
CANADA / JUDGMENT

K.M.P. v. A.E.J.

2020 BCSC 1916

COURT

Supreme Court of British Columbia

DECIDED

4 December 2020

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2020 BCSC 1916 K.M.P. v. A.E.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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

2020 BCSC 1916

Date: 20201204

Docket: E57641

Registry: New Westminster

Between:

K.M.P.

Claimant

And

A.E.J.

Respondent

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

In Chambers

Counsel for the Claimant:

K.L. Pollitt

Counsel for the Respondent:

J. Mangat

Place and Dates of Hearing:

New Westminster, B.C.

November 13 and 16, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 4, 2020

INTRODUCTION

- [1] The claimant has applied to vary the parenting time of the respondent with the 30-month old son of their relationship, for an order that the parties attend sessions of conflict coaching, and that the parties revisit the parenting schedule at a mediation one year from any order issued in this application.
- [2] Shortly before the hearing of this application on November 13, 2020, it was brought to my attention that my colleague, Mr. Justice Verhoeven, had previously heard an adjournment application from the parties and took the position that he was concerned that this Court did not have jurisdiction to hear this matter. He granted the adjournment, in part, to allow the parties to consider and address this jurisdictional issue.
- [3] Mr. Justice Verhoeven was concerned that the British Columbia Supreme Court does not have jurisdiction to hear this application because this Court has sat as an appellate court in this matter. Our colleague, Mr. Justice Harvey, had granted an appeal of orders made following a two-day trial in the Provincial Court of British Columbia. Mr. Justice Harvey's reasons for judgement on the appeal were issued on November 21, 2019.
- [4] At the opening of the hearing of this application on November 13, 2020, and being advised by counsel for the claimant of some urgency, I agreed to hear submissions subject to reserving a decision on the jurisdictional issue raised by Verhoeven J., in order that I may have time to review the relevant Family Law Act, SBC 2011, c 25 ("FLA") provisions and the authorities.
- [5] In his reasons for judgment issued November 21, 2019, Harvey J. made minor changes to the May 14, 2019 order of the Provincial Court Judge, Judge La Prairie, stating in his reasons:
- [62] On a global basis, I conclude the order made, based on the evidence before the trial judge, was, in the main, appropriate and open to the trier of fact as a reasonable conclusion save for the following: want of a term allowing the order to be reviewed upon a determination or consideration by the appellant as to the impact of, in particular, overnight access upon R.J. and his reaction to it.

...

[80] On the matter of costs, I agree with the respondent, the principal issued before me was that of the parenting plan and, in my considered view, what I have done is tweaked, not radically altered, the parenting plan.

[6] In the notice of application now before this Court, K.M.P is applying to vary the order of Harvey J. under s. 47 of the FLA which allows for a court to "change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child."

[7] K.M.P. alternatively relies on the review provision that Harvey J. included in the order on appeal:

"b. Upon the application of the appellant, the overnight access may be reviewed if it can demonstrated that the parenting shift has caused adverse reactions in the Child;"

[8] The reasons for judgment of Harvey J. did not mention which court could review the order should overnight access have an impact upon the child.

[9] I note that the originating proceeding in this Court upon which this notice of application is brought is the notice of appeal. There is no notice of family claim filed in the Supreme Court, and the substantive court file relating to the trial remains at the Provincial Court.

[10] For the reasons that follow, I find that the Provincial Court of British Columbia has "occupied the field" regarding the determination of parenting arrangements, and thus the appropriate place for issues of parenting arrangement to be heard is the Provincial Court as they have already "embarked on a consideration of the issues" in the two-day trial which was before La Prairie P.C.J.

[11] Although Harvey J.'s order altered the order of La Prairie P.C.J. in a minor way, he did not make a new order or create a new proceeding under the FLA. The jurisdiction of this Court was concluded with Harvey J. having decided the appeal and an order being entered reflecting those reasons; this Court is functus.

[12] Similarly, although this variation or review application could possibly be interpreted as a new proceeding or fresh application, there is authority to say that a variation proceeding is linked to the original proceeding and should go to the court which has granted or refused relief on that basis. This is supported on a procedural basis by noting the originating file on which the notice of application is brought.

DISCUSSION

[13] The applicable sections of the FLA are ss. 194 and 233:

194 (1) If a proceeding respecting a family law dispute may be started in either the Supreme Court or the Provincial Court, the starting of a proceeding in one court does not prevent the starting of a second proceeding in the other court, unless the relief applied for in the second proceeding has already been granted or refused in the first proceeding.

(2) If proceedings are started in both courts and each court may make an order for the same relief, the making of an order by one court does not prevent an application for an order in the other court unless the relief that is the subject of the application to the other court has already been granted or refused by the first court.

(3) If proceedings are started in both courts, a court, on application and to the extent that the matter is within the court's jurisdiction under section 192 [Supreme Court jurisdiction] or 193 [Provincial Court jurisdiction], as applicable, may do one or more of the following:

- (a) decline to hear a matter;
 - (b) decline to hear a matter until another matter under this Act, or under any other law of British Columbia or Canada, has been heard in the other court;
 - (c) consolidate proceedings started in the other court with proceedings started in the court;
 - (d) hear a matter.
- (4) Despite subsection (2), the Supreme Court may change, suspend or terminate, under section 215 [changing, suspending or terminating orders generally], an order of the Provincial Court if
- (a) the Supreme Court is making an order that affects an order of the Provincial Court, and
 - (b) the parties would have to go back to the Provincial Court to have the Provincial Court's order changed, suspended or terminated as a result.
- (5) If the Supreme Court acts under subsection (4), the Supreme Court's order is deemed to be an order of the Provincial Court for all purposes.
- (6) Nothing in this section authorizes the Supreme Court to change, suspend or terminate an order of the Provincial Court if the Provincial Court has refused to change, suspend or terminate the order, except as provided under section 233 [appeals from Provincial Court orders].

...

233 (1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.

(2) The time limit for starting an appeal is 40 days, beginning on the day after the order of the Provincial Court is made.

(3) After hearing the appeal, the Supreme Court may do one or more of the following:

- (a) confirm or set aside the order of the Provincial Court;
 - (b) make any order that the Provincial Court could have made;
 - (c) direct the Provincial Court to conduct a new hearing.
 - (4) On application by a party, the Supreme Court may extend the time limit for starting an appeal.
- [14] It is clear that the Supreme Court and the Provincial Court have overlapping jurisdiction to make orders for parenting arrangements under the FLA. The question under s.194 is whether in this application the proceeding has been started, and relief has been granted or refused, in the Provincial Court or the Supreme Court.
- [15] In a regular case of subsequent applications to the Supreme Court where the Provincial Court had already been considering the issues in question and granted or refused relief on those issues, it is clear that the Provincial Court would have jurisdiction and the Supreme Court would refuse to hear the subsequent application.
- [16] However, the unique situation of this case poses two underlying issues. The first, is whether having made the order on appeal, the Supreme Court has assumed jurisdiction. The second, is whether the notice of application seeking review or variation of a previous order constitutes a new proceeding for which relief has not yet been granted or refused by either court.

Principles on overlapping jurisdiction

- [17] On the question of which court has jurisdiction, the parties have highlighted the following cases: *Kane v. Proffitt*, 2018 BCCA 106, *Kelly v. Sidhu*, 2020 BCSC 393, *Power v. Spadafora*, 2015 BCSC 1399, *C.R.J. v. L.S.J.*, 2013 BCSC 1781, and *G.B. v. D.B.*, 2019 BCPC 69.
- [18] I have reviewed the principles from each of these cases. I have also reviewed the Continuing Legal Education Society of British Columbia's ("CLE") chapter on changing parenting orders where there is a jurisdictional issue. I will cite the summary of relevant principles from the CLE (British Columbia Family Practice Manual (online), "Jurisdiction of the Supreme Court to Change, Suspend, or Terminate an Order under the Family Law Act", at §16.3 (2020 Update)):

For an analysis of the law on the concurrent jurisdiction of the Provincial Court and the Supreme Court under the Family Law Act, see *Turner v. Turner*, 2013 BCSC 1988 (Master), and *Power v. Spadafora*, 2015 BCSC 1399.

In *Turner*, the court concluded that in the common situation where property issues arise after the commencement of provincial proceedings for other corollary relief, the changes under the Family Law Act did not significantly alter the law as it was under the Family Relations Act. When the Provincial Court has already embarked upon a consideration of issues on which the Supreme Court and Provincial Court have concurrent jurisdiction, then except in those enumerated

circumstances under the statute, the Supreme Court will not assume jurisdiction. Mere preference for the procedures in the Supreme Court will not suffice to convince that court to assume jurisdiction.

In *Power v. Spadafora*, although the issues of custody, guardianship, access, parenting time, and contact had already been determined under the Family Relations Act and the Family Law Act in Provincial Court, a party subsequently commenced an action in Supreme Court for custody and access under the Divorce Act. The court concluded that, although neither provincial statute limited the Supreme Court's jurisdiction over issues under the Divorce Act, it was appropriate for the court to decline jurisdiction in light of the principle of judicial comity.

Similarly, in *Song v. Zhang*, 2016 BCSC 1438, Hinkson C.J.S.C. held that the Supreme Court did not have jurisdiction to deal with the issue of access because the Provincial Court had pronounced on that subject in a consent order. The court therefore dismissed the claimant's application to have the Provincial Court proceedings transferred to, and consolidated with, proceedings she had commenced in the Supreme Court.

[19] As noted in *Power v. Spadafora*, the overarching principle at play is that of judicial comity. Thompson Reuters' Practical Law glossary defines judicial comity:

The legal doctrine under which courts recognize and enforce each others' legal decisions as a matter of courtesy, or based on the need for reciprocity, but not necessarily as a matter of law. Courts observing comity usually defer considering a case if the same issues are being considered in a court in another jurisdiction.

Did the Supreme Court assume jurisdiction on appeal?

[20] The Court of Appeal in *Kane v. Proffitt*, 2018 BCCA 106 at para. 42 explains the role of the Supreme Court sitting on appeal from the Provincial Court:

[42] The scope of appellate review in family matters is a narrow one; intervention by an appellate court is subject to a high standard of review. The function of appellate review is not to re-try a case or to continue the trial at a different stage. Rather, its purpose is to examine the record below to determine if material or reversible error has been demonstrated, including an error of law, an error of principle, an error of fact, or a serious misapprehension of the evidence that could reasonably have affected the result and therefore warrants appellate intervention. See *Scott v. Scott*, 2006 BCCA 504; *Jens; R.E.Q. v. G.J.K.*, 2012 BCCA 146; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 832-833; and *Van de Perre v. Edwards*, 2001 SCC 60 at para. 15.

[21] Under s.233(3)(b), the orders made on appeal by Harvey J. were those which the Provincial Court could make. As discussed in *Kane v. Proffitt*, Harvey J. did not re-try the case, nor continue the trial. Harvey J. was limited in the scope of appellate intervention, making only orders that the Provincial Court could make, thus reinforcing that the relief granted on appeal is necessarily linked to the underlying proceeding in Provincial Court. On appeal, the Supreme Court did not assume jurisdiction of this matter: the appeal has been heard and

this Court is now functus.

Is the review or variation a new proceeding seeking relief that has not been granted or refused by either court?

- [22] Under the FLA s.194(2), either court may have jurisdiction "unless the relief that is the subject of the application to the other court has already been granted or refused by the first court." The question is whether this notice of application is seeking relief that has been granted or refused by the Provincial Court, such that the Supreme Court should not take jurisdiction.
- [23] In her notice of application, the mother is seeking either a review or variation of the order of Harvey J. If we define the relief sought broadly as 'parenting arrangements', then the authorities say that the Provincial Court would have jurisdiction as there is a proceeding in that court which has considered those issues. This approach is in line with the principles noted above.
- [24] However, if alternatively the relief sought is defined more narrowly as "the question of variation or review", my concern is that there may be an argument that the relief has not yet been granted or refused.
- [25] On that point, G.B. v. D.B., 2019 BCPC 69 at para. 17 explains that "an application to vary an existing court order in either court constitutes an application for relief that has already been granted or refused as that language is captured in section 194(2) of the Family Law Act." I understand this to mean that although an application to vary may be 'fresh', a variation application is still linked to the original proceeding under s.194(2). Although the decision in G.B. v. D.B. is not binding on me, it does help to address my concern that this notice of application is creating a new proceeding seeking new relief.

DECISION

- [26] I conclude that any application to vary or review the order of La Prairie P.C.J. as altered by Harvey J. on appeal must be heard before the Provincial Court of British Columbia.

"Jenkins J."

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