

CANADA / JUDGMENT

Kelly v. Sidhu

2020 BCSC 393

COURT

Supreme Court of British Columbia

DECIDED

13 February 2020

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2020 BCSC 393 Kelly v. Sidhu IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Kelly v. Sidhu, 2020 BCSC 393 Date: 20200213 Docket: E182556 Registry: Vancouver Between: James William Kelly Claimant And Tejinder Sidhu Respondent Before: The Honourable Madam Justice Gropper Oral Reasons for Judgment In Chambers Counsel for the Claimant: L. Rudovica Counsel for the Respondent: D. Wilson Place and Date of Hearing: Vancouver, B.C. February 13, 2020 Place and Date of Judgment: Vancouver, B.C. February 13, 2020 THE COURT:

Introduction

[1] Mr. Kelly seeks a number of orders:

- a) enforcement of an order of Master Cameron on October 9, 2019 (the Cameron Order);
- b) that Ms. Sidhu, the respondent, provide financial disclosure;
- c) an order consolidating the Richmond Provincial Court proceeding, file number F6847, and this Supreme Court proceeding;
- d) an order adding Gurbachan Singh Sidhu and Ardas Kaur Sidhu to the claim;
- e) an order permitting the amendment of the notice of family claim; and
- f) costs.

Background

- [2] The parties were married on January 11, 2009. They have two children: a daughter born January 1, 2010, and a son born May 27, 2013. They separated in January 2016.
- [3] When the parties were married, they resided at 9737 Pigott Road in Richmond. The property is in the name of Ms. Sidhu's parents. Ms. Sidhu continues to reside in the family home with the children.

- [4] Mr. Kelly began an action in the Provincial Court soon after the parties separated. The parties are bound by orders of that court in respect of guardianship, parenting time, contact, conduct, allocation of parental responsibility and child support.
 - [5] The last order of the Provincial Court was made by Judge Raven on January 31, 2019, in respect of an exchange location for the exercise of parenting time.
 - [6] Mr. Kelly filed his notice of family claim in this Court on September 18, 2018. He seeks a divorce and equal division of assets, spousal support and other claims.
 - [7] The respondent filed her response to family claim on October 24, 2018.
 - [8] There is a trial scheduled in this Court for 10 days commencing in June 2020, and a trial scheduled in Provincial Court for six days in August 2020. Enforcement of the Cameron Order
 - [9] Master Cameron made the order on October 9, 2009, that the parties exchange financial documents within 30 days. Ms. Sidhu has not complied with that order.
 - [10] The order has not been entered. The clerk's notes are provided in the affidavit of Mr. Kelly.
 - [11] Counsel for Mr. Kelly provided a form of the order for signature to then-counsel for the respondent. There has been no substantive reply. There has been nothing raised concerning the form of the order, but the order has not been signed by Ms. Sidhu's former counsel.
 - [12] There is no dispute that there has been non-compliance with the Cameron Order.
 - [13] On that basis, I order that the respondent's counsel's signature on the Cameron Order be dispensed with and that the order be entered.
 - [14] I decline to order a fine or any of the other relief sought in the notice. I order that compliance with the Cameron Order must be made within 14 days of today's date and, if not, the claimant can apply for the other orders or make an application for finding of contempt.
- Consolidation

Legal Framework

- [15] Section 194 of the Family Law Act, S.B.C. 2011, c. 25 refers to overlapping jurisdiction in s. 194 and provides:
 - (1) [A family law proceeding may be started in this Court] or the Provincial Court, [and] the starting of the proceeding in one court does not prevent the 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 . . . 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 . . . may . . . :

- (a) decline to hear a matter;
- (b) decline to hear a matter until another matter under [the FLA], or . . . any other law of [B.C.] or Canada, has been heard in the other court; [or]
- (c) consolidate proceedings started in the other court with proceedings started in [this] court;

[16] In *Turner v. Turner*, 2013 BCSC 1988, the mother applied for custody and access to children of the marriage. There were existing Provincial Court orders, but the mother argued that the Supreme Court should assume jurisdiction. Master Caldwell concluded (at para. 23):

[23] It is clear to me that the Provincial Court has been asked to and has embarked on various applications regarding these children and these parties and having done so has made not one or two but a significant series of substantive and ongoing orders. In my respectful view this Court no longer has jurisdiction to deal with these matters however if I am wrong on that I am even more strongly of the view that if such jurisdiction exists, I should and would decline to exercise it.

[17] In *Power v. Spadafora*, 2015 BCSC 1399, Madam Justice Watchuk declined to exercise jurisdiction under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and ordered that future applications regarding the children be made in Provincial Court. She considered that s. 194 prevents the Supreme Court from pronouncing on matters already determined by the Provincial Court, but it does not prevent this Court from pronouncing on other related matters. The Provincial Court had made numerous orders dealing with parenting rights and responsibilities in an ongoing high-conflict dispute, and there was no evidence the proceedings under the Divorce Act would have been used materially or would have resulted in a materially different analysis. As a matter of comity, Watchuk J. refused to exercise jurisdiction under the Divorce Act.

[18] In *Song v. Zhang*, 2016 BCSC 1438, Chief Justice Hinkson followed Master Caldwell's decision in *Turner* and determined that the court does not have jurisdiction to deal with the respondent's access to the parties' child, because the Provincial Court has pronounced on the subject.

[19] In *D.A.F. v. R.D.F.*, 2017 BCSC 873, Mr. Justice Smith determined that a consolidation of the case in the Supreme Court was appropriate. There had been no proceedings in the Provincial Court since the consent order five years prior to the application to consolidate. Smith J. commented (at para. 24): This Court is therefore in as good a position as the Provincial Court to consider the best interests of the children in light of any changed circumstances.

- [20] Smith J. considered a further factor to determine that this Court should exercise jurisdiction: there was a consent order to the preparation of a s. 211 report. By consenting to the order that was made, the claimant effectively waived any objection to this Court exercising jurisdiction. Discussion and Analysis
- [21] Issues relating to parenting and child support have been addressed by the Provincial Court in this matter since late 2015 or early 2016. There have been several orders that have been made regarding guardianship, parenting time, contact, parental responsibilities, and child support, spanning April 2016 to January 2019. There is a trial set in Provincial Court in August 2020.
- [22] There are issues that have not been addressed before the Provincial Court: divorce and division of property, where the Provincial Court lacks jurisdiction; and spousal support.
- [23] The weight of the jurisprudence supports the respondent's position. D.A.F. is the case where consolidation was ordered, but it is distinguishable based on the five-year gap between the last matter before the Provincial Court and the application to the Supreme Court, and the consent that Smith J. found to be a waiver of an objection to the British Columbia Supreme Court's jurisdiction. In this case, there is really no gap: a trial date has been set in Provincial Court.
- [24] There is a concern that there are two trials scheduled, but they are not duplicating proceedings. One deals with parenting and child support; while property division, divorce and spousal support are to be dealt with in this Court. The claimant suggests that they are interrelated, particularly the matters of spousal support and child support, but that is insufficient in my view, to support consolidation of proceedings in this court.
- [25] As I have said, the weight of the jurisprudence supports the respondent. I decline to exercise my discretion to consolidate these proceedings or to determine that this Court has the jurisdiction with regard to parenting, child support, and matters related thereto. Application for Adding Parties
- [26] The claim against the respondent's parents, Gurbachan Singh Sidhu and Ardas Kaur Sidhu involves an equal division of family assets. The parties resided in the property owned by the respondent's parents during their marriage. The claimant asserts that the respondent is the beneficial owner of the property. A Certificate of Pending Litigation has been filed against the property. Property division cannot be dealt with fully without all the relevant parties added.
- [27] Mr. Sidhu objects. He says that this was a landlord/tenant relationship, although no rent was paid. That submission goes to whether the claim will be successful, which is not the test for determining whether these parties should be added. I find that it is appropriate in the circumstances to add the Sidhus to the proceedings.

- [28] I order that the style of cause in the notice of family claim be amended to include Gurbachan Singh Sidhu and Ardas Kaur Sidhu. Amendments
- [29] The claimant seeks to amend his notice of family claim to the proper address of the home in Richmond. That order is granted. Costs
- [30] As there has been divided success, I order that each party bear their own costs. "Gropper J."
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