

CANADA / JUDGMENT

DeFehr v. DeFehr

2002 BCCA 139

COURT

British Columbia Court of Appeal

DECIDED

20 February 2002

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2002BCCA0139 Citation: DeFehr v. DeFehr Date: 20020220 2002 BCCA 139 Docket: CA028740
Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA ORAL REASONS FOR
JUDGMENT Before: The Honourable Madam Justice Newbury February 20, 2002 The Honourable
Mr. Justice Hall The Honourable Madam Justice Levine Vancouver, B.C. BETWEEN: MOIRA ANN
DEFEHR also known as MOIRA ANN HUBBARD PLAINTIFF (RESPONDENT) AND: CURTIS WADE
DEFEHR DEFENDANT (APPELLANT) C.W. DeFehr Appellant appearing on his own behalf F.
Nudel appearing for the Respondent T. Mason appearing for the Attorney General of British
Columbia

- [1] LEVINE, J.A.: This application is for review of an order made by Lambert J.A. on December 4, 2001, dismissing the appellant, Curtis Wade de Fehr's, application for funding for counsel to assist with his appeal and the cost of transcripts. The appeal is from orders for custody and access of the four children of him and the respondent, Moira Ann Hubbard (also known as Moira Ann DeFehr), made by Loo J. in March and June, 2001.
- [2] The appellant was granted indigent status by Rowles J.A. on August 14, 2001. He then brought an application for funding for counsel and the cost of transcripts for the appeal. On October 25, 2001, Mackenzie J.A. ordered that the Attorney General provide funding for counsel designated by the Legal Services Society to argue the application, and set the matter to be heard peremptorily for December 4, 2001.
- [3] On December 4, the appellant appeared without counsel. He claimed that the Attorney General's department delayed the process and did not produce the required certificate on time. Lambert J.A. said that "on balance it was Mr. DeFehr who made it difficult to get counsel appointed." When asked whether he wanted to proceed with the application for counsel, the appellant responded that because of the interests of the children he did not wish to delay and wished to proceed with the argument. Counsel for the Attorney General and the respondent provided some information and outlined the basic nature of the case.

- [4] Lambert J.A. said (at para. 6): Mr. DeFehr's argument did not seek to make the very difficult points in relation to s. 7 and s. 11 of the Charter of Rights. I would not be quick to assume that any rights could be established and, indeed, Ms. Mason has said that the Attorney General very much opposes the argument that there are any rights to public funding in this kind of matter, or that there is any basis in the Charter for supporting such rights.
- [5] He continued (at para. 7): Balancing the interests of justice and bearing in mind the particular interests of the children, and the uncertainty caused by this appeal to them, and having regard to the fact that the points in the appeal are entirely different from the points on this application...it is my opinion that the application for funding of the legal services of the appellant in the appeal itself should be dismissed, and I so order.
- [6] A review of the decision of a chambers judge by a panel of this Court is not a rehearing of the original application. The test for review is: was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts. If the chambers judge did not commit any of those errors, then the division of the court in review should not change the order of the chambers judge: *Ward v. Clark*, [2001] B.C.J. No. 901 (C.A.)(QL), 2001 BCCA 264 (Donald J.A.); *Haldorson v. Coquitlam (City)* (2000), 3 C.P.C. (5th) 225, [2000] B.C.J. No. 2532 (C.A.)(QL) (Lambert J.A.).
- [7] The appellant claimed, in oral submissions on this review, that he has been "wronged by the state" in the course of the litigation between him and the respondent concerning the custody and access of the children. He alleges that Loo J. and other judges and masters were biased and denied him fundamental justice, including the right to call witnesses and make his arguments in interlocutory applications and at trial. None of these allegations are set out in affidavit form, and many of them were not before Lambert J.A.
- [8] The appellant provided a number of authorities in support of his application for funding for counsel to argue his appeal, but the only one really on point is *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46. In that case, the Supreme Court held that an application by a government for custody of children threatens the parent's right to security of the person, protected by s. 7 of the Charter, and in the circumstances of that case, would not be in accordance with fundamental justice if the parent was unrepresented at the hearing. The Court is clear that the threat to security derives from state action: "direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere" (para. 61 per Lamer C.J.). Whether the parent's right to a fair hearing is compromised by not having counsel to represent him or her must be determined in the circumstances of the particular case, taking into account: the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the appellant (para. 75 per Lamer C.J.).

- [9] Thus, following G.(J.), the appellant in this case has two hurdles to establish a constitutional right to counsel. First, he must establish, which he cannot, that this case involves state action that interfered with his relationship with his children. This case is a private dispute between two parents as to which of them will have custody and the terms of access. The G. (J.) case is not authority for the proposition that one parent has a constitutional right to parent in relation to the other. The question is which of them can best provide for the best interests of the children, taking into account all of the relevant factors, which are set out in the applicable statutes, the Divorce Act and the Family Relations Act. Allegations that the actions of the judiciary violated his constitutional rights do not provide a basis for claiming a right to state funding of counsel.
- [10] Furthermore, this Court made it clear in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2001] B.C.J. No. 2279 (C.A.)(QL), 2001 BCCA 647, that there is no "constitutional right to provincially-funded legal fees and the courts do not have jurisdiction to order same" (at para. 36).
- [11] Second, even if the appellant could show that his constitutional rights were violated in any way, the evidence before this panel does not establish that, taking into account the seriousness of the interests at stake concerning the appellant's relationship with his children, the complexity of the proceedings and the capacity of the appellant, his right to a fair hearing on his appeal would not be met if counsel were not appointed to represent him.
- [12] In my view, there is no basis to interfere with Lambert J.A.'s decision to dismiss the appellant's application for funding for counsel.
- [13] The appellant's application for funding for transcripts is similarly without merit. The Court of Appeal Rules make it clear that an appellant must provide copies of a transcript of any oral evidence that is required for the appeal (Rule 6). Rule 40(5) of the Supreme Court Rules, which provides that "in an action", the court may order that a transcript be prepared at the expense of the Crown where the cost would be a hardship on a party, does not apply to an appeal. In any event, any such order would be discretionary and not reviewable by this Court unless the discretion were not properly exercised. There is no basis for review of Lambert J.A.'s decision to dismiss the appellant's application for funding for transcripts in this case.
- [14] I would dismiss the application for review and confirm the order of Lambert J.A. that the appeal should proceed on the merits in strict compliance with the Rules without further delay.
- [15] NEWBURY, J.A.: I agree.
- [16] HALL, J.A.: I agree.
- [17] NEWBURY, J.A.: The application is dismissed. "The Honourable Madam Justice Levine"

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Prepared on 26 October 2026 · Esheria