
CANADA / JUDGMENT

M. v. M.

2012 BCCA 324

COURT

British Columbia Court of Appeal

DECIDED

20 July 2012

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2012 BCCA 324 M. v. M.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

M. v. M.,

2012 BCCA 324

Date: 20120720

Docket: CA039312

Between:

J.W.M.

Appellant

(Claimant)

And

J.L.M.

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Neilson

The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, August 30, 2011,

(M. v. M., New Westminster No. E33985)

Oral Reasons for Judgment

The Appellant:

In person

The Respondent:

In person

Place and Date of Hearing:

Vancouver, British Columbia

July 20, 2012

Place and Date of Judgment:

Vancouver, British Columbia

July 20, 2012

[1] BENNETT J.A.: Mr. M. appeals from a chambers judgment pronounced by Mr. Justice Crawford on August 30, 2011, the key terms of which are as follows:

1. Ms. M. may move her residence to Langley;
 2. The parties' two children may attend fine art schools in Langley;
 3. Ms. M. is to facilitate all of the children's transportation including Mr. M.'s access and the children's activities, unless Mr. M. is able to provide transportation;
 4. Mr. Justice Crawford is seized of the action; and
 5. Either parent may bring the matter back for review after mid-October 2011.
- [2] Mr. M. seeks to have clause 2 of the order of Mr. Justice Crawford set aside in favour of a consent order issued on April 23, 2010 following a judicial settlement conference before Mr. Justice Leask, and a subsequent order issued by Mr. Justice N. Smith on May 2, 2011. The relevant facts are set out in the following paragraphs.
- [3] The parties began living together in May 1998, and were married in February of 1999. There are two children of the marriage, R.E.M., born August 28, 1998, and L.O.M., born April 6, 2001.
- [4] The parties separated in August 2007, and were divorced in April 2010. The litigation between the parties has been lengthy and acrimonious.

- [5] Following the judicial settlement conference before Mr. Justice Leask, the parties agreed to a comprehensive consent order establishing, amongst other things, joint guardianship of the children and setting out a detailed schedule for equal-time parenting. The order also contained the following term with respect to the children's schooling:
8. The children shall continue in their present school, [X Elementary], for the 2010/2011 school year. [R.] shall then be free to choose his secondary school. [L.] will attend [Y Elementary school] for grades 5, 6 and 7. If absolutely necessary [L.] may return to [X Elementary School].

At the time of the consent order, both parents were living in Burnaby. At the time of this order the move to Langley was discussed and contemplated, according to the affidavit filed by Ms. M.

- [6] On March 29, 2011, Madam Justice Ker ordered the preparation of a "views of the child" report on the issue of R.'s preferred secondary school.
- [7] R. initially told the assessing psychologist, Dr. Posthuma, that he wanted to go to a high school in Burnaby. However, on the occasion of his second interview, he said that North Burnaby was the school his dad wanted him to attend, and that a specialized school in Langley was his first pick. Dr. Posthuma concluded that this second preference represented R.'s "reasoned opinion".
- [8] On April 8, 2011, the parties appeared before Mr. Justice Smith on two applications filed in November 2010.
- [9] According to the reasons of Mr. Justice Smith dated May 2, 2011, Ms. M. was seeking variations to the consent order of April 23, 2010, including "a revised parenting schedule to accommodate a proposed change in the children's schools". The judge described Ms. M.'s application at para. 5:

The respondent now seeks an order confirming R's choice to attend the [school in Langley]. She proposes to move to Langley to accommodate that choice and says that requires a further variation of the order so that L can attend an elementary school in Langley. ...

- [10] Mr. M. was seeking "an order prohibiting any relocation of the children outside the Burnaby School District".
- [11] Mr. Justice Smith's ruling on these applications is stated in the following three paragraphs:
- [7] While I am prepared to accept Dr. Posthuma's opinion about R's true preference, that preference cannot be determinative. Although the consent order gives R the right to choose his secondary school, it does so in the context of an order that his sister attend a school in Burnaby and a very specific parenting schedule that could only be practical if both parties live in reasonable proximity to one another and to the children's schools.

- [8] Although the respondent says changes will be necessary to those other portions of the order in order to accommodate R's choice of the Langley school, her notice of application does not seek those variations. More important, I do not think the consent order can be interpreted as giving R such an unlimited choice of schools that he can effectively dictate other changes to the order. In the context of the entire order, the provision giving R a choice of schools must be read as a choice of schools within Burnaby or, at most, reasonably accessible schools in adjacent municipalities.
- [9] The respondent has not formally applied for an order stating which school R is to attend and I make none. The claimant has applied for an order that the residence of the children not be changed from the Burnaby School District. I decline to make that order. Although the respondent clearly would like to move to Langley with the children, there is no evidence that she intends to do so while the children are required - as they are by the consent order - to attend schools in or near Burnaby.
- [12] Ms. M. moved to Langley on May 1, 2011, prior to the release of Mr. Justice Smith's reasons. R. was accepted to the Langley school on May 7, 2011.
- [13] Despite the clear ruling by Mr. Justice Smith, Ms. M. brought her application to change R's school again in the Supreme Court.
- [14] On August 26, 2011, Mr. Justice Crawford delivered oral reasons on an application to vary the order of Mr. Justice Smith. (I will discuss further whether the variation was of the order of Mr. Justice Smith or of Mr. Justice Leask.) He described the order sought by Ms. M. before Mr. Justice Smith as an order confirming R's choice to attend the Langley school as an "odd order to be seeking". He further indicated that he was confused by Mr. Justice Smith's conclusion that "[t]he respondent has not formally applied for an order stating which school R is to attend and I make none." Mr. Justice Crawford determined that Mr. Justice Smith had dismissed both of the applications before him.
- [15] Mr. Justice Crawford concluded that Ms. M. was really seeking a variation of the consent order. He described Ms. M.'s application as follows: "(a) that mother may have residence in Langley, and (b) that the children, at least, R., is allowed to express his wish on which school he goes to."
- [16] Mr. Justice Crawford found that R. had already expressed his clear view as to his preferred high school, and agreed that the Langley school was the ideal place for him given his talent for fine arts. He determined that the cost of Ms. M.'s unilateral decision to move to Langley was that she would have to bear the burden of transporting the children between Burnaby and Langley. The reasons indicate that she was prepared to do so.

- [17] On August 30, 2011, in response to an indication from Mr. M. that the children did not want to attend the Langley schools and instead wanted to stay in Burnaby, Mr. Justice Crawford interviewed the children to ascertain their wishes. He concluded that the children wanted to "have a shot at seeing how this Langley school curriculum works for them". He confirmed his decision of August 26.
- [18] Ms. M. now submits that both children enjoyed significant success at fine arts schools in Langley this past school year and further asserts that there is no comparable school for either child in Burnaby.
- [19] Ms. M. indicates that the parties are currently waiting for a decision from Mr. Justice Crawford as to whether or not Dr. Posthuma will be conducting an updated "views of the child" report.
- [20] Mr. M. seeks to have the order of Mr. Justice Crawford set aside on the basis that there was no material change in circumstances to justify a variation of the order of Mr. Justice Smith.

THE PARTIES' POSITIONS

- [21] Mr. M. says that Ms. M., in argument before Mr. Justice Crawford on August 26, 2011, relied on her move to Langley and R.'s acceptance to the Langley school as a material change in circumstances capable of justifying a variation of the existing order. He says that the proposed move to Langley was squarely before Mr. Justice Smith, and was known to and contemplated by the parties at the time of the ruling. He further says that the unilateral move was a "manufactured" change in her circumstances that cannot provide the required basis for variation. Lastly, he says that R.'s acceptance cannot constitute a material change in circumstances because Ms. M. should have removed the children from any and all waitlists for schools outside of Burnaby or reasonably adjacent municipalities upon receiving the order of Mr. Justice Smith. He says that Ms. M.'s actions constitute a knowing and unilateral violation of existing court orders.
- [22] Mr. M. further contends that Mr. Justice Crawford never turned his mind to the requirement for a material change in circumstances.
- [23] Ms. M. submits that Mr. Justice Crawford found that there was no application before Mr. Justice Smith as to which schools the children were to attend and that this issue was not decided in his ruling. Given this context, there was no need for a material change in circumstances; Mr. Justice Crawford properly decided Ms. M.'s new application on the basis of the best interests of the children, relying on his own interview with the children in chambers, R.'s expressed preference to Dr. Posthuma, and evidence of the children's exceptional achievement in, and aptitude for, the arts.
- [24] In the alternative, the following events are relied upon to satisfy the requirement for a material change in circumstances: 1) R. became the valedictorian for his Grade 7 class in June of 2011 and won a music merit award for his outstanding achievements; 2) R. was

accepted to the Langley school on May 7, 2011; and 3) Ms. M. moved to Langley on May 1, 2011. Lastly, and in the further alternative, Ms. M. submits that Langley is within 20 km of Burnaby and should be considered an "adjacent municipality" as required by Mr. Justice Smith.

- [25] If this Court overturns the ruling of Mr. Justice Crawford, Ms. M. asks that the matter be sent back to the Supreme Court for determination of the issue of the children's schooling. In the interim, she asks that the children remain at their schools in Langley.

Analysis

Is a material change in circumstances necessary?

- [26] The Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, held that on an application to vary an existing custody or access order, a parent must establish, as a threshold issue, that there has been a material change in circumstances affecting the child. It is only after such a change is established that the court may go on to determine whether variation of the order would be in the best interests of the child. Madam Justice McLachlin (as she then was) said the following in her majority reasons:
- [10] Before the court can consider the merits of the application for variation, it must be satisfied there has been a material change in the circumstances of the child since the last custody order was made. Section 17(5) [of the Divorce Act] provides that the court shall not vary a custody or access order absent a change in the "condition, means, needs or other circumstances of the child". Accordingly, if the applicant is unable to show the existence of a material change, the inquiry can go no farther: *Wilson v. Grassick* (1994), 2 R.F.L. (4th) 291 (Sask. C.A.).
- [11] The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued....
- [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.

[13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[Emphasis in original.]

[27] The original order in *Gordon* was made under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Section 17(5) of that Act says:

17.(5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

[28] There is no strictly equivalent provision in the Family Relations Act, R.S.B.C. 1996, c. 128, although s. 20 of the FRA states:

20. Subject to this Act, if a court has made an order under this Act, except an order under Part 5 or 6 [Matrimonial Property and Division of Pension Entitlement], the court may, on application, vary or rescind the order if circumstances have changed since the order was made or last varied.

[Emphasis added.]

[29] Despite the differences between the two provisions, the test from *Gordon* is also applicable to orders made under the Family Relations Act. For example, Madam Justice Rowles said the following in *Boychuck v. Singleton*, 2008 BCCA 355::

[14] In this case, the prior consent order which the appellant sought to vary was made under the Family Relations Act. While the Family Relations Act does not contain a specific provision such as the one found in s. 17(5) of the Divorce Act, the court must nevertheless proceed with a two-step analysis, the first step being to determine whether there has been a material change in circumstances since the making of the prior order. That is so because the court must proceed on the assumption that the prior order is correct. Therefore, before any change may be made in the order, the applicant must show that there has been a material change in circumstances after the order sought to be varied was made.

[15] The leading case on variation of custody and access orders is *Gordon v. Goertz*, in which McLachlin J., as she then was, summarized the law in the context of a mobility case, at para. 49:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

...

[Emphasis added.]

- [30] While the consent order in this case does not specify whether it was made under the Family Relations Act or the Divorce Act, it contains one paragraph (para. 15) dealing with the division of Mr. M.'s 401K, suggesting it was made under the Family Relations Act. If the order of Mr. Justice Smith can be considered a variation of this order, it would also have to have been made under the Family Relations Act.
- [31] While Gordon and many of the cases that apply it are mobility cases where one parent seeks to move with the child, the test is not limited to this type of case. It has been applied more broadly to other types of variations of custody access orders. For example, in Boychuck, the mother sought to change the terms of a consent order setting out the father's access to their son on the basis that his increasing involvement in team sports required travel that would interfere with the father's access periods. This Court upheld the decision of the chambers judge that this was not a material change in circumstances within the meaning of the test from Gordon, and thus that the order should not be varied.
- [32] In this case, there was clearly an order in place regarding custody and access. Although Ms. M.'s application before Mr. Justice Crawford sought "to vary the order of the 8th of April 2011", and Mr. M. in his factum treats the decision of Mr. Justice Crawford as one to vary Mr. Justice Smith's order, it is my view that Mr. Justice Crawford's order should be considered a variation of the consent order, not of the order of Mr. Justice Smith. I say this for several reasons.
- [33] In my view, Mr. Justice Smith's order cannot be said to have "varied" the consent order, but only to have interpreted it. Paragraph 5 of his order states: "[t]he Consent Order dated April 23, 2010 is interpreted as giving the child "R." a choice of high school within Burnaby or, at most, reasonably accessible schools in adjacent municipalities". Otherwise, there is nothing in his order dealing with custody and access, other than to say that he dismissed Mr. M.'s application that the residence of the children not be changed from the Burnaby School District, on the basis that it was not fully argued. Consequently, if Mr. Justice Smith's order did not vary the consent order, the consent order is the only one which remains in place with respect to custody and access, and it is thus only that order which could have been varied by Mr. Justice Crawford in finding that L. and R. could attend schools in Langley.

[34] Also, Mr. Justice Crawford does not purport to vary or set aside Mr. Justice Smith's order. He does not conclude that Mr. Justice Smith was mistaken and that the interpretation to be given to the provision in the consent order that R. should be free to choose his secondary school was that R. was permitted to choose any school in any municipality. Rather, he says:

[11] ... And what do we have back before us here a few months [after N. Smith J.'s order], an application to vary the order of the 8th of April 2011. Well, I am not sure what that is. I do not have an order of the 8th of April 2011. There was a hearing on the 8th of April 2011, but His Lordship's judgment is May 2nd. And what His Lordship did on May 2nd was dismiss both applications. You can see why I have been a bit puzzled in the last hour or so.

[12] What I take it is being sought really is a variation of the consent order that goes back to 2010 so [R.] may go to school in Burnaby [it is not clear if the judge meant "Langley" here], but then he has a choice of where he goes...

[Emphasis added.]

[35] His order permitted both children to attend schools in Langley. This clearly varies the provision in the consent order that "L. will attend [Y Elementary school for grades 5, 6 and 7]", as well as the provision that R. shall be free to choose his school, as it was interpreted by Mr. Justice Smith. Permitting Ms. M. to relocate to Langley was not a variation of the consent order (the consent order was silent on the parents' residences); nor could it be considered a variation of Mr. Justice Smith's order, which did not deal with the mother's residence. He specifically refused to do so on the basis that there was no evidence Ms. M. intended to relocate at that time.

[36] In any event, while the question of whether the order of Mr. Justice Crawford was a variation of the consent order or of Mr. Justice Smith's order may be relevant to whether any of the changes suggested by Ms. M. could constitute a material change, there is clearly an existing order in place. As Ms. M.'s application was therefore not a fresh application for custody or access, a material change in circumstances must be found before the judge can consider whether the variation is in the best interests of the children.

[37] Here, Mr. Justice Crawford granted the application, which would require that there have been both a material change and that the variation be in the children's best interests. I do not think that on a reading of Mr. Justice Crawford's reasons, it can be said that it was clear that he viewed any particular fact to constitute a material change. I do not think R.'s talent alone can be considered a material change, and Mr. Justice Crawford does not actually refer to R.'s acceptance to the school in his reasons, only to his desire to attend. He also does not make the decision to vary on the basis of Ms. M.'s move, if that could be considered a material change.

[38] Consequently, I do not think it is implicit in his reasons that he considered there to be a material change such that the threshold of the Gordon analysis was met.

Do any of the events relied on by Ms. M. constitute a material change?

[39] As noted at para. 24, Ms. M. argues that if Mr. M. succeeds on the point that Mr. Justice Crawford was required to consider whether there had been a material change in circumstances, the following events satisfy the requirement of material change:

1. R. becoming valedictorian for his grade 7 class in June 2011;
2. R. winning a "music merit award" for his outstanding achievements;
3. R.'s acceptance to the Langley school on May 7, 2011;
4. Ms. M.'s move to Langley on May 1, 2011.

[40] In my view, on the facts of this case, none of these circumstances amounts to a material change in circumstances as defined in *Gordon*. In addition, none of these circumstances touch on L., yet L.'s school was changed as well.

Is Burnaby an "adjacent municipality"?

[41] In the further alternative, Ms. M. effectively argues that even if none of the events discussed above constitute a material change, the consent order as interpreted by Mr. Justice Smith permits the children to attend schools in Langley. She submits that Langley can be considered to be adjacent to Burnaby, on the basis of a dictionary definition of "adjacent" as meaning "near" or "next". She says Langley is near Burnaby, as it is within 20 km.

[42] In my view, in the context of this case, Langley cannot be considered "adjacent" to Burnaby. There are two large municipalities in between the two cities: New Westminster and Surrey. Further, even if it could be, the consent order provides that only R. would be able to choose his school. L. was to attend a particular school in Burnaby for grades 5, 6 and 7, unless it was absolutely necessary for her to continue attending the Burnaby school both children were attending at the time the consent order was made. Consequently, L. attending a Langley school could not have been permitted by that order as it was made.

Disposition

[43] I conclude that Mr. Justice Crawford committed an error in law in failing to consider whether there had been a material change in the circumstances affecting the children before granting Ms. M.'s application to vary the provisions of the consent order respecting the children's schools.

[44] I would allow the appeal. I would set aside clause 2 of Mr. Justice Crawford's order and restore the consent order made by Mr. Justice Leask as interpreted by Mr. Justice Smith.

[45] This does not resolve the issue, however, as the children have now been attending schools in Langley for one year.

[46] This order does not prevent Ms. M. from either bringing an application in the Supreme Court to vary the consent order based on this new evidence, or to have the parent coordinator now assigned to this case negotiate a resolution with respect to where the children will attend school and any changes in the access schedule.

[47] Since the school year starts in September, it is my view that the application may be brought back before any judge in the B.C. Supreme Court and not necessarily before Mr. Justice Crawford, who seized himself, in order to expedite a hearing of this matter.

[48] FRANKEL J.A.: I agree.

[49] NEILSON J.A.: I agree.

[50] FRANKEL J.A.: This appeal is allowed. The order of Mr. Justice Crawford is varied by deleting clause 2. Mr. M. is entitled to costs of this appeal.

"The Honourable Madam Justice Bennett"

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