

CANADA / JUDGMENT

Hokhold v. Gerbrandt

2017 BCCA 216

COURT

British Columbia Court of Appeal

DECIDED

9 June 2017

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2017 BCCA 216 Hokhold v. Gerbrandt

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Hokhold v. Gerbrandt,

2017 BCCA 216

Date: 20170609

Dockets: CA43916; CA43917; CA43942; CA43943

Dockets: CA43916; CA43943

Between:

Andrew Nicholas Hokhold

Appellant

(Plaintiff)

And

Laurie Darlene Gerbrandt and Elise Darlene Gerbrandt

Respondents

(Defendants)

- and -

Dockets: CA43917; CA43942

Between:

Andrew Nicholas Hokhold

Appellant

(Plaintiff)

And

Laurie Darlene Gerbrandt

Respondent

(Defendant)

The judgment was updated on May 25, 2022.

Before:

The Honourable Madam Justice Newbury

(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated August 8, 2016 and August 18, 2016 (Hokhold v. Gerbrandt, 2016 BCSC 1559, Vernon Registry Dockets 53557 and 53558).

The Appellant, Dr. Andrew Nicholas Hokhold:

In Person

Counsel for the Respondents:

L.A. Kahn, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

May 1, 2017

Place and Date of Judgment:

Vancouver, British Columbia

June 9, 2017

Summary:

Held: vexatious litigant order granted.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] By motion filed October 21, 2015, the respondents, Ms. Gerbrandt and others, seek to have pending appeals in four proceedings struck out as an abuse of process or alternatively, stayed; and to have the appellant, Dr. Andrew Hokhold, declared a vexatious litigant under s. 29 of the Court of Appeal Act, R.S.B.C. 1996, c. 77. The applicants also seek a term that if Dr. Hokhold were permitted by court order to bring a proceeding, he would be required to do so through legal counsel.
- [2] I start by noting that it is not within the authority of a single justice to strike out an appeal except where the appellant has, in the words of s. 10(2)(e) of the Court of Appeal Act, "failed to comply with a provision of this Act or the rules or an order extending or shortening time". I did not understand the respondents to be relying on that provision. A single justice may, under s. 18, stay all or any part of the proceedings in a cause or matter from which an appeal has been taken, and where an appellant fails to comply with an order under s. 18(1), may dismiss the appeal as abandoned under s. 18(4).
- [3] Section 29 provides that where a justice is satisfied that a person has "habitually, persistently and without reasonable cause" commenced vexatious proceedings in the Court, he or she may be prohibited from commencing proceedings in the Court without leave of a justice. The purpose of s. 29 is to allow the Court to control its own process "to prevent the abuse of that process by a litigant repetitively bringing unmeritorious proceedings that result in the needless expenditure of judicial resources and cause unnecessary expense to other parties": see *Houweling Nurseries Ltd. v. Houweling* 2010 BCCA 315 at paras. 1, 40; and *Dawson v. Dawson* 2014 BCCA 44 at para. 17. This court has affirmed the types of factors that should be considered in an application under s. 29, which are set out at para. 16 of *Dawson*, and which I will not repeat here. (See also *Extra Gift Exchange Inc. v. The Owners, Strata Plan LMS3259* 2014 BCCA 228 (Chambers) at para. 36.) In my view, most if not all of those factors are engaged in this instance.
- [4] The law is also clear that the conduct of a litigant in the court below may inform this court's decision under s. 29: *Extra Gift* at para. 36; *Dawson* at para. 26. I understand that an application to have Dr. Hokhold declared a vexatious litigant in the Supreme Court of British Columbia is pending and I make no comment on that application. However, the applications in both courts involve the family and family-related litigation between the parties and it would be difficult to separate Dr. Hokhold's conduct in this court from his conduct in the Supreme Court.

Factual Background

- [5] Dr. Hokhold and Ms. Gerbrandt have been parties to "high conflict" family litigation since 2009. They lived in a common-law relationship between 2005 and early 2010 and have two children, ages six and nine. After a trial in the summer of 2012, Mr. Justice Cole in the Supreme Court dealt with most issues of support and custody of the children and in particular, granted sole custody of the children to Ms. Gerbrandt, joint guardianship to both parents, and dismissed Ms. Gerbrandt's application to relocate with the children to Swift

Current, Saskatchewan. Cole J. attributed an annual income of \$610,000 per year to Dr. Hokhold, who is a dentist, and on this basis, ordered child support of \$7,900 per month and spousal support of \$9,000 per month.

- [6] Two years later, Ms. Gerbrandt was permitted to relocate, again by order of Cole J. The Court was satisfied that the move would enhance the children's quality of life and increase Ms. Gerbrandt's emotional well-being and financial opportunities: see 2014 BCSC 1875 at para. 138. The Court's order provided that the primary residence of the children would be with their mother, that she would be entitled to make all significant decisions relating to them, and that a child psychologist was to be engaged for the children until further order. Cole J. seized himself of any further applications.
- [7] Dr. Hokhold has failed to pay the support ordered by Cole J. and vehemently denies that the income attributed to him is realistic. He says he is not capable of working the four days per week assumed by Cole J. - as opposed to the ten to 11 hours three days per week he was found to be working. By order dated May 15, 2014, Cole J. found Dr. Hokhold to be in contempt for his failure to pay support: see 2014 BCSC 1784 at para. 17.
- [8] Dr. Hokhold made a few support payments up to August 2014. FMEP became involved and was able to seize some of Dr. Hokhold's funds over 2013 and 2014. Cole J. ordered that he pay \$25,000 per month commencing December 2014 until a trial was scheduled to vary the earlier support order: see 2014 BCSC 1875 at paras. 21-3.
- [9] Dr. Hokhold's next step was to appeal the contempt order made in 2014. He was successful in having it set aside: see 2016 BCCA 6. Madam Justice Saunders, speaking for the Court, however, told Dr. Hokhold that he "must comply with the order as varied from time to time, or he will face sanction from the court." (At para. 36.) Ms. Aucoin deposes that as of April 3, 2017, over \$448,000 was owing for child and spousal support, together with various costs orders that Dr. Hokhold had failed to pay.
- [10] In June 2015, Dr. Hokhold brought on an appeal of the order dealing with the primary residence of the children. This court declined to hear that appeal in the absence of any "convincing explanation" as to why he remained in arrears with respect to support: see 2015 BCCA 268. We noted that in his argument, Dr. Hokhold had "said little or nothing about the interests of his children in arguing that the appeal should proceed." Dr. Hokhold then filed voluminous materials containing new evidence and lengthy arguments that were, we commented, "largely irrelevant to the question of whether the appeal should be reopened." We also observed:

On March 21, 2016, the Registrar wrote to Dr. Hokhold and Mr. Kahn directing that any further submissions should be of a summary nature and that although they were permitted to refer to evidence, evidence and affidavits should not be filed unless the Court agreed to reopen the appeal. Undeterred, Dr. Hokhold then filed 58 additional pages of submissions including further evidence and arguments. Mr. Kahn again objected, observing that the submissions represented Dr. Hokhold's view of the evidence and had nothing to do with the underlying reasons for

judgment of this court dated June 11, 2015 dismissing the mobility appeal. He added that without incurring substantial legal fees, he was unable to rebut the new submissions of Dr. Hokhold.

We view this situation as very unfortunate. From the material, it appears that Dr. Hokhold is still in arrears (as to a very substantial amount) with respect to spousal support and the payment of certain expenses; yet, having discontinued his appeal of the support order, has not sought any variation of that order in the Supreme Court. This fact (which Dr. Hokhold has not attempted to explain), together with his continued 'stonewalling' of the Court by filing obviously irrelevant material and flouting of the Registrar's directions, lead us to the conclusion that we should not exercise our discretion in favour of reopening the appeal. [At paras. 4-5.]

The application was dismissed: 2016 BCCA 159.

- [11] As noted at para. 3 of our reasons, Dr. Hokhold had abandoned an appeal from the support orders. Presumably, this made it more important than ever for him to pursue a variation of the support order in Supreme Court - yet this has not happened. Instead, he has turned his attention to various other alleged wrongs on the part of Ms. Gerbrandt, including defamation and an alleged conspiracy with the Canada Revenue Agency. He also commenced two civil actions against her and her mother in which he purported to be acting as the litigation guardian of both of his children. In these actions, he claimed the defendants had acted in breach of trust in connection with certain gold coins held for the children. These actions became the focus of multiple applications, adjournments, filings and hearings. At one point (on August 15, 2016), Dr. Hokhold conceded that the proceedings had been improperly commenced and that he had had no authority to bring them on his children's behalf.
- [12] The defendants in the gold coin actions sought to have them struck. In the course of a hearing, Dr. Hokhold suggested that the Public Trustee might be willing to act as the children's litigation guardian - failing to disclose to the Court that the Public Trustee had already written to him declining to do so.
- [13] For reasons indexed as 2016 BCSC 1559, Abrioux J. struck the two actions and awarded special costs to Ms. Gerbrandt. The judge urged Dr. Hokhold to consider the claims "from his children's perspective" and to "recognize that it was in their best interests that their mother and grandmother not be sued by them without an independent assessment as to the merits of the claims." Dr. Hokhold's response was to seek the recusal of Mr. Justice Abrioux - a motion that has now been withdrawn.
- [14] Dr. Hokhold applied in this court for leave to appeal the two orders of Abrioux J. made on August 8, 2016 in the two gold coin actions, and sought an order setting aside the Supreme Court's order declining to adjourn. He sought a new hearing and special costs. The following week, he also filed notices of appeal in respect of Abrioux J.'s orders made August 18 striking the civil actions, thus bringing to four the number of appeals filed in the gold coin actions.

- [15] Mr. Kahn scheduled his client's application under s. 29 of the Court of Appeal Act to be heard in November, but it was adjourned to December 12. On December 8, Dr. Hokhold applied for an adjournment and filed seven binders of material, provided to Mr. Kahn on December 8 at 4:30 p.m. The application was set to be heard the next day but was not. At 9:06 a.m. on December 12, Ms. Gerbrandt received an email from Dr. Hokhold purporting to serve her with thousands more pages of materials. Meanwhile, in chambers, Mr. Kirkpatrick appeared by telephone as a friend of the Court and told me as chambers judge that Dr. Hokhold had been hospitalized in Vernon and could not appear. I adjourned the vexatious litigant application. Mr. Kahn has since obtained records from the hospital that indicate that Dr. Hokhold left the hospital at 11:10 that morning, "driving self" after having been discharged without any prescriptions or medications. The hearing was re-scheduled for May 1, 2017.
- [16] On that date, Dr. Hokhold did not address directly his record of misconceived applications and appeals, repeated adjournments, and voluminous and irrelevant filings in both courts. On this occasion, he was preoccupied with his belief that Mr. Justice Cole has committed "fraud" in his dealings with Dr. Hokhold. Mr. Justice Cole is said to have "blocked" several of his applications and "targeted" him, but more importantly, is said to have "fabricated" oral "declarations" made by Dr. Hokhold's previous lawyer and another so-called "phantom lawyer" in some manner that I must admit is not clear to me. Dr. Hokhold says he has launched complaints about the conduct of Cole J. to the Canadian Judicial Council and to the R.C.M.P., and said he was sure Cole J. would be "indicted". Dr. Hokhold seemed to suggest as well that Ms. Gerbrandt had "participated" in the "fabrications".
- [17] As I told Dr. Hokhold, until any "fraud" is proven on the part of a judge of the Supreme Court, I assume that the judge is speaking honestly and is not a fraudster. I also advised Dr. Hokhold that if an order were to be made under s. 29, and it later turned out that Dr. Hokhold's allegations against Cole J. were correct, it is very likely he would obtain the permission of this court to reopen or appeal any orders of the lower court that were affected by such "fraud".
- [18] In his reply submissions, Mr. Kahn on behalf of Ms. Gerbrandt admitted that Ms. Gerbrandt has not always been the model of patience and has sometimes reacted strongly to Dr. Hokhold's conduct. Mr. Kahn also noted that because Cole J. is a supernumerary judge, his seizing himself of the family litigation has created problems in terms of scheduling applications. Overall, however, Mr. Kahn emphasized the extreme demands put on his client in terms of responding and attending to the constant stream of (misconceived) applications, the legal fees associated therewith, and the stress of attacks on her status as the primary caregiver to her children, not to mention financial pressure due to Dr. Hokhold's continued failure to pay his support obligations. I accept that Ms. Gerbrandt's feeling of stress is certainly justified by Dr. Hokhold's conduct, and I expect that the children also feel strain as well.

- [19] Mr. Kahn provided me with a list of appeals and applications that Dr. Hokhold has filed in this court since 2011. There are 12 items in the list, four of which relate to the "gold coin" appeals that have now been stayed or dismissed. Two other appeals have been abandoned, one has been allowed, and the rest are not active. Mr. Kahn has also provided a summary of the litigation between Dr. Hokhold and the FMEP, which list Cole J. requested some time ago in Supreme Court. Finally, I was referred to a list of the results of a search of Court Services Online which lists actions commenced by Dr. Hokhold against various defendants from 1993 to date. As Ms. Gerbrandt deposes, there are 54 British Columbia court files involving Dr. Hokhold, in most of which he was or is the plaintiff.
- [20] In the absence of evidence that his conduct in those files was abusive or vexatious, I do not regard the online list as relevant to the present application, although it may suggest that in recent years Dr. Hokhold has become increasingly obsessive in his interactions with the courts.
- [21] An order under s. 29 of the Court of Appeal Act is obviously not one that should be made lightly. Such an order is an "extraordinary remedy that alters a person's right to access the courts": *Kallaba v. Bylykbashi* (2006) 207 O.A.C. 60, lve. to app. dismiss'd [2006] S.C.C.A. No. 144, at para. 31. In *Nayyar v. Manufacturers Life Insurance Company* 2016 BCSC 1587, Mr. Justice Voith observed that:
- An order declaring that an individual is a vexatious litigant is a serious matter. It is not an order that is lightly made. At the same time, that order is, in certain circumstances, in the public interest and necessary to prevent ongoing abuse of the court's process. [At para. 78.]
- [22] While in this case the majority of vexatious conduct on Dr. Hokhold's part has taken place in the Supreme Court of British Columbia, there are two factors that amplify the seriousness of his conduct in this court - the extreme pressure that it has put on Ms. Gerbrandt and the children; and the fact that Dr. Hokhold insists on filing (usually very shortly before the relevant hearing) volumes - literally hundreds if not thousands of pages - of materials with every application, no matter how insignificant. Virtually every affidavit has attached to it other affidavits and their exhibits, with the result that any substantive issues he might raise or response he might make, are simply lost in a sea of paper. No judge can digest such a stream of irrelevancies on a regular basis; and few litigants could afford to pay counsel to review such materials carefully. Certainly Ms. Gerbrandt cannot.
- [23] It is these factors, together with his filings in this court, that lead me to conclude that Dr. Hokhold has been using the judicial process in a manner calculated to divert attention from the real issues outstanding between the parties - his annual income, the amount of support he should pay, and his rights and obligations as a parent. Even Dr. Hokhold admits that he is "tired" as a result of the litigation, and there are more than a few judges who feel the same.

- [24] Last, I note that Dr. Hokhold wrote recently to the Court requesting that this application be reopened to give him an opportunity to make more submissions that are apparently contained on a memory stick he wishes to play in the courtroom. I would dismiss that application as I am satisfied Dr. Hokhold is very unlikely to say anything truly relevant to the application that he has not already said.
- [25] In the result, I declare Dr. Hokhold a vexatious litigant and order, pursuant to s. 29 of the Court of Appeal Act, that from this date on, he may not bring or commence proceedings in this court against or otherwise involving Ms. Gerbrandt or any family members thereof, without leave of a justice. I order that the 'gold coin' appeals still outstanding (CA43942 and CA43943) continue to be stayed pending further Order.

"The Honourable Madam Justice Newbury"

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