

CANADA / JUDGMENT

Gill v. Delbeck

2020 BCCA 37

COURT

British Columbia Court of Appeal

DECIDED

22 January 2020

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2020 BCCA 37 Gill v. Delbeck COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Gill v. Delbeck, 2020 BCCA 37 Date: 20200122 Docket: CA46309 Between: Cecilia Oiling Gill and Ronald Anthony Gill Respondents (Claimants) And Scott Delbeck Appellant (Respondent) Before: The Honourable Madam Justice Garson (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated July 19, 2019 (Gill v. Delbeck, 2019 BCSC 1660, Vancouver Docket E171246). Oral Reasons for Judgment Counsel for the Appellant: S.M. Armstrong Counsel for the Respondents: E.B. Clavier Place and Date of Hearing: Vancouver, British Columbia January 20, 2020 Place and Date of Judgment: Vancouver, British Columbia January 22, 2020 Summary: The appellant seeks leave to appeal an interim order granting the respondents contact time with his children, who are their grandchildren. Held: Application dismissed. The appellant has not shown that the disposition of this appeal would affect the upcoming trial of this matter in any substantive way. Consequently, it is not in the interests of justice for the appeal to proceed.

- [1] GARSON J.A.: This is an application for leave to appeal an interim order of the Supreme Court of British Columbia granting the respondents contact with their grandchildren, pursuant to the provisions of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The application turns on whether it is in the interests of justice to grant leave to appeal.
- [2] For the reasons given below, I have concluded that it is not in the interests of justice to grant leave to appeal. As a result, the appellant's application is dismissed.

Background

- [3] The appellant, Scott Delbeck, is the father of two children (the "children"). The respondents, Cecilia and Ronald Gill (the "Gills"), are the maternal grandparents of the children.
- [4] The children's mother died in November 2016. At that time, she and Mr. Delbeck had been separated for approximately one year. The Gills were very involved in the children's lives before and for some time after their mother's death.
- [5] In March 2017, Mr. Delbeck stopped allowing the Gills to have contact with the children. In May 2017, the Gills filed a notice of family claim in which they sought an order for contact.

- [6] In August 2017, Mr. Delbeck advised the Gills that he planned to move with the children to Denver for work purposes. That move occurred on November 8, 2017.
- [7] Before the Delbecks moved to Denver, two interim orders were made respecting contact: one by consent at a judicial case conference on August 24, 2017, and the other following a contested application on November 3, 2017. Those orders provided for periodic in-person contact and regular contact via Skype through the summer of 2018. The parties agreed to a further in-person visit in January 2019.
- [8] On June 13, 2019, the Gills filed a notice of application seeking a further interim order for contact. At the time the application was filed, the children were living in Denver and were not physically present in British Columbia.
- [9] In reasons indexed at 2019 BCSC 1660, Justice Fleming found that she had jurisdiction to order contact under s. 74(2) of the FLA. That section provides:
- (2) Despite any other provision of this Part, a court may make an order under this Part respecting guardianship, parenting arrangements or contact with a child only if one of the following conditions is met:
- (a) the child is habitually resident in British Columbia when the application is filed;
- (b) the child is not habitually resident in British Columbia when the application is filed, but the court is satisfied that
- (i) the child is physically present in British Columbia when the application is filed, (ii) substantial evidence concerning the best interests of the child is available in British Columbia, (iii) no application for an extraprovincial order is pending before an extraprovincial tribunal in a place where the child is habitually resident, (iv) no extraprovincial order has been recognized by a court in British Columbia,
- (v) the child has a real and substantial connection with British Columbia, and (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia;
- (c) the child is physically present in British Columbia and the court is satisfied that the child would suffer serious harm if the child were to
- (i) remain with, or be returned to, the child's guardian, or (ii) be removed from British Columbia. [Emphasis added.]
- [10] The chambers judge held that for the purposes of s. 74(2), an "application is filed" when the "document that commences the claim for guardianship, parenting arrangement[s] or contact is filed; in this case, the notice of family claim": at para. 10. She determined that because the children lived in the jurisdiction at the time the notice of family claim was filed, the court was entitled to make an interim order respecting contact.

- [11] The chambers judge further concluded that an order for contact was appropriate in this case. She made an order that allowed the Gills to exercise in-person contact for four days in Colorado during the children's 2019-2020 winter break and for ten days in Vancouver during the children's 2020 summer break. The order also provided for weekly 15-minute Skype calls.
- [12] Mr. Delbeck seeks leave to appeal the chambers judge's order. He alleges that she erred in her interpretation of s. 74(2) of the FLA and was without jurisdiction to make an interim order for contact when the children resided in Denver. He says the word "application" in s. 74(2)(b) refers to the notice of application that is the actual notice seeking the interim order, filed, in this case, long after the children had moved to Denver, not the initiating pleading that commenced the family claim. Accordingly, he says the chambers judge lacked jurisdiction to make an order under s. 74(2)(b) because the children were not physically present in British Columbia when the application was filed.
- [13] The Gills say there is no merit to the appeal and no merit to the application for leave. In particular, they say there is no utility to the parties in this appeal because the jurisdictional question will not arise at the trial and, therefore, the appeal will have little impact on the child care arrangements.
- [14] The trial of the action is set to proceed in September 2020.

Legal Framework

- [15] An appeal to the Court does not lie from a limited appeal order without the leave of a justice: Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 7(2). Orders granting interim relief under the FLA are limited appeal orders: Court of Appeal Rules, R. 2.1(c).
- [16] In *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Chambers), Justice Saunders explained that the criteria for granting leave to appeal include:
- [1] whether the point on appeal is of significance to the practice;
 - [2] whether the point raised is of significance to the action itself;
 - [3] whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
 - [4] whether the appeal will unduly hinder the progress of the action.
- [17] The criteria for leave are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers). Even where the four criteria listed above are met, leave may be denied if it would not be in the interests of justice for the appeal to proceed: *Movassaghi v. Aghtai*, 2010 BCCA 175 at para. 27 (Chambers).

- [18] The party seeking leave to appeal bears the onus of establishing that the test for leave has been met: *B.C. Teachers' Federation v. B.C. (Attorney General)* (1986), 4 B.C.L.R. (2d) 8 (C.A.) at 11 (Chambers).

Analysis

- [19] In oral argument, counsel for Mr. Delbeck did not contest the Gills' submission that the outcome of the appeal is irrelevant to the ultimate disposition of this action. Consequently, I accept that characterization is accurate. As I have said, the trial is to determine the final order and the relevant pleading is the originating family claim. Accordingly, the question of jurisdiction that Mr. Delbeck says arises on the interim application will not arise in the trial.
- [20] The sole effect of this appeal as it relates to the parties themselves would be to determine whether the Gills are entitled to the interim contact. That contact includes one ten-day visit over the summer holidays and weekly Skype calls. Depending on the timing of the appeal, reasons may or may not be available prior to the summer visit.
- [21] As stated in *Munro v. Munro*, 2015 BCCA 530 at para. 18 (Chambers), the "values of efficiency and proportionality are relevant to the interests of justice." The question is whether the potential benefit of a successful appeal justifies the expense that both parties will incur if it proceeds, given that the appeal will have no effect on the final order made at trial. In my view, it does not.
- [22] Mr. Delbeck's proposed ground of appeal is arguable and may be of importance to the practice. However, in this case, and for these parties, the interests of justice favours resolution by trial without an intervening and costly appeal, particularly where the trial is only eight months away. Moreover, as I have said, the appeal is only relevant to the interim order and will not advance the disposition of the underlying dispute.
- [23] For these reasons, I dismiss the application for leave to appeal with costs. "The Honourable Madam Justice Garson"

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