
CANADA / JUDGMENT

K.J.M. v. P.D.A.

2012 BCSC 434

COURT

Supreme Court of British Columbia

DECIDED

24 February 2012

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2012 BCSC 434 K.J.M. v. P.D.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.J.M. v. P.D.A.,

2012 BCSC 434

Date: 20120224

Docket: E104021

Registry: Vancouver

Between:

K.J.M.

Claimant

And

P.D.A.

Respondent

Before: The Honourable Mr. Justice Butler

Oral Ruling on Application for Change of Venue

In Chambers

Counsel for the Claimant:

Magal Huberman

Counsel for the Respondent:

Terence J.A. Wright

Place and Date of Hearing:

Vancouver, B.C.

January 26, 2012

Place and Date of Judgment:

Vancouver, B.C.

February 24, 2012

- [1] THE COURT: This is an application by Ms. M. for a change of venue for the trial of this matter. The trial is presently scheduled to take place in Terrace, British Columbia, where the parties lived for many years. The trial was scheduled to start on January 3, 2012, but was adjourned by agreement when a s. 15 report was not prepared in time for the trial. The trial has not been rescheduled pending my ruling on this application to change venue.
- [2] I will commence my reasons by setting out the history of the proceedings and some background information. I will follow that with my analysis and decision.
- [3] This is a high conflict family law case. The parties were never married, but lived in a marriage-like relationship which lasted more than 15 years. Their two daughters are currently 16 and 12 years old. The issues in the proceeding include custody, access, child support, spousal support, and division of assets. From my limited involvement with this case, it would appear that the family has been in a state of high crisis for at least two years.
- [4] In November 2010, Ms. M. and the two girls were involved in a serious motor vehicle accident which has added to the family distress. The eldest daughter has been left paraplegic as a result of the spinal injuries suffered in the accident.
- [5] The action was commenced in the Vancouver Registry by Ms. M. From June 27 to 29, 2011, Blok J. heard three days of contentious applications. The most significant application was an interim nesting order sought by Ms. M. Mr. Justice Blok, in reasons reported at 2011 BCSC 913, determined that it was in the children's best interests that their primary residence be with their father pending the trial, with Ms. M. to have generous access. The application for the nesting order was dismissed.
- [6] Mr. A. brought an application to change the venue for the trial, which was heard at the same time as the application for the nesting order. Justice Blok ordered that the venue for trial be changed to Terrace. His conclusions are stated at paragraphs 76 to 77:
- [76] In this case I am satisfied that the great preponderance of convenience favours a trial taking place in Terrace instead of Vancouver. By the time of trial both parties will be residing in Terrace and, of course, both children reside there (and no mention was made by either party as to arrangements for the children if both parents had to be in Vancouver for the two

weeks of trial). Most of the likely witnesses are from Terrace, including Dr. Altar, the children's family physician, an appraiser (if needed), Ministry social workers and perhaps RCMP officers, and of the 11 or so individuals who filed affidavits supporting one party or the other, eight are from Terrace or that general area. It would be very expensive indeed to have all of the Terrace-area witnesses flown to Vancouver for a trial and it seems that, by the time of trial, medical professionals from Vancouver will less likely be needed since their involvement with the children will be, by that time, somewhat dated. Dr. Korpach is an obvious exception.

- [77] I am, of course, mindful of the additional cost to Ms. M of bringing her counsel from Vancouver to Terrace for the trial, as well as the cost to one or both parties of bringing Dr. Korpach to Terrace, but these costs are far outweighed by the costs associated with a Vancouver trial. If, as seems likely, there are to be witnesses from the Ministry, there is also the matter of inconvenience, both to the witnesses themselves and to those members of the public who will be deprived of their important services for a longer period of time for a Vancouver trial than in the case of a Terrace trial.
- [7] Since the July order, Ms. M. has moved to Vernon, British Columbia. The children are still living with Mr. A. in the family home just outside of Terrace. I understand that there has been some difficulty in arranging access visits between Ms. M. and the younger daughter. I cannot say who, if anyone is at fault for those difficulties. There are no access visits at the present time between the eldest daughter and Ms. M., as their relationship remains strained.
- [8] On December 16, 2011, Master MacNaughton ordered that the family home and adjacent properties be sold. The parties are currently making arrangements to list the properties. I expect that the properties, which are rural and have a quantity of harvestable timber, may take some time to sell.
- [9] The incident which gives rise to this change of venue application took place on October 8, 2011. Ms. M. was in Terrace to visit the family home to take photographs of the parties' chattels and horses. She was at a bar on the evening in question and was confronted by a neighbour, who I will refer to as D.M. Ms. M. says that D.M. approached her aggressively and made derogatory statements to her. He made reference to things she had said to Dr. Altar, a psychologist who prepared a report in this matter, and which D.M. could only have learned from Mr. A. A short time later, D.M. and other individuals cornered her, swore at her, and told her that her kids hate her. She says that D.M. spat at her, hit her in the neck, and pushed her against the wall. On October 9, Ms. M. reported the incident to the police and understood at that time that charges would be brought against D.M.
- [10] She has not returned to Terrace since the incident. She is fearful for her own safety if she returns to Terrace. On January 19 of this year, she spoke to the RCMP in Terrace and was told that the police file will be closed without charges being brought against D.M. She was told there was not enough evidence to support a charge.

- [11] Ms. M. says that as a result of this incident, she is fearful of attending in Terrace for the trial which is scheduled to last three weeks. She is afraid that she could be subject to further attacks which would compromise her safety. She says it would be extremely stressful for her to have that possibility hanging over her during the trial. This would make it difficult for her to prepare for trial and testify. She has not, however, provided any medical or psychological evidence to support her statements regarding her present psychological condition and her ability to deal with stress.

Analysis

- [12] The law regarding applications to change venue is not controversial. Madam Justice Bennett succinctly summarized the law in *Schuler v. Schuler*, 2000 BCSC 1498 at para. 27:

The law is clear that a court can change the venue of a trial if it is in the interests of justice or "a great preponderance of convenience" justifies such a change.

- [13] In the July decision, Blok J. considered both the interests of justice and the preponderance of convenience in coming to the decision to change the venue for the trial to Terrace. There is no question that he applied the correct test. Ms. M. did not appeal that decision. However, she now seeks to change that order. As this issue was recently and thoroughly considered by my brother judge, I would be reluctant to order a further change of venue, unless Ms. M. has shown that there has been a change of circumstances since the July order was made which materially affects the interests of justice or the preponderance of convenience.
- [14] Ms. M. argues that the incident of October 8 results in a change of circumstance that affects the interests of justice. She acknowledges that even with her move to Vernon, the preponderance of convenience is not significantly different from what it was at the time of the July order. However, she says that if she has to be concerned throughout the trial about her safety, she would be subject to considerable stress, and says that this will result in significant prejudice to her. This is a matter which goes directly to the interests of justice, because she will have a more difficult time preparing for trial, giving evidence, and instructing counsel than Mr. A. In short, she argues it will be difficult for her to deal with all of the issues required for a lengthy Supreme Court trial and there will not be a level playing field for her and Mr. A. Ms. M. has not suggested a particular alternate venue. She would be content with Prince George or Vancouver or any other venue away from Terrace.
- [15] Mr. A. argues there is no change in circumstances since the July order which affects either the preponderance of convenience or the interests of justice. He says that if Ms. M.'s application is based on her concern for safety and stress levels, she should have provided medical or psychological evidence to support that allegation. Further, if the alleged assault was a serious issue, D.M. would have been charged. Mr. A. relies on RCMP records for the proposition that Ms. M. has made other allegations of assault which have not been pursued by the police. He also referred to a report by Dr. Altar for the purpose of showing that there are other occasions where Ms. M. has made unfounded allegations.

- [16] I should indicate that I have not referred to or considered Dr. Altar's report for the purpose of arriving at a decision on this application. Ms. M. objects to the admissibility of this report and, rather than deal with that issue on this interim application, I have simply disregarded the report in its entirety.
- [17] Ms. M. also says that I should place no reliance on the decisions taken by the RCMP in relation to Ms. M.'s complaints. She says that the RCMP actions were tainted because the first encounter the police had with the couple involved an allegation by Mr. A. that Ms. M. was not reliable and was prone to exaggeration. I agree that I cannot take much from the comments in the RCMP records about Ms. M.'s complaints. It is at best hearsay opinion.
- [18] While I cannot rely on the statements in the RCMP records or Dr. Altar's report, I find that Ms. M. has not put forward sufficient evidence to meet the onus on her to show that the preponderance of convenience or the interests of justice requires a change of venue for the trial. Mr. Justice Blok thoroughly considered the preponderance of convenience. I agree with his conclusion and find that there has been no change in circumstances that alters the preponderance of convenience.
- [19] The question thus comes down to whether, in the interests of justice, the venue should be altered. To arrive at the conclusion that it should be altered, I would have to be satisfied that Ms. M. has shown either (1) the existence of a real and substantial safety concern associated with a trial in Terrace; or (2) a verifiable psychological condition arising from stress occurring as a result of the October incident.
- [20] I say that the safety concerns must be "real or substantial" and the psychological condition must be "verifiable", because this court will not lightly order a change of venue. That is particularly so where the issue has already been thoroughly considered in the same action.
- [21] I must start my analysis with the presumption that a party will be able to have a fair trial in any venue in this province. Ms. M.'s application challenges that presumption in relation to a trial in Terrace. In order to succeed with that challenge, there must be convincing evidence to show that the interests of justice require a change of venue. Here the evidence simply does not satisfy that test.
- [22] With regard to the issue of personal safety, Ms. M. lived for more than 15 years in Terrace. The suggestion that she is no longer able to spend three weeks in Terrace because of safety concerns requires more evidence than she has provided to this court. While I do not mean to downplay the October incident, the fact that the RCMP has closed their file is a relevant consideration. While I have not taken the other comments from the RCMP file into account, the fact that they have not pursued this allegation indicates that the incident may not be as serious or may not have occurred as Ms. M. has alleged.

- [23] I must also take into account the circumstances of this case. It is a highly acrimonious family proceeding where extensive allegations and counter allegations have already been traded. Mr. Justice Blok noted that on the application before him there were 36 affidavits filed by the parties and other witnesses. Given the nature of the allegations in the case and the serious way in which each side challenges the allegations of the other party, I would be reluctant to reach a conclusion about the interests of justice on the evidence before me.
- [24] The evidence presented by Ms. M. does not satisfy me that she would be under additional stress that would result in unfair prejudice. This trial will be stressful for both parties. There is a high level of animosity and associated conflict. However, Ms. M. presented no independent evidence to support her assertion that the incident in October has or will result in additional or debilitating stress. No medical or psychological evidence was presented. Ms. M.'s assertion that the incident will result in unfair prejudice is not sufficient to support such a proposition.
- [25] Before concluding my reasons, I should indicate that I was advised that Ms. M.'s counsel approached trial scheduling in Terrace and Vancouver to see if there were scheduling concerns that might be relevant to my decision in this matter. I have not taken scheduling concerns into consideration in arriving at my decision. The reason I have not done so is that I agree with the parties that this case should proceed to trial as soon as possible.
- [26] Now that I have determined that the case should proceed to trial in Terrace, I will canvass possible trial dates with the parties and their counsel, and I expect that a special sitting can be arranged for Terrace within a reasonable timeframe and a date which fits into everyone's schedule.
- [27] In summary, the application for a change of venue from Terrace is dismissed.

"Butler J."

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