
CANADA / JUDGMENT

K.W. v. L.H.

2018 BCCA 350

COURT

British Columbia Court of Appeal

DECIDED

31 August 2018

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2018 BCCA 350 K.W. v. L.H.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

K.W. v. L.H.,

2018 BCCA 350

Date: 20180831

Docket: CA44682

Between:

K.W.

Appellant

(Claimant)

And

L.H.

Respondent

(Respondent)

Before:

The Honourable Madam Justice Dickson

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated August 16, 2017 (K.W. v. L.H., 2017 BCSC 1441, Vancouver Docket E151548).

Oral Reasons for Judgment

Counsel for the Appellant

(appeared via teleconference on August 31, 2018):

S.L. Specht

Counsel for the Respondent:

L.A. Cruickshank

Place and Date of Hearing:

Vancouver, British Columbia

August 24, 2018

Place and Date of Judgment:

Vancouver, British Columbia

August 31, 2018

Summary:

The applicant seeks an order staying various terms of a previous order, including a relocation term, pending the outcome of his application for leave to appeal to the Supreme Court of Canada. Held: Application dismissed in part. While applicant's leave to appeal application meets the merit threshold, it is not in the child's best interests to grant a stay of proceedings pending further appeal. Balance of convenience favors refusing a stay, as irreparable harm occasioned to child as a result of a stay outweighs harm occasioned to applicant. One-half of the total sum of the trial and appeal costs award to be paid into trust account pending the outcome of the leave application.

Overview

[1] DICKSON J.A.: N. is the seven year old boy at the center of this family law litigation. K.W. is his mother and L.H. is his father. Following the breakdown of their relationship, K.W. applied to the court below to relocate N. from British Columbia to Nova Scotia. Justice Affleck dismissed her application on August 16, 2017. On May 25, 2018, this Court allowed K.W.'s appeal and ordered that K.W. was permitted to relocate N. to Nova Scotia. She did so on July 31, 2018.

- [2] L.H. seeks an order staying various terms of this Court's May 25 order, including the relocation term, pending the outcome of his application for leave to appeal to the Supreme Court of Canada, which he filed on August 22, 2018. For the reasons that follow, I dismiss L.H.'s stay application, except to the extent of ordering that L.H. pay one-half of the total sum of the trial and appeal costs award into the trust account of K.W.'s counsel pending the outcome of the leave application.

Background

- [3] K.W. was raised on a farm in a large, supportive family in Nova Scotia. In 2004, she moved to Vancouver, although she intended to return to Nova Scotia eventually. In May 2015, she completed a nursing degree at the University of British Columbia, but has not worked full-time since N.'s birth.
- [4] L.H. was raised in Australia. His family continues to reside there. He moved to Canada in 2005 and became a Canadian citizen in 2012. L.H. is employed in Vancouver in the construction field, having recently left a long-term job to work in his own company.
- [5] K.W. and L.H. met in 2007 and moved in together in 2009. In 2010, L.H. bought a house, where they lived until after N.'s birth. Following N.'s birth in June 2011, their relationship deteriorated and, in May 2013, K.W. and N. left Vancouver and moved to Nova Scotia. However, after she returned to Nova Scotia K.W. was accepted into the nursing program at the University of British Columbia. She and N. returned to Vancouver so that she could pursue her nursing degree. From September 2013 to September 2015, they lived in L.H.'s house with him, which was unhealthy for all concerned.
- [6] While K.W. and N. lived in L.H.'s house, K.W. suffered from depression and hoarding behaviour. L.H. drank excessively and verbally abused K.W., sometimes in N.'s presence. L.H. also encouraged N. to engage in aberrant behaviour such as urinating on K.W.'s bed and throwing away K.W.'s clothes. Unsurprisingly, N. developed serious behavioural difficulties which involved loud, aggressive tantrums and occasional violence toward others, including K.W.
- [7] After K.W. and N. left L.H.'s house in September 2015, they moved four times in search of appropriate accommodation in the Vancouver area. At the time of trial, they resided in a one-bedroom basement suite.
- [8] K.W. commenced the underlying family proceeding on June 4, 2015. She initially sought spousal support, an order relating to property, and costs. L.H. filed a counterclaim on August 21, 2015 seeking, among other things, an order providing for parenting arrangements and restraining either party from relocating N.'s residence away from Vancouver.

- [9] On January 19, 2016, Justice Duncan made an interim order defining parenting time and providing that N.'s primary residence would be with K.W. She included a term in her order to the effect that neither party was to remove N. from British Columbia without a court order. The order also included a provision requiring L.H. to provide breathalyzer testing during his parenting time.
- [10] On June 13, 2016, K.W. filed an amended notice of family claim seeking an order pursuant to s. 45 and/or Division 6 of Part 4 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], allowing her to relocate N. to Nova Scotia. She also sought orders dealing with parenting arrangements and child support. The trial took place between March 27 and May 15, 2017 before Justice Affleck. On August 16, 2017, he denied K.W.'s relocation application and made a variety of other orders.

Trial judgment (2017 BCSC 1441)

- [11] The judge began by determining whether Division 2 (specifically s. 46) or Division 6 of Part 4 of the FLA applied to the relocation application. This was a significant issue because the test for relocation is more onerous under Division 6 than it is under Division 2. The judge found that an order respecting parenting arrangements existed in this case, triggering the application of Division 6 of Part 4. In particular, he held that an interim order falls within the meaning of an "order" under s. 46(1)(a). As noted, Justice Duncan made an interim order respecting parenting arrangements on January 19, 2016.
- [12] Applying the test under Division 6, the judge dismissed K.W.'s relocation application. His order included the following terms: N.'s primary residence would be with K.W.; the parties would have equal parenting time; neither party would remove N. from British Columbia without the other party's consent or a court order; L.H. would pay child support in accordance with his Federal Child Support Guidelines, SOR/97-175 income and disagreement on his income would be referred to the registrar; K.W. had an imputed income of \$30,000 commencing July 1, 2018; and K.W. would pay for half the cost of an expert report.
- [13] K.W. appealed Justice Affleck's order to this Court.

Appeal judgment (2018 BCCA 204)

- [14] The appeal was heard on March 19, 2018. On appeal, K.W. argued that Justice Affleck erred by applying Division 6 of the FLA rather than Division 2 to her relocation application and contended that, but for this error, the application would have been granted. She also contested certain factual findings and challenged the judge's approach to the parties' income. On the issue of whether Division 2 or Division 6 applied to the application, writing for the Court, Justice Goepel stated:
- [78] In short, Division 2 applies to relocation applications when there is no order or agreement in place and Division 6 governs when there is. Division 6 assumes that an existing agreement or order respecting parenting arrangements has been made in the best interests of the child

and in those circumstances, deference should be given to that pre-established arrangement. When there is no order or agreement, there is no rationale for the same deference. Regrettably, these divisions do not explicitly address what happens when the parties obtain an interim order respecting parenting arrangements. The difficulty which has arisen in the trial court is whether an interim order made in the course of the proceeding takes the application out of Division 2 and into Division 6.

[Emphasis added.]

[15] In reaching his decision, Justice Goepel adopted the reasoning of Justice Punnett in *S.J.F. v. R.M.N.*, 2013 BCSC 1812:

[92] I agree with Justice Punnett and adopt his analysis set out at paras. 54-60 of *S.J.F.* reproduced above. Absent an existing agreement between the parties, when an initial application is brought for an order respecting parenting arrangements under s. 45 and a guardian indicates in his or her pleadings or by notice in writing of an intention to change the child's residence, s. 46 applies notwithstanding that an interim order is made in the course of the proceedings. To the extent that *L.J.R., A.J.D., Pepin, and Wong* suggest otherwise, those cases were wrongly decided and should not be followed.

[93] Whether an interim order made in advance of any claim or notice of intention to relocate would transfer the matter from Division 2 to Division 6 raises somewhat different policy considerations. Arguably, such an order may create legitimate expectations about existing arrangements, particularly if the order has remained in effect for an extended period of time. This issue however does not arise on this appeal and I will say no more about it.

[94] In the result therefore I find the trial judge erred in law in deciding the relocation application pursuant to Division 6.

[Emphasis added.]

[16] Justice Goepel found that Justice Affleck based the relocation decision on a material error of law and made a serious error in principle in failing to consider family violence when determining N.'s best interests, which error tainted the decision. He also elected to determine the relocation issue rather than order a new trial:

[97] In my view, the evidence in this case is such that it is both possible and preferable for this Court to make its own determination while still giving appropriate deference to the factual findings of the trial judge that are untainted by error in principle. The parties have already incurred the expense of a lengthy trial and remitting this matter back to the trial court would result in potentially harmful delay, uncertainty, and significant cost. It is in N.'s best interest that this Court resolve the outstanding issues.

- [17] After considering the relocation application in light of Division 2, Justice Goepel concluded that the best solution would be for both parents to move to Nova Scotia. He went on to hold that, notwithstanding L.H.'s refusal to do so and the reduction in contact that K.W. and N.'s move would entail, it was in N.'s best interest to move to Nova Scotia with K.W.:
- [135] When considered in the round I find that N should not be separated from his Mother who has been his primary caregiver for almost all of his life. The move to Nova Scotia is clearly in the Mother's best interest. The move will provide her and N with much needed emotional support. More importantly, I find the move is in N's best interest. The Mother's increased stability and personal happiness will undoubtedly have a positive impact on N. The move is likely to enhance the general quality of his life. He is a troubled child who will benefit from being surrounded by a loving extended family. I find that his best chance to succeed in life would be to live in Nova Scotia with his Mother.
- [136] I would order that N reside primarily with the Mother. The Mother is permitted to forthwith relocate with N to Nova Scotia. The parties shall remain joint guardians of N.
- [18] Although this Court's order permitted K.W. to relocate with N. to Nova Scotia immediately, she did not do so. Instead, she waited until N. finished his school year and L.H. and his parents were able to see him while they visited from Australia. As noted, K.W. and N. moved to Nova Scotia on July 31, 2018.
- [19] K.W. deposes that N. is thriving in Nova Scotia. He lives with K.W. and her parents on the family farm, spends time with family members and has been enjoying activities such as camping since his arrival. She also deposes that N. is excited about starting elementary school in his new home and is enrolled in Beavers starting in the fall. She deposes further that he speaks regularly with L.H., who has parenting time in Nova Scotia coming up soon.
- [20] L.H. deposes that he is concerned about his inability to be involved in parenting decisions from Vancouver while N. and K.W. are in Nova Scotia, particularly as K.W. does not consult him about parenting decisions. For example, he was not consulted about N.'s recent enrollment in Beavers in the fall. He also deposes that he believes N. misses him and would reintegrate well in Vancouver if he were to return when the stay is granted. He says that N. has a home with him and he thinks there would be no problem re-enrolling him in his previous school. He deposes further that he booked flights to visit N. in Nova Scotia over the September long weekend. He makes no concrete proposal as to where and how K.W. and N. would live during K.W.'s parenting time should K.W. choose to return to Vancouver with N.
- [21] In their affidavits, both parties describe what they see as ongoing incivility and lack of cooperation on the part of the other.
- [22] Costs of the trial and appeal have not yet been determined. However, in combination, they are likely to be in the range of \$90,000-\$100,000.

[23] As noted, L.H. filed this stay application on August 14, 2018 after K.W. and N. relocated to Nova Scotia. Counsel tells me that this is the date upon which she received instructions from L.H. to seek leave to appeal to the Supreme Court of Canada. L.H.'s leave application was filed shortly before the deadline, on August 22, 2018. There are three proposed questions in issue:

Issue No. 1: Statutory Interpretation, Interim Orders and Relocation

Does Division 2 or Division 6 of the Family Law Act apply in this case? Did the Court of Appeal correctly apply principles of statutory interpretation and existing appellate authority to interpret the word "order" in the Family Law Act? Did the Court of Appeal incorrectly emphasize the timing of an interim order in a manner inconsistent with the Family Law Act and principles of statutory interpretation?

Issue No. 2: "Family Violence", Best Interests, and Relocation

What constitutes "family violence", and to what extent does a determination that a party has engaged in family violence impact on a determination of the best interests of a child in mobility cases? In the absence of any finding of family violence by the Trial Judge, did the Court of Appeal improperly give undue weight to this factor in considering the child's best interests?

Issue No. 3: The Scope of Appellate Review

Did the Court of Appeal exceed its jurisdiction in re-trying the case, substituting its discretion for that of the Trial Judge, drawing inferences, and making factual findings which the Trial Judge is better positioned to make?

Stay Pending Leave to SCC

Law

[24] Section 18(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, provides that the Court may order a stay of proceedings pending further appeal. The test for a stay is: (1) whether there is some merit to the appeal in the sense that there is a serious question to be tried; (2) whether the applicant will suffer irreparable harm if the stay is refused; and (3) whether the balance of convenience favours the applicant: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[25] The merit test requires consideration of whether the issue raised on appeal is one of public importance such that the Supreme Court of Canada might grant leave to hear the appeal. In circumstances such as these, the focus of the irreparable harm test is principally upon whether the child would suffer irreparable harm if the appeal is ultimately successful and a stay has not been granted: *RJR-MacDonald*, supra; *Solis v. Tibbo Lenoski*, 2015 BCCA 531 at paras. 8-15.

Position of the Parties

- [26] L.H. contends the proposed grounds of appeal raise issues of public importance and, for this reason, leave to appeal is likely to be granted. For example, he says, issue No. 1 engages considerations of statutory interpretation, which has important national implications. In addition, issue No. 2 is a significant matter that the Supreme Court of Canada has yet to address and issue No. 3 raises general concerns relating to the need to discourage litigation in this area.
- [27] As to irreparable harm, L.H. says that N.'s best interests are the prime consideration and they will be best met by returning him to his home in Vancouver, where he knows the local school and has friends in the neighborhood. In his submission, neither he nor N. can recover the time that would be lost in what is likely to be approximately a three-month waiting period before it is known whether the Supreme Court of Canada will grant leave to appeal. During this time, he says, important relationship-building and bonding can and should take place between himself and N., but it will be lost forever unless a stay is granted. In other words, according to L.H., unless a stay is granted N. would lose an important and regularized relationship with his father.
- [28] With regard to the costs order, L.H. emphasizes that he pays ongoing child support, but K.W. is otherwise substantially impecunious. Unless the stay is granted, L.H. says that he will likely have nothing to collect from in the event he succeeds on appeal as K.W. has no assets.
- [29] K.W. responds that the proposed grounds of appeal do not raise matters of national importance. In addition, and importantly, she says, N. would be irreparably harmed if L.H.'s stay application is granted pending a determination of the leave to appeal application. This is so, she says, because a stay would create further instability for N., who desperately needs the stability provided to him by his current living situation in Nova Scotia. She also says that L.H. is focused on his own needs, as evidenced by this application. Further, she notes, L.H. suggested no workable proposal for her return to Vancouver with N. if a stay is granted. Although K.W. has been N.'s primary caregiver for most all of his life, she has neither a place to live here nor the financial means with which to make a smooth move.
- [30] As to costs, K.W. emphasizes that L.H. has not provided current financial documents in connection with his new job and, as a result, it is difficult to assess his financial position. However, she is clearly in a precarious financial position and entitled to the fruits of this Court's judgment. As to the term regarding outstanding daycare costs, the payment of which L.H. seeks to have stayed, she notes this is a \$7,500 debt that has been outstanding for six years. In sum, in her submission, there is no good reason to grant a stay of any term of the order, but if a stay or partial stay of the costs aspect of the order is granted she says the funds should be paid into trust.

Analysis

- [31] I am satisfied that L.H.'s leave to appeal application has merit in the sense that the Supreme Court of Canada might grant leave, given the issues raised by the application. In this age of mobility, the proper test to be applied and considerations to be weighed for relocating children is a matter of considerable public importance, as are the parameters of appropriate appellate review.
- [32] However, I am also satisfied that N. would be irreparably harmed if his nascent stability in Nova Scotia is disrupted at this juncture by a stay of the relocation term. In other words, I am satisfied it is not in his best interests for a stay to be granted. N. is a troubled child who is finally in a stable environment in which he is thriving, albeit without frequent in-person contact with L.H., which is unfortunate. Nevertheless, for most of his life K.W. has been N.'s primary caregiver and his well-being is tightly connected to her well-being, which is plainly best served by continuing the present living arrangement. As her counsel points out, L.H. made no viable proposal for K.W. to return to Vancouver with N. and he seems to contemplate the prospect of N. coming back to live here without her, which would be very harmful for N. The same is true of renewing the pre-existing instability associated with N. residing here with K.W.
- [33] I accept that, as his counsel explained, L.H. wanted to consider carefully whether to seek leave to appeal to the Supreme Court of Canada before making the application. However, the fact is that he did not make the decision until after K.W. and N. moved back to Nova Scotia, despite knowing since May 25, 2018 that, unless he sought leave to appeal and a stay promptly, that is what would occur. The delay in his decision to seek leave inevitably meant that the prospect of a stay and N.'s associated return to Vancouver would be harmful and disruptive to N.
- [34] As to the trial and appeal costs award, I accept there is a real risk L.H. may be unable to recoup all of the funds paid to K.W. in the event that his appeal is successful, given her present financial circumstances. That being said, L.H. has an ongoing child support obligation and some form of set-off may be possible should the need arise. In addition, K.W. has capacity to earn income in Nova Scotia when she goes to work.
- [35] Turning to the balance of convenience, as to the relocation and other parenting terms of the order, including the award for daycare costs, in my view it is self-evident that K.W. and N. would be much more inconvenienced by a stay being granted than would L.H. by a stay being refused. As to the trial and appeal costs award, balancing K.W.'s current precarious financial circumstances and entitlement to the fruits of the judgment with the realistic risk that L.H. may be unable fully to recover them if he does succeed on further appeal, I conclude that one-half of the total sum of the costs award should be paid into the trust account of K.W.'s counsel pending the outcome of the leave application.

"The Honourable Madam Justice Dickson"

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