

CANADA / JUDGMENT

Godin v. Phan

2020 BCSC 405

COURT

Supreme Court of British Columbia

DECIDED

18 March 2020

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2020 BCSC 405 Godin v. Phan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Godin v. Phan,

2020 BCSC 405

Date: 20200318

Docket: E43722

Registry: Penticton

Between:

Richard Edward Godin

Claimant

And

Wanda Phan

Respondent

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Claimant:

M.A. Patterson

Counsel for the Respondent:

C. Ayers

Place and Date of Trial/Hearing:

Penticton, B.C.

February 26, 2020

Place and Date of Judgment:

Penticton, B.C.

March 18, 2020

Introduction

[1] There are three notices of application before me:

- a) The first was filed by the respondent on July 24, 2019, seeking to strike the claimant's notice of family claim filed October 18, 2018 ("NOFC") on the grounds that it is barred by the doctrine of res judicata because of a final order made on the same issues in the Ontario Superior Court of Justice on December 13, 2018 ("Final Order") in an action filed by the respondent on May 11, 2018 ("Ontario Proceeding"). Alternatively, she seeks a declaration that this Court does not have jurisdiction respecting the NOFC because Ontario has already taken jurisdiction over the matter. In the further alternative, if this Court does have jurisdiction, she seeks a declaration that this Court decline to exercise jurisdiction;
- b) The second was filed by the claimant on August 20, 2019, seeking an order for equal parenting time of the parties' two young children; and
- c) The third was filed by the claimant on October 4, 2019, seeking the attendance of the respondent for cross-examination on her affidavits filed in this proceeding.

[2] The couple have two children, Noah, aged 6, and Rayne, aged 4, (the "Children") who are currently residing with the respondent in Ontario. The claimant has not seen or spoken to the Children for approximately six months despite the Final Order giving him telephone access to them every Tuesday and Thursday evenings. He seeks redress for what he considers are flagrant breaches of the Final Order.

[3] Prior to considering the claimant's two applications, it is necessary to make a ruling on the respondent's application respecting the issues of res judicata and jurisdiction. If she succeeds on either the res judicata or the jurisdictional arguments, the claimant's applications would be rendered moot and unnecessary to decide.

Respondent's Position

- [4] At the core of the respondent's application is the Final Order in the Ontario Proceeding. She asserts that it determined all issues between the parties including property division, custody, guardianship, support, and parenting time. She says that Ontario was the proper forum for these issues, Ontario properly took jurisdiction, and that the claimant should not have filed his NOFC in the interim. She argues that the claimant is simply seeking to bypass a valid order of the Ontario Court because he does not like its terms.
- [5] The respondent says that the NOFC should be struck as unnecessary and an abuse of process. Additionally, she says the background of the parties and circumstances of this case do not permit a finding that either party, and particularly the Children, were ever habitually resident in British Columbia and, under the relevant provisions of the Family Law Act, S.B.C. 2011, c. 25 ("FLA"), this Court has no jurisdiction in any event. She argues in the alternative that even if this Court has jurisdiction, it should decline jurisdiction in the circumstances.

Claimant's Position

- [6] The claimant objects to Ontario taking jurisdiction of the family law issues between the parties. He argues that neither party nor the Children were habitually resident in Ontario when the respondent filed the Ontario Proceeding and the Ontario Court should have declined jurisdiction. He asserts that British Columbia is the proper forum for this case to be heard. He says the parties and the Children were habitually resident in British Columbia when the respondent absconded to Ontario with the Children in November 2017 without his knowledge or consent. He argues that the Ontario Court erroneously assumed jurisdiction based on the respondent's false, unsubstantiated and inconsistent affidavits. He says it would be a gross miscarriage of justice for this Court to decline jurisdiction and dismiss his applications.

Background

- [7] The claimant has a history of involvement with the criminal justice system in Canada and the United States. He is involved in the illicit drug culture.
- [8] The parties met in Toronto, Ontario, in September 2012, shortly after the claimant was paroled from an eight-year prison sentence he was serving in the United States for drug-related offences.
- [9] The couple moved to Lloydminster, Alberta, in October 2013, where they purchased a house ("Lloydminster House"). In April 2017, the couple rented a waterfront apartment in the Yaletown area of Vancouver which, according to the claimant, they used as a second residence ("Yaletown Condo"). They stayed in the Yaletown Condo from April to June 4, 2017, July 7 to August 1, 2017, and September 23 to November 6, 2017. Their permanent residence, however, remained the Lloydminster House. According to the claimant, he provided the respondent and the Children with a lavish lifestyle.

- [10] Throughout this time, the respondent was aware of the claimant's continued involvement in the illicit drug culture.
- [11] On October 30, 2017, the claimant was arrested and incarcerated in Vancouver on drug-related offenses. Fearful for her and the Children's safety, on November 6, 2017, and without notice to the claimant, the respondent moved with the Children to the Toronto area and commenced residing with her mother. The Children were aged three and two at the time.
- [12] The claimant remained incarcerated until he was released on bail on December 6, 2017, under bail conditions that included that he could not leave British Columbia unless for his employment. In January 2018, he obtained employment as a truck driver in Ontario and, according to the claimant, initiated discussions with the respondent in an attempt to reconcile and relocate the family to British Columbia. He says that the parties discussed reconciliation from January to May 2018. The respondent vehemently denies any attempt at reconciliation and says that any discussions were simply facilitating the claimant's parenting time. Indeed, the claimant confirms that by late February 2018, he suspected that the respondent had no intention of reconciling with him.
- [13] On May 9, 2018, the claimant was arrested again, this time in Alberta, for more drug-related offenses. He was held in custody at the Edmonton Remand Centre.
- [14] Throughout the early months of 2018, the respondent had been receiving threatening text messages and other messages, which she believed were sent or initiated by the claimant. She engaged the RCMP, who investigated. The RCMP urged her to seek the assistance of the Ontario courts. On May 11, 2018, the respondent commenced the Ontario Proceeding seeking, inter alia, orders respecting support, custody, access, family property and jurisdictional issues. The respondent's Ontario counsel, Ms. Richards, arranged to have the claimant served with the court documents related to the Ontario Proceeding care of the Edmonton Remand Centre. Service was effected on June 22, 2018.
- [15] On July 20, 2018 and July 24, 2018, the claimant emailed Ms. Richards confirming receipt of the Ontario Proceeding documents and advising that he was attempting to secure Ontario Legal Aid counsel. He stated:
- "... I am currently in the process of retaining a lawyer in Ontario, however, given the circumstances and that I do not live in Ontario doing such has been a daunting task. Once I have retained a lawyer they will be in touch with you as quickly as possible. Please ensure that until this time you do not take any more steps against me. . . . In the meantime I would like to make clear . . . that it is of my understanding (and belief) that Ontario is not the proper jurisdiction upon which this matter should be heard.
- [16] The claimant's application for Legal Aid in Ontario was denied.

[17] He was released from custody on August 30, 2018, and on September 7, 2018, sent a lengthy email to Ms. Richards stating that he was unemployed, homeless, a "victim of parental kidnapping", and that he was seeking spousal support from the respondent. His email stated:

I provided [the respondent] and the children with an abundant and opportunity filled life full of luxuries including a beautiful home in Alberta, a second home [waterfront luxury Vancouver condo], plenty of spending money and trips to Ontario and US destinations several times a year spanning several months, jewelry and clothes and toys and anything else she requested. . .

It is not my intention to discredit her or take the children. I think she is a capable and loving mother and that the children are safe with her primarily. I also believe that I am capable of sharing the parental responsibilities with her and that supervised visits are not necessary or justified.

I will be calling around again tomorrow to attempt to retain counsel and we will also be looking into Alberta courts because it is our belief that this is the jurisdiction for our matter. The children were taken away when I was jailed for a charge I had stayed on July 6, 2018. The children were born in Lloyminster and resided there until the week I was arrested and incarcerated pending bail.

[18] The claimant finished the letter by stating that he had documentation, financial statements, police reports and affidavits to support "every single fact" he had listed in the email.

[19] On September 10, 2018, the claimant again emailed Ms. Richards indicating he had retained Mr. Patterson, a Penticton, BC, lawyer, as counsel. Mr. Patterson emailed Ms. Richards on September 18, 2018, taking issue with the Children being taken to Ontario. He referenced s. 65 of the Family Law Act ("FLA") providing that 60 days' notice or a court application was required to remove the Children from British Columbia. He also stated that the Children's ordinary residence was British Columbia and he would proceed with an application to have them returned to British Columbia. He further noted:

. . .the allegations that have been made by your client about Mr. Godin, I would ask that you advise your client that this matter has a long way to go and we will provide our affidavit and supporting documentation to the court.

[20] On September 19, 2018, Ms. Richards corresponded with Mr. Patterson highlighting the extension of time already provided to the claimant to file a formal answer to the Ontario Proceeding, acknowledging the claimant's concerns about jurisdiction and suggesting that the proper procedure would be a motion on jurisdiction in the Ontario Court. She stated:

. . . it is our client's position that the children are habitual residents of Ontario, pursuant to the Children's Law Reform Act. As such an application was issued in Ontario and service was validated on June 27, 2018, by the Superior Court of Justice.

Your client has had multiple extensions to file an answer and have this matter addressed in the appropriate fashion. Your client opted not to do so. If it is your client's position that this matter should be heard in Alberta, he is welcome to bring a motion seeking clarification of jurisdiction in the courts in Ontario.

As no answer has been filed despite the extensions granted, your client is in default. In your correspondence you have not indicated any intention to respond to the application in Ontario. This is not reasonable; [the respondent] has been extremely patient as such steps will be taken to move this file along.

[21] That same day, Ms. Richards filed and served a motion in the Ontario Proceeding seeking:

- a) an order that the claimant be noted in default;
- b) that the respondent could proceed in the form of an uncontested trial on affidavits; or
- c) alternatively, the matter be set down for a motion to argue jurisdiction.

[22] On September 20, 2018, Mr. Patterson acknowledged receipt of the motion materials and on September 26, 2018, requested a two-week adjournment on the basis that the claimant had been improperly served.

[23] Mr. Patterson filed the NOFC in the Penticton Registry of the Supreme Court of British Columbia on October 18, 2018.

[24] Mr. Patterson next attempted to contact Ms. Richards on October 24, 2018, by telephone, but without success. On October 25, 2018, Ms. Richards emailed Mr. Patterson to arrange a phone call for either that or the next day. There was no response and on October 26, 2018, a previous order noting the claimant in default in the Ontario Proceeding was confirmed ("Default Order"). The Default Order gave the respondent liberty to proceed with the Ontario Proceeding on an uncontested basis. The Default Order was forwarded to Mr. Patterson who promptly telephoned Ms. Richards accusing her of sharp practice.

[25] Mr. Patterson filed and delivered three affidavits in the Ontario Proceeding to Ms. Richards on November 28, 2018. One was an affidavit sworn by the claimant, one an affidavit sworn by the claimant's mother and the third was an affidavit sworn by Mr. Patterson. The affidavits were noted to be in support of the claimant's application to set aside the Default Order, however no notice of motion accompanying the affidavits was filed at the time.

[26] On December 13, 2018, Justice Coroza made the Final Order. It provided, among other things, that the respondent would have sole custody of the Children; that the claimant would have telephone access on Tuesdays and Thursdays at 7 PM Eastern Standard Time for ten minutes; that on the basis of the claimant's income being imputed at \$75,000 per annum, he was to pay the respondent \$1,164 per month child support commencing December 1, 2017, and that the respondent was a fifty-percent owner of the Lloydminster House.

[27] By March 2019, the claimant had retained Ontario counsel who applied on March 8, 2019, for an order to set aside the Final Order and permit him to file an answer, financial statement and other documents. The respondent's application was heard on April 11, 2019, by Justice Barnes who reserved his decision. On August 19, 2019, Barnes J. released his reasons (unreported, Court File No. FS-18-122-00) dismissing the claimant's application. Justice Barnes concluded that the claimant's difficulty and delay in filing an answer to the Ontario Proceeding was precipitated by him being incarcerated and unable to secure Legal Aid counsel in Ontario. At the same time, however, he found that Ms. Richard's efforts to keep the claimant informed at every step of the litigation process was "exemplary", that the claimant was fully aware of each stage of the litigation process along the way and that the claimant had ample time to respond appropriately to the Ontario Proceeding. In dismissing the claimant's application, he stated:

I am satisfied that had the [claimant] been out of custody there is a high likelihood that he would have fully participated in the Ontario proceedings I have no basis to conclude that the [claimant] has an arguable defence on the merits. The material filed on the motion is wholly inadequate. No adequate materials have been filed to demonstrate that the [claimant] has an arguable defence on the merits. He advanced inadequate financial resources as the reason. At the current time, no child support has been paid.

[28] No appeal was taken from Barnes J.'s decision.

Jurisdiction - The Law

[29] The relevant statute in Ontario dealing with jurisdiction respecting children is the Children's Law Reform Act, R.S.O. 1990 c. C.12 [CLRA]. Sections 22 to 24 of the CLRA provide as follows:

22 (1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where,

- (a) the child is habitually resident in Ontario at the commencement of the application for the order;
- (b) although the child is not habitually resident in Ontario, the court is satisfied,
 - (i) that the child is physically present in Ontario at the commencement of the application for the order,
 - (ii) that substantial evidence concerning the best interests of the child is available in Ontario,
 - (iii) that no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,
 - (iv) that no extra-provincial order in respect of custody of or access to the child has been recognized by a court in Ontario,
 - (v) that the child has a real and substantial connection with Ontario, and

(vi) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario.

- (2) A child is habitually resident in the place where he or she resided, . . .
- (b) where the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order; . . .

23 Despite sections 22 . . . a court may exercise its jurisdiction to make or to vary an order in respect of the custody of or access to a child where,

- (a) the child is physically present in Ontario; and
- (b) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,
- (i) the child remains in the custody of the person legally entitled to custody of the child, . . .

24 (1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child, in accordance with subsections (2), (3) and (4).

[30] The FLA deals with extraprovincial matters respecting parenting arrangements in ss. 72-74:

72 (1) In this Division:

"extraprovincial order" means an order of an extraprovincial tribunal that is similar in nature to an order respecting guardianship, parenting arrangements or contact with a child;

"extraprovincial tribunal" means a court or tribunal, outside British Columbia, having authority to make an extraprovincial order.

- (2) For the purposes of this Division, a child is habitually resident in the place where the child most recently resided
 - (a) with his or her parents,
 - (b) if the parents are living separate and apart, with one parent
 - (i) under an agreement,
 - (ii) with the implied consent of the other parent, or
 - (iii) under an order of a court or tribunal, or
 - (c) with a person other than a parent on a permanent basis for a significant period of time.

- (3) The removal or withholding of a child without the consent of a guardian does not affect the child's habitual residence unless the guardian from whom the child is being removed or withheld acquiesces or delays in applying for an order of a court or an extraprovincial tribunal.

73 The purposes of this Division are as follows:

- (a) to ensure that court applications respecting guardianship, parenting arrangements or contact with a child are determined on the basis of the best interests of the child;
- (b) to avoid the making of orders respecting guardianship, parenting arrangements or contact with a child, respecting the same child, in more than one jurisdiction;
- (c) to discourage child abduction as an alternative to determining by due process the guardianship of, or parenting arrangements with respect to, a child;
- (d) to provide for effective enforcement of orders respecting guardianship, parenting arrangements or contact with a child, and for the recognition and enforcement of extraprovincial orders.

74 (1) This section applies if an order respecting guardianship, parenting arrangements or contact with a child may be made, respecting the same child, in more than one jurisdiction.

- (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;

...

(3) A court may decline to make an order under this Part if the court considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.

[31] The FLA also sets out jurisdiction and choice of law rules respecting the division of property in s. 106:

106 (1) This section applies if an order respecting property division, respecting the same spouses, may be made in more than one jurisdiction.

(2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:

(a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;

(b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;

(c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;

(d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.

(3) For the purposes of subsection (2) (d), a real and substantial connection is presumed to exist if one or more of the following apply:

(a) property that is the subject of the proceeding is located in British Columbia;

(b) the most recent common habitual residence of the spouses was in British Columbia;

(c) a notice of family claim with respect to the spouses has been issued under the Divorce Act (Canada) in British Columbia.

(4) Despite subsection (2), a court may decline to make an order under this Part if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.

[32] In its simplest form and from the claimant's perspective, the jurisdictional issue boils down to the claimant saying that this Court should take jurisdiction because both the parties and the Children were "habitually" resident in British Columbia at the time the NOFC was commenced, the respondent wrongfully absconded with the Children to Ontario and the Ontario Court relied on false and untested affidavits to assume jurisdiction. From the respondent's perspective, jurisdiction of the dispute has already been taken by Ontario and the claimant has attorned to that jurisdiction. She asserts that, firstly, neither she nor the Children were habitually resident in British Columbia when the NOFC was filed and this Court has no jurisdiction over them. Additionally, the Final Order was made in the Ontario Proceeding, the claimant's application to set it aside was dismissed and it would be

inappropriate for this Court to appropriate that jurisdiction.

Res Judicata

- [33] The parties dispute whether the doctrine of res judicata applies in this case. The respondent argues that the Final Order is just that--final. It was made by a court of competent jurisdiction.
- [34] She asserts that the criteria needed for res judicata to apply have been met: *Stav v. Stav*, 2014 BCSC 188 at paras. 34-36. She says that it is "plain and obvious" that the doctrine of res judicata applies to this action, that the NOFC is an abuse of process and should be struck: *Stav* at para. 39. She says that even if the requirements of res judicata are not met, this Court has discretion to use its inherent jurisdiction to find an abuse of process and, in this case, the Court should exercise that jurisdiction to prevent a re-litigation of the issues: *L. M. v. British Columbia (Director of Child, Family and Community Services)*, 2016 BCSC 275 at paras. 79-83.
- [35] The claimant responds that the principles of res judicata do not apply in this case because the Final Order was based on default proceedings being taken in Ontario (he says improperly), that it was a procedural step at best and that the Final Order was made without any determination of the merits of the case. The issues, disputes and controversy between the parties have not been the subject of any hearing or finding and therefore the principles of res judicata do not apply: *L. (R.) v. K. (P.)*, 1991 CarswellBC 568 (S.C.).
- [36] In my view, the claimant's assertion that the principles of res judicata do not apply is correct. The Final Order was made without a hearing on the merits and without the benefit of the claimant's version of the story being heard. It was a procedural order rather than a finding on the merits.

Jurisdiction

- [37] The burden of establishing that the British Columbia court has territorial competence or jurisdiction is on the claimant: *Ma v. Li*, 2016 BCSC 469 at para. 20. In this case, I am not satisfied that the claimant has proven that this Court has jurisdiction because he has not proven that the respondent or the Children were "habitually" resident in British Columbia within the meaning of the Family Law Act.
- [38] The affidavits filed in support of the applications conflict in many respects. However, the claimant's email to Ms. Richards on July 24, 2018, is telling. In that email, he took the position and clearly believed that the Children were habitually resident in Alberta, not British Columbia, as he now suggests. It is disingenuous for him to attempt to change his position at this point. Further, in none of the affidavits before me does he indicate that he even resides in British Columbia or, if he does, for how long he has done so.

- [39] The NOFC was filed on October 18, 2018, 11 months after the respondent and Children moved to Ontario. For this Court to have jurisdiction over the Children, the claimant must bring them within either s. 74(2)(a) or (b) of the FLA. He has failed to do so. In addition to the Children being resident in Ontario for some 11 months before the NOFC was filed (s. 74(2)(a)), none of the factors set out in s. 74(2)(b) apply:
- a) the children were not physically present in British Columbia when the NOFC was filed;
 - b) there is no substantial evidence that the best interests of the Children would be served and available in British Columbia. Indeed the evidence suggests the contrary;
 - c) to the claimant's knowledge, the respondent had already filed the Ontario Proceeding and there was an application for an order pending in Ontario when the NOFC claim was filed;
 - d) no prior extra-provincial order had been recognized by a court in British Columbia;
 - e) other than the Vancouver Condo, where the parties resided part-time, the Children had no real and substantial connection with British Columbia; and
 - f) the claimant has not proven that the balance of convenience favours British Columbia as the appropriate jurisdiction.
- [40] Even had the claimant been able to satisfy the factors of s. 74(2)(b), I would decline to exercise jurisdiction on the basis that, in the circumstances of this case, Ontario is the more appropriate jurisdiction for the disposition of this matter.
- [41] Likewise, the claimant has not proven the factors set out in s. 106(4) respecting division of property. Similar to the issues respecting the Children, I conclude that Ontario is the most appropriate jurisdiction to determine the division of property issues.
- [42] The fair and efficient working of the Canadian legal system requires this Court to respect the jurisdiction and orders of the Ontario Court. It does not benefit our system to permit the claimant, who is dissatisfied with the Ontario Proceeding and the Final Order, which he was unable to have set aside, to use the British Columbia courts as a means of appeal, or to initiate new proceedings, or to mount another attack on issues that are the subject of the Final Order. To permit the claimant to do so, would be to undermine the fair and efficient working of the Canadian legal system: Ma at para. 35.

Decision

- [43] I conclude that pursuant to s. 74(2) and s. 106 of the Family Law Act, this Court does not have jurisdiction with respect to the NOFC and I order that it be struck. Even if this Court did have jurisdiction, I would decline to exercise jurisdiction with respect to the claims set out in the NOFC.
- [44] My ruling effectively disposes of the claimant's applications; there is no need to rule on them and I decline to do so. The claimant's remedies, if any, lie in the Ontario Proceeding.

Costs

[45] The respondent is entitled to her costs.

"G.P. Weatherill J."

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