimant)

And

K.K.M.

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Abrioux

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

October 29, 2018 (D.L.T. v. K.K.M., 2018 BCSC 1862, Vancouver Docket E131162).

Oral Reasons for Judgment

The Appellant, appearing in person:

D.L.T.

The Respondent, appearing in person:

K.K.M.

Place and Date of Hearing:

Vancouver, British Columbia

April 1, 2019

Place and Date of Judgment:

Vancouver, British Columbia

April 1, 2019

Summary:

The appellant father appeals from an order which varied prior orders to (1) permit the respondent mother to continue seeing a Registered Clinical Counsellor ("RCC") rather than a psychologist or psychiatrist, and (2) require the father to contribute to their child's tutoring expenses. Held: Appeal dismissed. The father showed no error in the findings of the chambers judge, which were heavily rooted in factual findings and discretionary determinations. The chambers judge did not err in finding that the RCC was qualified to provide the type of assistance contemplated by the order or in finding that the father's belief that the RCC was biased was unfounded. It was open to him to find that the modest tutoring expenses were reasonable given the appellant's financial situation and that the expenses were extraordinary and necessary. The evidence that the child's performance in school had improved with the benefit of tutoring constituted a change in circumstances from the prior order, justifying variation. As the appellant showed no reversible error, the appeal was dismissed.

I. Overview

- [1] FITCH J.A.: This is an appeal from an order of Justice Grauer pronounced October 29, 2018, in a high-conflict family matter. The dispute concerns parenting and child support obligations for the parties' seven-year-old daughter, J.T (the "Child"). The appellant, D.L.T. (the "Father") and the respondent, K.K.M. (the "Mother") are both self-represented.

- [2] On appeal, the Father seeks to have set aside two terms of the chambers judge's order. The first addresses the Mother's need for therapeutic assistance and the means through which that assistance will be provided. The second addresses the Father's obligation to contribute to the Child's tutoring expenses.

II. Background

1. The Consolidated Order

- [3] The parties lived together for about 18 months. They never married. They separated in 2012 when the Child was about one year old. Their dispute over parenting and child support proceeded to trial before Justice Gray in July and August 2015. Her reasons for judgment are indexed as 2015 BCSC 1771. Following further applications, she consolidated her previous orders into her order of March 1, 2017 (the "Consolidated Order").

2. The June 29, 2018 Order

- [4] In late 2016, the Mother became concerned that the Father was inappropriately touching the Child. Justice Gray ordered a report to be prepared under s. 211 of the Family Law Act, S.B.C. 2011, c. 25. The report, dated March 21, 2018, was prepared by Robert Colby, a psychologist. No evidence of inappropriate touching emerged and Mr. Colby found that the Father did not pose a risk to the Child. He made a number of recommendations, including a shared parenting arrangement, shared guardianship, and therapy for the Mother.
- [5] The Father applied to vary the Consolidated Order following the receipt of Mr. Colby's report. As Gray J. had retired, the application came before Grauer J. (the "Chambers Judge") on June 26 and 27, 2018. The Mother was represented by counsel on this application.
- [6] On June 29, 2018, in oral reasons for judgment indexed as 2018 BCSC 1133, the Chambers Judge varied the Consolidated Order and made a new order (the "June 29 Order") that included the following terms:
- a) the Father's applications for sole guardianship and for an order temporarily limiting the Mother's parenting time to supervised access were dismissed;
 - b) the parties were to have shared parenting time;
 - c) the Mother was to engage at least once a month with a registered psychologist or psychiatrist, as per Mr. Colby's recommendation;
 - d) the Child was to commence play therapy with a licensed play therapist;
 - e) the costs of Mr. Colby's report were to be shared equally; and
 - f) on an interim basis, the Father was to pay child support of \$409 per month (at the time of the Consolidated Order the Father had been unemployed, but disclosed at the hearing that he was now earning \$85,000/year).

- [7] The Father appealed from parts of the June 29 Order, including the failure to order supervised parenting time, the order that the parties share equally the costs of Mr. Colby's report, and the failure to order the Mother's therapist to provide him with written progress reports. The appeal was dismissed on January 22, 2019 in oral reasons for judgment indexed as 2019 BCCA 13.
3. The October 29, 2018 Order
- [8] This appeal arises from two applications filed by the Mother on October 1, 2018. She sought various orders regarding s. 7 expenses, therapy for both parents and the Child, dental treatment for the Child, telephone communication with the Child, a restraining order preventing the Father from making further applications without leave of the court, the involvement of the maternal grandfather and the Child's older half-sister in exchanges of the Child, and which parent should have the default decision-making power.
- [9] The Father also filed an application on September 27, 2018, returnable on the same date as the Mother's applications. Among other things, he sought an order finding the Mother in contempt for seeing a registered clinical counsellor ("RCC"), Dr. Martin Pinaud, rather than a registered psychologist or psychiatrist. Although the Father's application was filed contrary to the Chambers Judge's express directions in a pre-hearing conference, he granted one order the Father sought with the consent of the Mother for a minor variation of an earlier order. The other orders the Father sought "became largely superfluous" following resolution of the Mother's applications.
- [10] The Chambers Judge made a wide range of orders on October 29, 2018 (the "October 29 Order"). His reasons for judgment are indexed as 2018 BCSC 1862. Among other things, he varied the Father's child support obligations in accordance with his increased income, varied his June 29 Order to permit the Mother to continue seeing Dr. Pinaud rather than a registered psychologist or psychiatrist, varied the Consolidated Order by ordering that the Father share in the Child's tutoring expenses and by lifting a prohibition on the maternal grandfather from participating in exchanges of the Child, ordered the Father to undergo counselling, dismissed the Mother's application for a restraining order under s. 221 of the Family Law Act preventing the Father from filing further applications without leave of the court, and ordered costs against the Father.
- [11] The only parts of the October 29 Order that are under appeal are those concerning therapy for the Mother and special expenses for tutoring referred to as the "Kumon expenses". I will address those issues now.
- (a) The Kumon Expenses

- [12] The Mother sought to vary the Consolidated Order in relation to the Child's Kumon expenses of \$130 per month. On February 11, 2016, Gray J. ordered that the Mother could enroll the Child in Kumon tutoring classes so long as she was responsible for the entire cost and so long as the classes did not occur on the Father's parenting time (the "First Kumon Order"). This order was incorporated into the Consolidated Order.
- [13] In an affidavit filed for use on the applications, the Mother said the Child started having problems in school in July 2017, well after the Consolidated Order was made. She said the Child's teacher spoke to the parties in a parent-teacher meeting and advised them that the Child needed supplemental help with school work. The Mother's evidence on this point does not appear to have been contested by the Father. The Mother immediately enrolled the Child in remedial reading courses. Her evidence was that the Child's reading has improved since obtaining tutoring. She pointed to the Child's report cards to support her argument and, in particular, to improvements the Child has demonstrated since January 2018. She submitted that the Father should contribute to these expenses proportionate to their respective incomes.
- [14] The Chambers Judge noted the Father's opposition to contributing to the Kumon expenses, but nonetheless found that they were proper s. 7 expenses and ordered the Father to contribute to them (the "Kumon Order"). He stated:
- [25] The claimant maintains that these [expenses] are not necessary, and that if the respondent insists on tutoring, she should have her "rich parents" pay for it (there is no evidence as to their economic status). He states that he cannot afford such expenses on top of all his other expenses.
- [26] I am not persuaded. The respondent has satisfied me that these are proper expenses to be incurred, and indeed, they are precisely the sort of expense contemplated by section 7 of the Guidelines. The amount is not excessive, and the obligation towards JT is that of the claimant, not the respondent's parents, rich or poor.
- [27] Given that circumstances have changed considerably since the consolidated order, with the claimant now being fully employed and earning an income in excess of \$113,000, I find it appropriate to vary the consolidated order. In keeping with the parties' relative incomes, I order the claimant to reimburse the respondent for 72% of the monthly Kumon expenses for JT.
- [28] The respondent further seeks an order requiring the claimant to participate in the Kumon program actively. The claimant advised me that he works with JT while she is with him to complete the Kumon homework, and I accept him at his word in this regard. I make no further order.
- (b) Therapy for K.K.M.

- [15] The Consolidated Order provided that the Mother was to attend monthly "personal counselling" appointments. The June 29 Order of the Chambers Judge varied the Consolidated Order by requiring the Mother to attend monthly appointments with a registered psychologist or psychiatrist, in accordance with Mr. Colby's recommendation.
- [16] The Mother sought to have this provision of the June 29 Order varied to permit her to continue to receive counselling from Dr. Pinaud. She said she had a long and well-established clinical history with Dr. Pinaud and was able to afford his fees. She did not want to see a different therapist.
- [17] The Father was opposed to varying the order to permit the Mother to continue to see Dr. Pinaud, in part because he did not believe that Dr. Pinaud had the required qualifications, and in part because he was concerned that Dr. Pinaud believed the unfounded allegations the Mother had made against him.
- [18] The Chambers Judge granted the variation in the terms sought (the "Therapy Order"). He stated:
- [34] The claimant has been deeply concerned about the respondent's psychological status, and objects to any change. Their history has given him some cause for his concern, and I discussed some concerns of my own in my previous reasons. Nevertheless, he seems to have become rather fixated on the question, trying to control matters that are not for him to control. At the previous hearing, he sought an order limiting the respondent to supervised access until she had received sufficient psychological treatment, with the psychologist to make monthly reports of her progress directly to him, notwithstanding that Mr. Colby recommended joint guardianship and shared parenting. I dismissed that application.
- [35] The claimant points out that Mr. Colby's recommendation was made with full knowledge that the respondent had, in the past, undergone counselling with Dr. Pinaud. He objects that Dr. Pinaud had told Mr. Colby that he did not think the respondent had made up the allegations against the claimant, and that Dr. Pinaud believed those allegations to be true.
- [36] This last point is not quite correct. In the part of his report to which the claimant refers, Mr. Colby was referring to what a ministry social worker had reported in 2016. Mr. Colby did speak to Dr. Pinaud, but noted only that Dr. Pinaud indicated that he had not seen the respondent for some months, and had kept no records. He therefore provided no input. Since then, however, the respondent has resumed counselling with Dr. Pinaud and has given him the section 211 reports, which deal with the allegations.
- [37] What I said in my earlier reasons for judgment was this:

- [21] The claimant further applies for an order concerning the respondent's therapy. The existing order provides in clause 1.15(c) that "the mother is ordered to continue to pursue personal counselling, attending appointments at least once every month". It now appears that although the respondent saw a psychologist, Dr. Pinaud, for several years, she was unable to continue that therapy, and then began seeing a clinical counsellor. That too, has stopped.
- [22] Given the circumstances I described above, and the findings of both Dr. Krywaniuk [the author of the first s. 211 report] and Mr. Colby, I agree that it is urgent that the respondent obtain regular qualified assistance. I therefore order that, as recommended by Mr. Colby, the respondent engage with a registered psychologist or psychiatrist who is to maintain an active and vigilant observation of her status. Her appointments should be at least once a month, and should commence (subject to availability) within 42 days of today.
- [38] I continue to believe, as I did then, that the respondent needs to obtain regular qualified assistance. But I am satisfied that Dr. Pinaud is qualified to provide that assistance, and I did not find otherwise before. My previous order was based on Mr. Colby's recommendation in combination with Dr. Pinaud's apparent unavailability. The evidence before me now indicates that he is available and that the therapy has resumed.
- [40] Autonomy of choice in terms of such matters as medical treatment and psychological counselling is of the greatest importance if the treatment is to be successful. Given that the evidence I have now seen [sic], I am satisfied that it is appropriate, and in the best interests of both of the respondent and her daughter, that my order be varied in order to permit the respondent to continue therapy with the qualified counsellor of her choice, in this case Dr. Pinaud. I continue to require that she see Dr. Pinaud at least monthly, so that he can maintain an active and vigilant observation of her status, and I direct that she provide him with a copy of these Reasons for Judgment. I further direct the respondent to obtain a letter from Dr. Pinaud within 90 days, to be filed with the court, confirming ongoing therapy, and outlining the goals of that therapy.

[Emphasis added.]

III. Issues on Appeal

- [19] The Father appeals from the Kumon Order and the Therapy Order. With respect to the Therapy Order, he says the Chambers Judge erred in not considering the best interests of the Child when "lowering the standard of care" for the Mother, finding that Dr. Pinaud was qualified to provide assistance to her, and finding that Dr. Pinaud was not biased against him. With respect to the Kumon Order, he says the Chambers Judge erred in misapprehending the evidence of the Child's report cards, finding that the tutoring expense was extraordinary and necessary, and finding that the Father had the financial means to bear the expense without considering his debt.

IV. Standard of Review

- [20] An appellate court must show deference to a judge's findings of fact and factual inferences in a family law matter and will not reverse them unless there is palpable and overriding error or a fundamental mischaracterization or misapprehension of the evidence: *Rick v. Brandsema*, 2009 SCC 10 at para. 30.
- [21] On questions of law and principle, the standard of review is correctness: *Fleetwood v. Percival*, 2014 BCCA 502 at para. 9.
- [22] Where a judge is required to exercise discretion, an appellate court will give considerable deference to the judge and interfere only where the judge acted on a wrong principle or failed to give sufficient weight to all relevant considerations: *Fleetwood* at para. 9.

V. Analysis

1. The Therapy Order

- [23] The Father objects to the Mother being permitted to see Dr. Pinaud. In my respectful view, however, he has not shown any error in the Chambers Judge's decision that Dr. Pinaud was an appropriate counsellor for the Mother.
- [24] First, the Father says that Dr. Pinaud is not qualified to give the Mother the care she needs, and that as a result, allowing the Mother to continue to receive counselling from him is not in the best interests of the Child. He says the Chambers Judge misapprehended evidence suggesting that Dr. Pinaud inappropriately aligned himself with the Mother's cause by concluding she would not "make up" allegations of inappropriate touching. He says there was no evidence before the Chambers Judge regarding Dr. Pinaud's qualifications, such as a CV or a third-party expert report opining that an RCC can provide an equal standard of care to a registered psychologist or psychiatrist. He says that Mr. Colby, who recommended that the Mother see a registered psychologist or psychiatrist, is best qualified to determine the type of mental health treatment she needs. While the Father acknowledges that the Mother's freedom of choice is important, he says she should not be allowed to choose a therapist with lesser qualifications.
- [25] I am unable to accept the Father's arguments on this issue.
- [26] First, when the June 29 Order was made, the Chambers Judge was not aware that the Mother had continued to see Dr. Pinaud. Further, the Chambers Judge was operating on the mistaken belief that Dr. Pinaud was not available to treat the Mother. In my view, the Chambers Judge implicitly concluded that the availability of Dr. Pinaud materially changed the ability of the Mother to meet the Child's needs and that the previous order might have been different had the actual circumstances been known when the June 29 Order was made.
- [27] The Chambers Judge was certainly not bound to follow Mr. Colby's recommendation as to what kind of mental health professional the Mother should see, nor was he obliged to seek out the kind of evidence the Father refers to in order to assess Dr. Pinaud's qualifications. He

was satisfied that it was "of the greatest importance" for the Mother to continue seeing a professional with whom she had a strong therapeutic relationship "if the treatment is to be successful." The rationale behind imposing the counselling condition was, of course, the promotion of the Child's best interests and I am satisfied the Chambers Judge remained focused on that issue throughout his reasons.

- [28] The Chambers Judge did not misapprehend the evidence on the question of Dr. Pinaud's ability to provide the Mother with impartial and professional counselling service. Rather, he simply pointed out that Dr. Pinaud never expressed any view to Mr. Colby about whether the Mother was the sort of person who would "make up" such a serious allegation. In advancing this argument, the Father relies on hearsay in Mr. Colby's report including a reference he made to notes prepared by a social worker that Dr. Pinaud did not believe the Mother would "make up" allegations against the Father. The statement appears to have been made in late 2016.
- [29] I make two observations about this ground of appeal. First, there is a world of difference between opining that someone would be unlikely to "make up" or fabricate a claim of abuse and accepting that a concerned parent with mental health challenges might raise a concern that is later determined to be unfounded. I have no doubt that Dr. Pinaud understands that distinction. More importantly, Dr. Pinaud has since been given a copy of the s. 211 report which exonerates the Father, and the Mother was directed to give Dr. Pinaud a copy of the Chambers Judge's October 29 reasons for judgment. These documents make clear that the Father has been cleared of the allegations. Dr. Pinaud could not now be operating under a different impression. I see no reversible error in the approach of the Chambers Judge to this issue.
- [30] At the end of the day, there was a basis upon which the Chambers Judge could vary this term of the order and his decision to do so engages the exercise of discretion. In my view, the Father has not shown any basis upon which this Court could interfere with the order made below.
- [31] I wish to be clear that I come to this conclusion without considering evidence the Father seems to have produced for the first time on appeal, a webpage titled "What is the difference between Psychologists, Psychiatrists and Counsellors?" apparently taken from the website of the BC Psychological Association. Appellants are not permitted to adduce fresh evidence on appeal unless they bring a motion to adduce that evidence. That was not done in this case. I emphasize that even if I had considered this evidence I would have reached the same conclusion.

2. The Kumon Order

[32] The Father raises a number of objections to the Kumon Order, including that the Child does not need a tutor, that he has never approved of her having a tutor, and that he cannot afford to pay for a tutor. He says that the expenses are neither extraordinary nor necessary. Further, he submits there was no material change in circumstances since the making of the Consolidated Order that justified varying it.

[33] In support of this ground of appeal, the Father says first that the Chambers Judge misapprehended the evidence by finding that the Child's report cards show she needs remedial tutoring. He says the report cards show she is doing well in school. I am not persuaded by the Father's argument on this issue. If anything, the report cards -- which show an improvement in the Child's grades between January and June 2018 -- demonstrate that the tutoring is having its intended effect. The June 2018 report card comments on the "great progress in reading" the Child has made. In any event, the report cards were not the only evidence before the Chambers Judge concerning the need for tutoring. The Chambers Judge also referred to the Mother's affidavit, in which she deposed that the Child had been having problems in school but had improved with the benefit of tutoring. In my view, the Father has not shown any error in the Chambers Judge's assessment that tutoring was a necessary expense.

[34] Second, the Father says that the Chambers Judge erred in finding that the Kumon expenses were extraordinary because the Child has no learning disabilities and the tutoring subjects are ordinary. In my view, the Father's argument on this point misconstrues the meaning of the word "extraordinary". The definition of "extraordinary expenses" is set out at s. 7(1.1) of the Federal Child Support Guidelines, SOR/97-175:

(1.1) For the purposes of paragraphs (1)(d) and (f), the term extraordinary expenses means

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and

(v) any other similar factor that the court considers relevant.

[35] In *McLaughlin v. McLaughlin* (1998), 167 D.L.R. (4th) 39 (B.C.C.A.) at paras. 81-82 this Court noted that a wide range of variables should be considered in determining whether an expense is extraordinary, including "the combined income of the parties, as well as the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the children, and the overall cost of the activities": at para. 81. This list was not intended to be exhaustive. The cost of tutoring in this case is very modest, at \$130 per month. It is the only cost-related educational supplement the Child is receiving. In addition, at the time of the Mother's application the parties had a combined income of \$156,000 per year.

[36] In my view, the Father has not shown any error in the Chambers Judge's assessment that the tutoring expense was extraordinary. The Father's arguments appear to go to the factors identified in ss. 7(1.1)(b)(ii) and (iii): the nature of the educational program and the special needs of the child (or more accurately, what he says are her lack of special needs). However, the nature of the program and the Child's special needs are only two factors among many that the Chambers Judge was entitled to consider in determining that the expense was extraordinary. Moreover, it was also open to the Chambers Judge to find that the expense was extraordinary because it exceeded the amount that the Mother was reasonably able to pay pursuant to s. 7(1.1)(a).

[37] The Father next says that the Chambers Judge failed to adequately consider his debt load in determining that he had the financial means to contribute to the expenses. I am not persuaded that the Chambers Judge erred in not specifically referring to the Father's debt in his reasons. The authorities the Father refers to, *Bodine-Shah v. Shah*, 2014 BCCA 191 at para. 66 and *Delichte v. Rogers*, 2013 MBCA 106 at para. 38, both state that the court may or can consider the parties' debts along with a number of other factors in determining their financial means. The Father has not pointed to any authority for the proposition that a chambers judge's failure to refer specifically to a parent's debt in determining that an expense is reasonable constitutes reversible error.

[38] Here, the Chambers Judge was aware of the Father's financial situation, including his debt, but determined that he could afford an extraordinary educational expense that amounts to less than \$100 per month on his income of \$113,000 per year. The Father has not shown any basis upon which this Court could interfere with his finding on that point.

[39] The Chambers Judge found that "circumstances have changed considerably since the consolidated order, with the claimant now being fully employed and earning an income in excess of \$113,000". Although not framed as a discrete ground of appeal, the Father says the Chambers Judge erred in finding that there had been a change in circumstances. He points out that the First Kumon Order was pronounced on February 11, 2016, a year earlier than the Consolidated Order. At that time, he says he was earning \$115,000.

[40] I am not persuaded that the Chambers Judge made a palpable and overriding error that had an impact on his decision. Even accepting the Father's position that his income had not changed, what had materially changed was the Child's progress in school and her need for supplementary educational assistance.

VI. Conclusion

[41] For the foregoing reasons, I would dismiss the appeal with costs on a party to party basis to the Mother.

[42] GROBERMAN J.A.: I agree.

[43] ABRIOUX J.A.: I agree.

[44] GROBERMAN J.A.: The appeal is dismissed. We are also in agreement that the judgment, when published, will be initialized.

"The Honourable Mr. Justice Fitch"

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