
CANADA / JUDGMENT

K.F.M. v. K.G.T.

2020 BCCA 10

COURT

British Columbia Court of Appeal

DECIDED

6 January 2020

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2020 BCCA 10 K.F.M. v. K.G.T.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

K.F.M. v. K.G.T.,

2020 BCCA 10

Date: 20200106

Docket: CA46217

Between:

K.F.M.

Appellant

(Claimant)

And

K.G.T.

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Hunter

The Honourable Madam Justice Griffin

On an application to vary: An order of the Court of Appeal for British Columbia, dated September 18, 2019 (K.F.M. v. K.G.T., 2019 BCCA 339,

Vancouver Docket CA46217).

Oral Reasons for Judgment

The Appellant, appearing in person:

K.F.M.

Counsel for the Respondent:

M.G. Perry

Place and Date of Hearing:

Vancouver, British Columbia

January 6, 2020

Place and Date of Judgment:

Vancouver, British Columbia

January 6, 2020

Summary:

The appellant seeks a review of a decision denying him leave to appeal an interim order under the Family Law Act conferring sole authority on the respondent to make health-related decisions concerning their son pending trial. Held: Application dismissed. The leave judge did not commit an error of law or principle and did not misapprehend the evidence.

- [1] HUNTER J.A.: On July 5, 2019, an order was made in the Supreme Court of British Columbia that granted the respondent, K.G.T., the sole authority on an interim basis to make decisions related to the health of the parties' eight-year-old child. The order was made in the context of high conflict family litigation between the parties, who separated in October 2011 and have been engaged in disputes over the parental responsibilities for their child for much of the intervening eight years. The trial of this longstanding litigation is now scheduled for July of 2020.
- [2] Although the transcript of the chambers judge's reasons refers to s. 45(f) of the Family Law Act, S.B.C. 2011, c. 25, it is apparent that the order was made by reference to s. 41(f) of that Act.
- [3] The child resides with his mother, K.G.T. His father, K.F.M., has parenting time of eight hours per week in accordance with interim orders made and varied throughout the eight years of litigation. For clarity in these reasons, I will refer to the applicant K.F.M. as the Father, and the respondent K.G.T. as the Mother.

- [4] The basis of the July 5 order was a concern that the parties' child required psychological counselling but the Father was refusing to consent to the referral to a child psychiatrist recommended by the child's general practitioner. A physician had been retained to prepare a s. 211 Child Custody, Parenting Capacity and Parenting Time report, but it was not anticipated that the report would be completed until a few months before trial. The Supreme Court chambers judge who heard the Mother's application considered the Father's reasons for not consenting to counselling and other mental health recommendations to have no merit. The effect of the order was that pending trial, the Mother would make all decisions concerning the child's physical and health treatments.
- [5] The Father wishes to appeal this July 5 order. Because the July 5 order grants interim relief under the Family Law Act, leave to appeal is required. The Father sought leave to appeal before a judge of this Court in chambers, but his application was dismissed for reasons indexed at 2019 BCCA 339. He seeks a review of that decision by a division of this Court pursuant to s. 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77.
- [6] At the outset, it is important to note that a review of a decision of a chambers judge is not a re-hearing of the application. The standard to be applied by a division of this Court on a review application was summarized by Madam Justice Dickson in *Lungu v. British Columbia (Human Rights Tribunal)*, 2016 BCCA 136, in these terms:
- [8] A review application brought before a division of the court under s. 9(6) of the Act does not provide an opportunity for a rehearing of the original chambers application. The standard of review is whether the justice sitting in chambers was wrong in law, wrong in principle, or misconceived the facts. In the absence of such an error, the court will not interfere with the chambers judge's exercise of discretion: *DeFehr v. DeFehr*, 2002 BCCA 139 at para. 6.
- [7] Thus, the question for this Court is whether in exercising his discretion not to grant leave to appeal, the chambers judge was wrong in law, wrong in principle, or misconceived the facts.
- [8] With this standard in mind, I turn to the decision of the chambers judge, who for clarity I will refer to as the leave judge. The leave judge began by reviewing the circumstances in which the order had been made. A series of applications was before the Supreme Court chambers judge on July 5. The Father had sought an order varying the interim parenting time order to increase his parenting time and to entitle him to travel with the child in the summer. The chambers judge was not prepared to change the parenting time order. That part of the July 5 order is not in issue in this Court.
- [9] In addition, the Mother sought a series of orders relating to the allocation of parental responsibilities. The Father objected to those applications being heard on July 5 due to insufficient notice, and the chambers judge gave effect to this objection in respect of all of the Mother's applications except the application concerning the child's health-related treatments. The chambers judge explained his reasoning for proceeding with that application in these terms:

- [6] Having read and considered the materials before me, in the circumstances I am satisfied that there is some urgency to the respondent's application, but only as it relates to the child's health-related treatment and, accordingly, I am allowing the respondent to bring her application in that regard by way of short notice. The balance of the respondent's application will have to be heard on a later date convenient to the parties and Madam Justice Fleming, who is the case management judge assigned to this matter and who is familiar with these proceedings.
- [10] The leave judge then reviewed the chambers judge's assessment of the evidence. He summarized the chambers judge's assessment in this way:
- [11] The chambers judge expressed serious concern about the child's mental health. He understood that [the Father] was convinced that the situation is one involving parental alienation by [the Mother]. Given that Dr. England had been retained to assess the entire situation and prepare a full s. 211 parenting assessment, the judge considered that no change in parenting time should be ordered until that assessment had been completed. Accordingly, he dismissed [the Father's] application.
- [12] The chambers judge found no merit in [the Father's] reasons for not consenting to counselling and other recommended mental health modalities. Given this, and the judge's concerns about the child's mental health, he granted the order sought by [the Mother].
- [11] The leave judge then turned to the law relating to leave to appeal, and cited the test in this way:
- [13] The party seeking leave to appeal bears the burden of showing that leave should be granted: *British Columbia Teachers' Federation v. British Columbia (Attorney General)* (1986), 4 B.C.L.R. (2d) 8 at 11 (C.A.) (in Chambers). The criteria to be applied are well-established:
- (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.
- See also *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Saunders J.A. in Chambers). The overarching concern is the interests of justice and the four criteria are "all considered under the rubric of the interests of justice": *Movassaghi v. Aghtai*, 2010 BCCA 175 at para. 22 (D. Smith J.A. in Chambers) and the cases cited therein.
- [12] This test is well accepted in this Court, and I can see no error in the leave judge's statement of the applicable law.

- [13] The leave judge went on to point out the high hurdle faced by appellants who seek appeals of interim orders in family matters:
- [16] The court's jurisdiction to vary interim orders made in family matters is "extremely limited", and it will only interfere with such orders "in exceptional circumstances": *N. (T.) v. N. (J.C.)*, 2013 BCCA 432 at para. 10 (Levine J.A. in Chambers); *F. (J.G.) v. B. (C.L.)*, 2003 BCCA 382 at para. 10 (Huddart J.A. in Chambers).
- [14] This principle is also well accepted in this Court.
- [15] The leave judge then considered the grounds for appeal, which comprise 35 numbered paragraphs in the amended notice of application for leave to appeal, but which the leave judge summarized in this way (para. 20):
- a) whether the chambers judge erred in allowing [the Mother's] application to proceed on short leave, despite her non-compliance with the service requirements in the Supreme Court Family Rules and despite the informal protocol established by the case management judge; and
 - b) whether the chambers judge misapprehended the evidence and erred in his assessment of urgency.
- [16] The leave judge reviewed the submissions of the Father and concluded that he had not identified a good arguable case of sufficient merit to warrant scrutiny by a division of this Court. The Father submits that the judgment refusing leave contains factual inaccuracies and does not give effect to what he characterizes as the breach of his procedural rights in hearing the Mother's application on short notice. The alleged breach of procedural rights concerns the decision of the chambers judge to hear and decide the application concerning the child's health needs, without the Mother having given proper notice under the Rules. The leave judge considered that the procedural issue was not one that satisfied the requirement of a point of significance to the practice or the parties. I would go further. In my view, there is no reasonable prospect that a division of this Court would interfere with the exercise of a chambers judge's discretion to hear this application on short notice given the material that was before the judge.
- [17] The applicant has put a number of authorities before us in support of his review application, but I consider it necessary to address only one, *Williamson v. Williamson*, 2016 BCCA 87. *Williamson* was one of those rare cases where this Court did interfere with an interim order relating to family litigation, but the circumstances were very different. The mother in that case had sought an order for inpatient counselling for the children of the marriage, but the application had been dismissed by a judge of the Supreme Court. The mother then brought an identical application before a different judge, who granted the order, apparently on the mistaken belief that the first judge had not made a decision on the first application. This Court held that the second judge had erred in hearing the mother's application without first finding there was a material change in circumstances from those prevailing at the time the

first application was dismissed. Williamson did not involve an emergent situation of mental health needs of the child requiring an interim order to break an impasse between the parents.

- [18] In the case at bar, the chambers judge was of the view that there was urgency in addressing the child's mental health needs. Although the Father disputes that assessment, there was ample evidence before the chambers judge to justify this conclusion. There is no reasonable possibility that a division of this Court would interfere with that determination.
- [19] In my view, the refusal of leave to appeal was an appropriate exercise of the leave judge's discretion, and I can see no error that would justify interfering with the order. Accordingly, I would dismiss the application to discharge or vary the order refusing leave to appeal.
- [20] The leave judge also dismissed a second application brought by the Father for an order that he be permitted to file materials without paying court fees, generally referred to as a no fees order, as he did not consider that the position being argued by the Father had merit, which is a prerequisite to a no fees order. For the reasons I have outlined in relation to the leave application, I can see no error in that decision.
- [21] As a result, I would dismiss the application to discharge or vary the order refusing leave to appeal and refusing a no fees order. Costs of this application are payable to the respondent.
- [22] GROBERMAN J.A.: I agree.
- [23] GRIFFIN J.A.: I agree.
- [24] GROBERMAN J.A.: The application to discharge or vary the order is dismissed.

"The Honourable Mr. Justice Hunter"

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