
CANADA / JUDGMENT

L. v. L.

2003 BCSC 1392

COURT

Supreme Court of British Columbia

DECIDED

2 September 2003

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2003BCSC1392

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: L. v. L.

2003 BCSC 1392

Date: 20030902

Docket: 26398

Registry: Prince George

Between:

C.A.L.

Plaintiff

And

G.G.L.

Defendant

Before: The Honourable Mr. Justice Rogers

Oral Reasons for Judgment

September 2, 2003

Appearing for the plaintiff:

C.L., In Person

Counsel for the defendant:

D. Smith

Place of Hearing:

Prince George, BC

- [1] THE COURT: This is one of these applications that I personally cringe to see because they are, in my view, the most difficult of the family applications we hear. The overriding concern in a case of this sort is what is in the best interest of the child, C. To get to an examination of what is in her best interests though we have to follow a route or a path that allows both parties an adequate and reasonable and full opportunity to both make a case and answer a case. Here I am of the view that Mr. L. did not have an opportunity on August 19th, 2003 to answer Ms. L.'s application, and Ms. L. organized things in such a way as to deny Mr. L. that opportunity.
- [2] Now, by way of history, Mr. L. and Ms. L. were a couple in Mackenzie some time ago. They separated. They have between them one child, C., who is now ten years old. She was born March 15, 1993.
- [3] In the spring and early summer of 1999 C.'s custody was the subject of an application that was heard by Mr. Justice Meiklem of this court. The end result of that application was the making of an order that C. should be in Ms. L.'s custody, but that in the event that she chose to leave Mackenzie where she was then living C.'s custody would then transfer to the defendant.
- [4] The evidence before me establishes quite clearly, and this appears to be common ground between both Ms. L. and Mr. L., that in 1999 Ms. L. wanted to leave Mackenzie. It was her desire to do so, and her reason for moving was that she had no friends or family support or very little support in the Mackenzie area, she wanted to relocate to the town where her parents lived, that was in 1999 Cranbrook, and she wanted to pursue higher education. At that time she was considering taking training in nursing, but the essence of her desire to leave Mackenzie was to be closer to her own family, the lack of family support in Mackenzie and a desire to pursue higher education. Having heard all of that evidence, Mr. Justice Meiklem made the order that he did. That was, of course, the proper and correct order to make at that time.
- [5] In October of 2000 Ms. L. applied again for leave to leave Mackenzie and relocate. That application was heard on October 16, 2000 by Mr. Justice A.F. Wilson of this court. He heard Ms. L.'s arguments in favour of her desire to move and dismissed her application. That left Mr. Justice Meiklem's order alive and well.
- [6] In May of 2001 Mr. L. again began to feel apprehension that Ms. L. was planning to quit Mackenzie and take C. with her. As a result, Mr. L. filed his own application seeking a declaration that Ms. L. had moved, but by virtue of discussions Mr. L. became mollified and accepted the proposition that Ms. L. had not yet moved and would not move in the immediate future and so he did not pursue that application and it was adjourned generally.

- [7] I quote that history for two reasons: one, to give the reader some idea of what went on here; and secondly, to emphasize the fact that over a three year span, or at least a two year span, Mr. L. consistently resisted Ms. L.'s desire to take C. away from Mackenzie. That is a pattern of behaviour that simply did not change.
- [8] Now, in August of this year, Ms. L. did in fact move from Mackenzie. She left at the very end of June of this year and she took C. with her. Ms. L. did not apply to court for an order varying Mr. Justice Meiklem's order. I infer she did not make that application because she suspected she would lose again. I should make that clear. She did not apply to vary Mr. Justice Meiklem's order before she moved, which would have been the proper and correct thing to do. However, after she got to Vernon and settled in then Ms. L. made an application to the court for an order varying Mr. Justice Meiklem's order and essentially approving post hoc C.'s move from Mackenzie to Vernon.
- [9] Had that application been made with notice to Mr. L., as it should have been, and had it been argued on its full merits before Mr. Justice Brooke in Kelowna, as it should have been, no doubt I would not be involved in this issue. But that is not what happened.
- [10] In mid-August, at a time when Ms. L. knew for certain that Mr. L. was away on vacation in Nova Scotia, she applied for the order that she sought on an ex parte basis, and she went before Mr. Justice Brooke seeking approval of what she had already done without giving Mr. L. any opportunity to challenge C.'s move to Vernon. She now wishes to have that ex parte order preserved.
- [11] Now, it will be no surprise to anyone that the principles that apply when asking the court for an ex parte order include, first and foremost I should think, an obligation on the applicant to bare all to the court hearing the application, to advise the court both of the merits of the application and to advise the court of any circumstances which on any reasonable consideration the applicant would think militate against the order they are seeking. There is on an ex parte application an obligation on the applicant to observe uberrima fides, utmost good faith.
- [12] An ex parte order may be set aside if the court on hearing the set aside application comes to the conclusion that there has been a lack of utmost good faith and that the applicant has not advised the court of material circumstances which, had the court known about them, may have had a bearing on the court's decision.
- [13] Mr. L. has applied to set aside Mr. Justice Brooke's ex parte order made on August 19, 2003. That order requires Ms. L. to serve an affidavit and a report on Mr. L. It varies Mr. Justice Meiklem's June 1999 order so that Ms. L. may relocate to Vernon with C. and moving the issue of variance of the June 28, 1999 order and issues of custody having regard to C. to the Vernon registry.

- [14] I must turn my mind to whether there was in Ms. L.'s affidavit a failure to provide the court with all of the material facts that the court could on any reasonable examination of the situation consider material and relevant. I note that Ms. L. did not in her application advise Mr. Justice Brooke that she had previously made an unsuccessful application to vary Mr. Justice Meiklem's order. That obviously is a material issue because it bears on what were the circumstances that led to the court's earlier decisions. It is, in my view, an extremely relevant fact and that there can be no excuse for not having brought it to Mr. Justice Brooke's attention when this ex parte order was applied for.
- [15] Furthermore, Ms. L. did not tell Mr. Justice Brooke that in May of 2001 Mr. L. had filed his own application for an order declaring that she had moved and requiring C. to remain in Mackenzie. That again is obviously a material fact that would be of interest, in my view, to any member of this court hearing an application such as the one Ms. L. brought then.
- [16] MS. L.: Sir, I had no idea --
- [17] THE COURT: You can be quiet now, Ms. L., I'm giving my reasons. If you don't like them you can head off to the Court of Appeal.
- [18] The real killer here, the absolutely utterly fatal failure that Ms. L. made on her ex parte application is her advice given to me in court here today that in her discussions with Mr. L. in 2003 she talked to him about moving with C. to Vernon and she says that Mr. L. changed his mind, that he waffled on the permission issue, that sometimes he gave it and sometimes he withheld it. There is absolutely nothing whatsoever in her affidavit materials that she put before Mr. Justice Brooke to that effect. Zero. It is absolutely inexcusable, in my view, to say to one court the defendant consented the move and to say to another member of the court he was all over the place, he waffled, he consented sometimes and did not other times.
- [19] I am convinced that had Mr. Justice Brooke heard that he would have thought twice about making this ex parte order. I do not say that he did not consider it carefully, I am sure he did, but he did not have all the facts before him. On that basis, I am convinced that the ex parte order must be set aside, and it will be set aside in its entirety, points 1, 2 and 3 of the order will be set aside.
- [20] Now, that dispenses with the ex parte application.
- [21] We now have Mr. L.'s application for a declaration that Ms. L. has moved to Vernon. Well, there can be no issue about that, she admitted as much in court before me. So Mr. L. will be successful on his application for a declaration that Ms. L. has moved from Mackenzie.
- [22] Mr. L. has asked for a declaration that C. is now in his custody. Well, it's the other shoe dropping from Mr. Justice Meiklem's 1999 order, of course that follows. There has not been before me evidence of a material change in circumstances between 1999 and today. The evidence is that in 1999 Ms. L. wanted to leave Mackenzie, she wanted to leave there because she had family elsewhere, she did not have much in the way of friend support in that community and she wanted to pursue education. Those are exactly the same reasons that

she expressed in support of her desire to vary the order in 2003. There is nothing different about it.

- [23] What has changed is Ms. L. is no longer employed in Mackenzie. I have not heard evidence that jobs are simply not available to Ms. L. in Mackenzie. I have not heard that she has applied to various employers and been denied. I have not heard that she has put her name in at Manpower for a reasonable period of time, three or four months, and has had no offers of employment. I have not heard that she has distributed resumes throughout Mackenzie. There is no evidence before me that replacement employment of some sort is just flat unavailable to Ms. L. Instead, I have a history of Ms. L. wanting to leave Mackenzie. I have no doubt that she took the bankruptcy of her former employer to achieve that end.
- [24] Accordingly, I am satisfied on the evidence before me that there has been no material change in circumstances that Mr. Justice Meiklem's order ought to remain in effect, there is no need to change it. Ms. L., having moved to Vernon, has in my view cut her own cloth, she can now wear it. C. will remain in Mr. L.'s custody.
- [25] It is of course open to Ms. L. to return to Mackenzie and apply for custody of C. It is open to her, having moved to Vernon, to apply for custody down there, but in my view she is going to have to adduce some more evidence than is before me to justify that. Having lost her job, Ms. L. might be, I do not say is, but might be in a position to apply for spousal support from one of her, I think, three ex-spouses. One or all of them perhaps.
- [26] In summary, I find that what Ms. L. did was reprehensible. She manipulated the system so that she could get the court's approval on a change that she had desired for three years and knew that Mr. L., at a minimum, was ambivalent about it, and she received that court's approval on an ex parte basis under circumstances where there was absolutely no excuse whatsoever for not giving the man an opportunity to answer the case against him. There was absolutely no urgency at all. Ms. L. could have had this application heard a week after August 19th and could have served these materials on Mr. L. so that he could present his case in full. She chose not to do that and the consequence of that, in my view, logically follows.
- [27] Mr. Smith, are you seeking costs? You are?
- [28] MR. SMITH: Yes, My Lord.
- [29] THE COURT: Yes, you will have costs of the application that you filed August 29, 2003.
- [30] For the record, I have paid no attention to the September 2, 2003 filed by J.M.T.O. In my view that affidavit was filed too late really to properly be part of this motion and I have paid no attention to it.
- [31] Mr. Smith, do you anticipate any difficulty getting approval on a form of order?
- [32] MR. SMITH: Yes.

- [33] THE COURT: Very good. Ms. L.'s approval on the order will be dispensed with. Mr. Smith, can I rely on you to deliver a copy of the order to Ms. L?
- [34] MR. SMITH: Yes, you may. There is not an official address for delivery at present so perhaps Ms. L. could provide us with one that we can rely on.
- [35] THE COURT: What is your present address, Ms. L?
- [36] MS. L.: It's Apartment . . . , Mr. L. already has that information.
- [37] THE COURT: All right.
- [38] MR. SMITH: I'm sorry, I only got as far as Apartment
- [39] MS. L.:
- [40] MR. SMITH: Thank you.
- [41] THE COURT: All right.

"P.J. Rogers, J."

The Honourable Mr. Justice P.J. Rogers

September 16, 2003

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