
CANADA / JUDGMENT

Marcus v. Trkla

2018 BCSC 1912

COURT

Supreme Court of British Columbia

DECIDED

25 July 2018

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2018 BCSC 1912 Marcus v. Trkla

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marcus v. Trkla,

2018 BCSC 1912

Date: 20180725

Docket: 52957

Registry: Kamloops

Between:

Stuart Douglas Lorne Marcus

Claimant

And

Jennifer Joanna Trkla

Respondent

Before: Master McDiarmid

in Chambers

Oral Reasons for Judgment

Counsel for Claimant:

D. Komori

Counsel for Respondent:

J.H. Grover

Place and Date of Trial/Hearing:

Kamloops, B.C.

July 23, 2018

Place and Date of Judgment:

Kamloops, B.C.

July 25, 2018

- [1] THE COURT: This is an application by the claimant father to enforce an access order made by me on September 7, 2016, although realistically he seeks to vary that order to ensure that he has some access to his children, especially pending a s. 211 report which is to be prepared in September.
- [2] Some of the facts are not in issue. The children, Mason, Nicholas and Mila, are eight, six and a half and five and a half. The parties commenced a relatively short marriage-like relationship in August 2009, married March 1, 2010 and separated August 14, 2015.
- [3] In the fall of 2017, after terms of my order had been lived up to for over a year, the claimant was arrested following disclosure by the respondent to the Ministry of Children and Family Development (the "Ministry") basically along the lines of what she deposes in her third affidavit at paragraphs 21-34. The claimant was placed on an undertaking; however, no charges were laid. Further allegations have been raised since. The respondent has denied them.
- [4] I have some concerns as to how the sexual assault issues were elicited from the children, but that does not mean I minimize them. Since the fall of 2017, the claimant has seen each child twice commencing in mid-June 2018. All of his access has been supervised.
- [5] Both sets of grandparents have been involved in a way that has been I think quite helpful, and both obviously sympathize with their children, and both obviously want to do the right thing for their grandchildren.

THE LAW

- [6] Yesterday, counsel on behalf of the Ministry said that Mr. Marcus had no standing with respect to the Provincial Court proceedings. That order made by Judge Dickey on April 19, 2018 was made pursuant to ss. 32.2(2) and 41.1 of the Child, Family and Community Service Act, R.S.B.C. 1996, c. 46 [CFCSA].

- [7] In *D.P. v. Director of Child, Family and Community Service* (1996), 32 B.C.L.R. (3d) 260, Justice Boyle, correctly in my view, sets out in para. 2 that s. 55 of the CFCSA permits any person to apply for access when a child is subject to an order other than a continuing order under that Act. I said when the submissions were made, that I found the position that was put forward to be - I cannot remember what words I used but odd would certainly be one of them -and the Ministry's position, as put forward by counsel, is incorrect.
- [8] Section 55 says that at the time an order, other than a continuing custody order or an order made under s. 54.01(5) or 54.1, is made under this part, the parent who had custody may apply. Subsection (2) states that after an order, other than an order under s. 54.01(5), is made under this part, any person may apply to the court for access to the child. There is no question that both parents have the right to participate in that Provincial Court case. The submission by the Director to the contrary is, in my view, wrong.
- [9] The relevant case law is cited by Boyle J. in *D.P.* at para. 10 as follows:
- [10] This is not a circumstance such as arose in the case *Re Superintendent of Family and Child Service and Stuart* (1985) 18 D.L.R. (4th) 617. In *Stuart* the issue was different than here. The reach of this Court's inherent jurisdiction was before the Court in that case but the observation of Esson J.A. (as he then was, now is) applies:

"It is sometimes said that the Family and Child Services Act (predecessor to the C.F.C.S. Act) is to be treated 'as a code in itself'. That phrase may be useful to emphasize the point that the Act embodies a comprehensive legislative scheme and that, to the end the scheme will be carried out, effect should be given to the plain meaning of the language of the Act. But it is a statute like any other. In a proceeding under it, due regard must be had to other applicable laws of the province and, should there appear to be overlapping or conflict, that must be resolved by the ordinary rules of interpretation "

- [10] It was also assisted by *W.N. v. C.G.*, 2012 BCCA 149. That case deals with the interplay between the Provincial Court pursuant to its jurisdiction under the CFCSA and this court with respect to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) [DA] and the Family Law Act, S.B.C. 2011, c. 25 [FLA]. At para. 74 of the Court of Appeal decision, Madam Justice Garson writes:
- [74] Thus I conclude from the jurisprudence that the jurisdiction of the court under the FRA is not necessarily ousted where CFCSA proceedings are underway.
- [11] Garson J.A. then recites Justice Esson's finding. In para. 77, Garson J.A. makes it clear that the CFCSA is paramount in the case of conflict. She then goes on to write about what happens with concurrent proceedings. In para. 85, she summarizes that concurrent proceedings are permissible but the Family Relations Act, R.S.B.C. 1996, c. 128 scheme, now the FLA scheme, cannot be used to challenge a decision made by the Director. A supervision order is not a determination of custody; therefore, the trial judge had jurisdiction, and by inference this court.

[12] One of the things that is important to keep in mind here and certainly what I keep in mind is what is written in paras. 90-91 of W.N., where Justice Garson cites from *Gordon v. Goertz*. I will not read it all in, but it is apparent that the inquiry is into the best interests of the child. It should not default in favour of some preordained outcome absent persuasion to the contrary.

Parliament did not entrust the court with the best interests of most children; it entrusted the court with the best interests of the particular child whose custody arrangements fall to be determined. Each child is unique, as is its relationship with parents, siblings, friends and community. Any rule of law which diminishes the capacity of the Court to safeguard the best interests of each child is inconsistent with the requirements of the Divorce Act for a contextually sensitive inquiry into the needs, means, condition and other circumstances of the "child" whose best interests the Court is charged with determining.

[91] The best interests inquiry is child-focused and not parent-focused.

[13] Garson J. A. goes on to cite from *Racine v. Woods*, [1983] 2 S.C.R. 173, a Supreme Court of Canada case: "cutting a child's legal tie with her natural mother," and by implication natural father, "is a serious step and should not be taken lightly."

[14] Sections 37 and 38 of the FLA provide:

Best interests of child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

Assessing family violence

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

[15] The courts have endorsed the maximum contact principle set out in s. 16(10) of the DA, but of course that maximum contact principle also contains the words "so long as is consistent with the best interests of the child."

- [16] With that legal background, I now consider the issue here. The present state of parenting is pursuant to the order of Judge Dickey made April 19, 2018. There was an agreement made in a mediation dated June 14, 2018, and then following up on that an email from counsel from the Ministry to both lawyers representing these parties dated July 5, 2018.
- [17] The matter was granted short leave because the respondent was not complying with Judge Dickey's order and with the parenting conditions set out by the lawyer for the Director. At that time, there was a pending series of meetings to take place this week with Dr. Waterman.
- [18] It is important to keep in mind the somewhat differing issues facing the various parties. The issue facing the Ministry under the CFCSA is to protect the children, and any doubts are resolved in favour of that protection.
- [19] The respondent has a similar interest in protecting her children. The claimant wants to continue his relationship with his children.
- [20] I hope all of that can be accommodated. It is important that the parties keep in mind the other parties' views and motivations here.
- [21] I think it is fair to say that all of the parties and parents of the parties want what is best for the children. There is no question that the children need to be protected. There is no question as well that in my order I need to ensure that there is no conflict with the order made by Judge Dickey. That is the intention of what I will order.
- [22] I was concerned about what the respondent deposed in paragraph 54, where she says:
I do acknowledge that recently there has been some confusion and missed meetings. I apologise. I was waiting for their response to my concerns, which is why the July 12th, 13 and 14 meetings did not occur.
- [23] I appreciate the concern that the respondent has here, but that part of the affidavit is troubling. Judge Dickey ordered that the respondent must comply and she did not. One reason that it is important is that if the respondent's credibility gets impugned, that may affect her ability, frankly, to protect her children.
- [24] I cannot imagine anything more difficult for parents to deal with than concerns about sexual assaults on their children. It is also extremely difficult to deal with a wrongful accusation of sexually assaulting one's children.
- [25] Both parties want the best for their children. The respondent, as I have said, wants to protect the parties' children; the claimant wants a relationship with them.
- [26] The affidavit of the paternal grandmother comments on the behaviour of the children when they are with their father; they seem to very much enjoy being with him.
- [27] It is vital that Dr. Waterman be able to properly determine what he is retained to do. That means, in my view, that the claimant must have some parenting with the children.

- [28] In looking at the children's best interests, I need to make sure that they have the protection they need. They should also have a relationship with their father.
- [29] I am also concerned about the reaction of the children. The reaction of the children as described by the respondent I think is possibly the unintended consequence of her concern for their well-being. Put another way, they may be acting out in reaction to how they interpret their mother's genuine concern.
- [30] My order will I hope alleviate the behaviour which is described by the mother in paras. 50 and 51. All parties need to play their part here, and fortunately I think the children's grandparents will assist in doing that.
- [31] I order that the parenting in para. 7 of my order is varied so that on days 2, 3 and 4 the children can visit with the claimant from 9:00 a.m. to 7:00 p.m. It is to be supervised by the people who are set out in that order. That parenting is to continue until Dr. Waterman has completed his s. 211 report, with liberty for any party to apply to vary after that report has been made available.
- [32] If a transcript is ordered, I reserve the right to edit these reasons by additional reference to law and facts. Any such additions will not affect the orders.
- [33] Any further issues, Mr. Komori?
- [34] MR. KOMORI: I'm just looking for the order right now, Your Honour. I have it now.
- [35] THE COURT: It is p. 43 of tab 5. So para. 7 --
- [36] MR. KOMORI: Yes, I have it. So he supervises on 7(a)? Yes?
- [37] THE COURT: That is right.
- [38] Any further submissions with respect to anything else, costs and anything like that?
- [39] MR. KOMORI: Well, you have made your order. No.
- [DISCUSSION RE SUPERVISORS]
- [40] THE COURT: It will be the people in (a) apart from Allyson Marcus.
- [41] MR. KOMORI: We're going to keep Cathy Purchase, the great aunt in Vancouver?
- [42] THE COURT: Yes.
- [43] MR. GROVES: So Allyson and Cathy are out?
- [44] THE COURT: No, Cathy is in. She stays.
- [45] MR. KOMORI: It will be up to my client to choose the supervisor?
- [46] THE COURT: Any one of those are fine.
- [47] MR. KOMORI: But he can choose?

[48] THE COURT: Yes. You will note that it says another party agreed upon.

[49] MR. KOMORI: Yes.

[50] THE COURT: If there is an agreement, that should be in writing, like a text or something.

[SUBMISSIONS RE COSTS]

[51] THE COURT: I want parenting to take place so that Dr. Waterman can do the job. I am going to adjourn the issue of costs, with liberty for the claimant to seek them after Dr. Waterman's report has been prepared. It is extremely concerning to me that those three days which caused the delay in Dr. Waterman's report were missed.

[52] MR. KOMORI: I'm sorry, Your Honour, to sort of back up a bit. I'm wondering if it might be prudent to have an order that Dr. Waterman can do the supervision as well. I mean, I'm assuming he'll want to see the children without the grandparents there.

[53] THE COURT: Well, if the children are with Dr. Waterman, that is not going to be an issue.

[54] MR. GROVES: If Mr. Komori meant without the grandparents present, I take no position. That makes sense actually.

[55] THE COURT: You can put that term in the order that when Dr. Waterman is interviewing the children in the presence of the claimant, no other supervision is required. Thank you all.

"Master R.W. McDiarmid"

MASTER MCDIARMID

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