
CANADA / JUDGMENT

L.P.T. v. M.R.

2013 BCCA 140

COURT

British Columbia Court of Appeal

DECIDED

27 March 2013

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2013 BCCA 140 L.P.T. v. M.R.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

L.P.T. v. M.R.,

2013 BCCA 140

Date: 20130327

Docket: CA040029

Between:

L.P.T.

Appellant

(Petitioner)

And

M.R.

Respondent

(Respondent)

Corrected Judgment: names of appellant, respondent and child
were initialized on May 28, 2018.

Before:

The Honourable Mr. Justice Harris

(In Chambers)

On appeal from: Supreme Court of British Columbia,

March 14, 2012 and May 30, 2012

(L.P.T. v. M.R., 2012 BCSC 785 and 2012 BCSC 786,

Vancouver Docket S118548)

Counsel for the Appellant:

L.A. Kahn, Q.C.

No one appearing for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

March 18, 2013

Place and Date of Judgment:

Vancouver, British Columbia

March 27, 2013

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] L.P.T. seeks directions on whether leave to appeal is required for this appeal and, if it is, an extension of time for leave to appeal an order refusing to vary a prior order, leave to appeal and an extension of time for the filing of appeal books and the factum.
- [2] Mr. Kahn advised me at the outset of the application that the respondent, M.R., has moved permanently to New Zealand to look after his ailing mother. From a practical perspective, the application is likely academic because the order ultimately sought, which would require M.R. to provide a DNA sample, could not be enforced. Nonetheless, I am asked to rule on the application because there may be some practical utility in doing so. A ruling, one way or the other, may, Mr. Kahn has been advised, assist in allowing L.P.T. to deal with the issues engaged in these proceedings through administrative means. I am, accordingly, prepared to provide a ruling, as requested.
- [3] I am satisfied that M.R., who did not appear, is aware of these proceedings, having been notified of them by email. M.R., as Mr. Kahn informed me, has co-operated in the proceedings and responded to them, while he was living in Canada.

Issue

- [4] These proceedings centre on the decision of a chambers judge not to vary her earlier order. The reasons are indexed as L.P.T. v. M.R., 2012 BCSC 785, and L.P.T. v. M.R., 2012 BCSC 786. The term sought to be varied related to the provision of a DNA sample for the purposes of proving that M.R. is the biological father of a child, C., who lives in China. The effect of the variation, if it had been made, would have been to remove conditions precedent to the provision of a DNA sample, thereby compelling M.R. to provide it.

Background

- [5] In June 2007, M.R. and L.P.T. agreed to a surrogacy arrangement in which M.R. could choose the role that he would play in the child's life. They agreed the child would be raised in Canada. In October 2007, the parties travelled to China to carry out the procedure. Unbeknownst to M.R., the embryo that was transferred to the surrogate used M.R.'s sperm but not L.P.T.'s ovum. Therefore, although L.P.T. was listed on the child's birth certificate as his mother, she was neither the biological, gestational nor birth mother, nor had she taken steps to adopt the child.
- [6] As between the parties, the fact that M.R. is the biological father of the child is not, it appears, in dispute. The DNA sample would, however, be confirmation of that fact for immigration purposes, entitling L.P.T., a landed immigrant, to bring the child to Canada.
- [7] After the child was born, L.P.T. decided that it was in his best interests to be raised in Canada. Citizenship and Immigration Canada decided that her son could not immigrate to Canada as her dependent as he was not her biological or adopted child. L.P.T.'s failure to establish an entitlement to bring the child to Canada appears to have led her to tell M.R. about the child. M.R. is a Canadian citizen and as the child's biological father all that was needed to establish this fact was a DNA test.
- [8] L.P.T. originally sought an order compelling M.R. to have a DNA test to establish paternity. M.R., discovering that L.P.T. had no biological connection to the child, nonetheless agreed to the DNA testing but on the condition that the child live with him in Canada and cut all ties to L.P.T.
- [9] The chambers judge decided that the proper process for determining parenting arrangements was under the Family Relations Act if the child comes to Canada. She made no finding about his best interests in relation to where the child should live pending determination of these issues.
- [10] The chambers judge concluded that it was in the best interests of the child to make a DNA order on the condition that certain terms were satisfied, principally that L.P.T. immediately facilitate meaningful communication between the child and M.R. It is apparent, reviewing the reasons of March 14, 2012, that it was material to the chambers judge, in making the order requiring the provision of the DNA sample on terms, that M.R. agreed to provide the

sample. The issue was not whether a sample should be provided, but the conditions under which that should occur.

- [11] One of the terms of the order was that the parties could apply to the chambers judge, who remained seized of the matter, to vary the order.
- [12] L.P.T. applied to remove from the order the condition precedent to the DNA order requiring her to facilitate communication between C. and M.R. It appears that L.P.T. received advice from a Dr. Elterman that it would be confusing and potentially emotionally harmful for M.R. to disclose to the child that he is, in fact, the child's biological father. The child, at that time over 3 years old, was being raised by L.P.T.'s current partner. The child calls him father.
- [13] M.R., on his part, agreed that telling the child about the circumstances of his birth would be confusing to him. However, he did not wish to provide his DNA until a relationship was established with the child, which he believes can wait until the child is old enough to understand the complexities of his birth and make his own decisions. Unlike L.P.T., M.R. did not see any urgency in C. coming to Canada, and now believes it would be in the child's best interests to be raised in China and finish his high school there.
- [14] The chambers judge detailed the parties' positions in her reasons and explained in some detail M.R.'s belief that L.P.T. has been deceptive and manipulative in her conduct and has only sought confirmation of his status as C.'s biological father to promote her (rather than C.'s) interest in living in Canada. As we shall see, the chambers judge was persuaded of the merits of M.R.'s position.
- [15] The practical effect of the changed positions of the parties is that L.P.T. will not provide access to the child for fear that M.R. will tell him he is his father. But without access, M.R. is not required to provide a sample of his DNA. Moreover, the original order required that the condition to provision of the sample be satisfied within one month of the order. It was not. Strictly, therefore, M.R. was under no continuing obligation to provide a DNA sample.
- [16] It is apparent that the point of the application to vary the order was to require M.R. to provide a DNA sample. The chambers judge took a view of the practical realities of the matter before her. The purpose of requiring a sample was to establish that M.R. was the child's biological father, thereby establishing L.P.T.'s right to bring the child to Canada as a Canadian citizen. This course of action avoided L.P.T. having to adopt the child. If she were to do so, she would, as a permanent resident, be able to bring the child to live in Canada. The judge noted that it is probable that the surrogacy arrangements entered into by L.P.T. were illegal in China, although, as she acknowledged, there was no evidence on the point.
- [17] The chambers judge's conclusions are as follows:

- [15] I cannot conclude that requiring [M.R.] to provide his DNA is in [C.'s] best interests. I cannot conclude that not requiring [M.R.] to provide his DNA jeopardizes [C.'s] best interests. In considering [C.'s] best interests, I note that he is not within the jurisdiction of this Court and never has been. At play here are [L.P.T.'s] best interests and what suits her best. As [M.R.] said, she has been deceptive and manipulative. She does not come to court with clean hands.
- [16] The March 14, 2012 order made by me was discretionary, but it was essentially by consent. [M.R.] withdraws his consent to provide a DNA sample in light of the circumstances. There is no evidentiary or legal support to make any discretionary order. Considering all of the circumstances, as detailed in these Reasons and my Reasons on March 14, 2012, I decline to vary the order of March 14, 2012.

Discussion

- [18] The application to vary the terms of the order to require a DNA sample is an application under Rule 9-5 of the Supreme Court Family Rules, B.C. Reg. 169/2009, and is therefore a limited appeal order as defined by Rule 2.1 of the Court of Appeal Rules, B.C. Reg. 297/2001, and requires leave.
- [19] A Notice of Appeal was filed within time after the chambers judge refused to vary her order, thereby demonstrating a bona fide intention to appeal. I intend therefore to turn first to the question whether leave should be granted on the assumption that to the extent otherwise necessary the applicant can meet the test for being granted an extension of time to file the application for leave.
- [20] Madam Justice Saunders summarized the factors to be considered on an application for leave to appeal in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (in Chambers) as follows:
- (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.
- [21] The applicant bears the onus of establishing that these conditions have been met.
- [22] This case concerns the chambers judge's exercise of discretion not to vary the term of a discretionary order.
- [23] Leave to appeal a discretionary order will not be granted unless the order is clearly wrong, where the exercise of discretion was not exercised judicially or was exercised on a wrong principle, or where a serious injustice will occur if leave is denied: see *Strata Plan LMS 2019 v. Green*, 2001 BCCA 286, 152 B.C.A.C. 174 (Proudfoot J.A. in Chambers) at para. 6.

- [24] L.P.T. alleges the chambers judge erred in law by:
- (a) reversing her earlier decision that the best interests of the child favoured a DNA test without any change in circumstances;
 - (b) concluding that the court's jurisdiction to make the March order was dependent on M.R.'s consent; and
 - (c) misinterpreting the application of Citizenship and Immigration Canada's Operational Bulletin 381, which deals with parentage for citizenship purposes where surrogacy arrangements are involved.
- [25] I turn now to the first alleged error. The chambers judge concluded at para. 27 of the March 14 reasons that it was in C.'s best interests to make a DNA order on certain terms first being satisfied. As noted above, at para. 15 of her May 30 reasons the judge found that she could not conclude that requiring M.R. to provide the sample was in C.'s best interests or that not requiring the sample jeopardized his best interests.
- [26] In my opinion, the judge did not fall into the error of reversing her decision about the child's best interests without a change of circumstances. There had been a change in circumstances. The premise of the order to provide a sample was that M.R. would be given an opportunity to establish a meaningful relationship with C. This did not happen. Dr. Elterman had advised against C. being told that M.R. was his biological father. M.R. wanted to do so. L.P.T. did not want that to happen. Not only has no meaningful communication been established, but M.R. now takes a different view of how best to proceed in dealing with his relationship with C. He is no longer of the view that C. need come to Canada now, but should wait until he is older, nor does C. need to know about the circumstances of his birth until he is old enough to comprehend them.
- [27] The fact that M.R. had consented to the DNA sample and supported C. coming to Canada was a critical fact underlying the exercise of the judge's discretion in making the March order. In the absence of that consent and agreement about C. living in Canada, it is more than doubtful that the chambers judge would have made the initial order requiring the sample. Indeed, the concerns raised in the May reasons and the pointed statement that the order was made "essentially by consent" demonstrate to my satisfaction that it would not.
- [28] In my view, it is most unlikely that a division of this Court would conclude that the chambers judge erred in changing her view of the best interests of the child in the absence of a change of circumstances. It is equally unlikely that this Court would interfere with the exercise of the judge's discretion in identifying the child's best interests in her May reasons. The judge concluded that L.P.T. was promoting her own interests in seeking a DNA sample (and by implication not C.'s best interests). Her judgment was informed by the fact that L.P.T. had been deceptive and manipulative and did not come to court with clean hands. She also took into account that C., personally, is not and never has been within the jurisdiction of the Supreme Court.

- [29] The chambers judge's refusal to vary her order involved an exercise of discretion superimposed on an earlier discretionary order. In exercising her discretion, the chambers judge took into account multiple factors (including consent, its withdrawal, and the conduct of the parties), all of which informed her decision and her judgment of C.'s best interests in a changing context. I think there is no prospect that this Court would interfere with the judge's exercise of discretion. As Mr. Justice Chiasson said in *Rupertus v. Rupertus*, 2012 BCCA 426 (in Chambers):
- [21] Judges in matrimonial disputes are faced with the unenviable task of considering objectively the highly subjective perceptions of parents as to the best interests of their children. Judges may differ in their conclusions, but the orderly and effective administration of justice in this context requires appellate courts to respect and defer to those conclusions, unless they clearly are wrong or based on wrong principles.
- [Emphasis added.]
- [30] Although this was said in a somewhat different context, the principles are applicable here. I cannot conclude that there is any prospect that a division of this Court would find that the judge exercised her discretion on wrong principles or that her conclusion was clearly wrong.
- [31] The second alleged error is that the chambers judge erred by concluding that her jurisdiction to make the March order was dependent on M.R.'s consent. I see no merit in this argument. The trial judge did not conclude that her jurisdiction depended on consent. Consent cannot confer jurisdiction and I see nothing in the reasons that leads to the conclusion that she thought it did. Rather, the fact of the consent was a reason why she exercised her discretion in the way she did. It explains her exercise of discretion, not her assumption of jurisdiction. The judge has jurisdiction in this matter because both L.P.T. and M.R. were before the court and she had personal jurisdiction over them. The chambers judge did not purport to exercise jurisdiction directly over C. But having jurisdiction over M.R., she exercised her discretion in light of his consent and in a manner informed by her views of C.'s best interests. I do not think the chambers judge made any error in proceeding as she did.
- [32] Thirdly, L.P.T. suggests that the judge misinterpreted Citizenship and Immigration Canada's Operational Bulletin 381 - March 8, 2012, which deals with Assessing Who is a Parent for Citizenship Purposes Where Assisted Human Reproduction (AHR) and/or Surrogacy Arrangements are involved. The argument is that the judge erroneously considered the bulletin to be relevant. L.P.T. argues that it is relevant only if there is no genetic connection between the child and Canadian parents, which is not the case here, as there is no dispute as to paternity or that the DNA test will lay the foundation for establishing C.'s Canadian citizenship.

- [33] I see no merit in this argument. It is clear that the judge fully understood the significance of a DNA sample confirming the genetic connection to M.R., who is a Canadian citizen, and the result flowing that C. is a Canadian citizen, entitled to reside here.
- [34] The judge referred to the bulletin because she understood its application in the absence of a genetic connection between L.P.T. and C. The reason the judge referred to the bulletin was because of its relevance to L.P.T.'s rights to come to Canada with C. and the possible need for her to adopt C. to do so.
- [35] I cannot see that the judge fell into the error alleged.

Conclusion

- [36] Although I appreciate the importance of the judge's decision for L.P.T., it does not necessarily prevent her bringing C. to Canada. I also appreciate that the judge's order has consequences for if and when C. may come to live in Canada, so that it may be seen as affecting his interests.
- [37] I am not, however, persuaded that there is any prospect that a division of this Court would interfere with the exercise of the chambers judge's discretion, nor, in my view, do the issues raised by the proposed appeal raise issues of general significance to practice.
- [38] In the result, I order that leave is required to proceed with this appeal, order that time to file an application for leave be extended, but dismiss the application for leave.

"The Honourable Mr. Justice Harris"

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