CANADA / JUDGMENT

McGroarty v. McGroarty

2024 BCCA 167

COURT
British Columbia Court of Appeal

DECIDED
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2024 BCCA 167 McGroarty v. McGroarty COURT OF APPEAL FOR BRITISH COLUMBIA Citation: McGroarty v. McGroarty, 2024 BCCA 167 Date: 20240411 Docket: CA49392 Between: Shannon Lee McGroarty Appellant (Claimant) And Ryan Drew McGroarty Respondent (Respondent) Before: The Honourable Mr. Justice Voith (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated September 7, 2023 (McGroarty v. McGroarty, Victoria Docket 13-2727). Oral Reasons for Judgment The Appellant, appearing in person (via videoconference): S.L. McGroarty Counsel for the Respondent: H.M. Gowans Place and Date of Hearing: Vancouver, British Columbia April 11, 2024 Place and Date of Judgment: Vancouver, British Columbia April 11, 2024 Summary: The respondent brings an application for security for costs of the appeal in the amount of $5,000. Held: Application allowed. Though the reasons for judgment of the order being appealed from are not yet available, the respondent concedes there is some merit to the appellant's appeal. The application for security is also timely and the appellant has a steady source of income despite having little to no assets. Given the respondent's concerns with recoverability of costs and the appellant's prior history of non-compliance with court orders, an order for security for costs is appropriate, but in the reduced amount of $2,500.

[1] VOITH J.A.: The respondent, Mr. McGroarty, seeks security for costs of the appeal in the amount of $5,000. The appellant, Ms. McGroarty, opposes the application.

Background

[2] The parties were married in 2004. They have two children, R who was born in 2006, and M who was born in 2009. The parties separated in 2013 and have been engaged in disputes regarding parenting time and child support since that time.

[3] R has lived with the respondent full-time since September 2022; however, the respondent asserts the appellant has not allowed him to see M since early 2022.

[4] The underlying dispute relates to an application filed by the respondent on February 15, 2023, in which he sought various orders relating to income disclosure, child care expenses and support, fines against the appellant for non-disclosure, breach of parenting and other orders, and existing parenting time orders.

[5] On September 5, 2023, Justice Wilson heard the application. On September 7, 2023, the judge made the following orders:

1. The application for a fine for financial non-disclosure is dismissed.
2. The matter of quantifying child support is adjourned generally until the matter is re-set; the existing child support order from 2017 will continue.
3. Ms. [McGroarty] wrongfully denied Mr. McGroarty parenting time, a fine is appropriate, and that fine is set in the amount of $2,500.00.
4. Mr. McGroarty is entitled to his costs from the November 17, 2021 application.
5. The parties have had divided success, and there will be no order with regard to costs for the February 15, 2023, application.
6. Any costs of this application will be shared by the parties.

[6] The November 17, 2021 application the judge referred to was another application brought by the respondent seeking enforcement of court orders made in 2014 and 2015 relating to parenting time. That application was heard by Justice Punnett on December 7, 2021. Justice Punnett made various orders, including that the costs sought by the respondent against the appellant be adjourned to the next court application in the matter.

[7] On October 4, 2023, Ms. McGroarty filed a Notice of Appeal of Justice Wilson's orders. She seeks to set aside the following terms of the order: (1) the finding that the appellant wrongfully denied the respondent parenting time and that a fine in the amount of $2,500 was appropriate; and (2) that the appellant was entitled to his costs from the November 17, 2021 application.

[8] Unfortunately, the judge's reasons that underlie his September 7, 2023 order are not yet available. The appellant advises that she paid an agency to transcribe the oral reasons in November 2023, but she has not yet received the transcript.

Legal framework

[9] The appellant bears the onus of establishing why security should not be required: Creative Salmon Company Ltd. v. Staniford, 2007 BCCA 285 (Chambers) at para. 9. The Court must decide whether the order would be in the interest of justice, having regard to the factors set out in Lu v. Mao, 2006 BCCA 560 (Chambers) at para. 6:

(1) the appellant's financial means;

(2) the merits of the appeal;

(3) the timeliness of the application; and

(4) whether the costs will be readily recoverable. Positions of the parties

[10] The respondent seeks security for costs in the appeal in the amount of $5,000 and asks for costs of this application. The respondent's draft bill of costs for a half day appeal totals $12,196.80.

[11] Though Justice Wilson's September 7, 2023 reasons are not yet available, the respondent concedes that the appeal is not bound to fail. He submits, however, that the merits of the appeal are weak as the appellant would be challenging the judge's exercise of discretion with respect to procedural matters and his findings of fact, both of which are subject to a highly deferential standard of review.

[12] Further, though the appellant's materials indicate she has limited means, and the respondent does not dispute that assertion, he submits the appellant has stable employment and income. Based on the financial statement filed by the appellant on February 27, 2023, the appellant's guideline income for child support purposes was $54,617.94.

[13] With respect to timeliness, the respondent gave early notice of his intention to bring this application. Though he delayed in filing his application, this too was on account of the delay in transcribing Justice Wilson's reasons. Notwithstanding that delay, the application was nevertheless brought prior to the appellant filing her factum and appeal book.

[14] The respondent submits he will not easily recover costs from the appellant based on her history of non-compliance with court orders. He contends he has had to bring multiple applications in the court below to enforce parenting time, and yet the appellant has refused to comply. He also emphasizes the appellant has not paid any of the costs orders made against her to date. He deposes that following the trial between the parties in 2014, in which the respondent was awarded costs in the amount of $15,790, the appellant declared bankruptcy and he was unable to recover most of his costs.

[15] The appellant's primary submission is that a security for costs order would prevent her from pursuing the appeal given her poor financial circumstances. The appellant submits that on account of her having earlier gone into bankruptcy, she has no credit, savings or assets. She further submits she has only been able to afford the expenses of pursuing the appeal thus far because her mother has lent her some money.

[16] The appellant's position is that, given that Justice Wilson's reasons for judgment are still unavailable, neither party is in a position to speak to the merits of the appeal. She submits she is at an unfair disadvantage without the judge's reasons for judgment. Further, because the judge's reasons have not yet been transcribed, she has also been unable to seek legal advice or to complete her factum. Nevertheless, the appellant submits her intended appeal has merit and raises questions of law that go, at least in part, to the judge's jurisdiction to make the orders in question.

[17] Finally, the appellant submits that though she has yet to file her appeal book and factum, she has already spent nearly $2,000 on her intended appeal. This includes amounts for the transcript of Justice Wilson's reasons, for two legal consultations, and for other printing and filing costs, all of which she says is a significant sum for someone in her financial position.

Analysis

[18] Given that the respondent concedes there is some merit to the appellant's proposed appeal, the absence of the judge's reasons is less compelling than it otherwise would be. In saying this, I recognize the merits of the appellant's proposed appeal is related to other aspects of the legal framework for this application. It is also relevant, however, that the amounts involved in the application are relatively modest and do not, in my view, justify adjourning the application and incurring the costs that would attend to a further hearing.

[19] As noted, the respondent has also brought this application in a timely way and before the appellant has filed her appeal book and factum.

[20] In the normal case, an appellant with a meritorious appeal should not be foreclosed from pursuing that appeal because they are impecunious: Zen v. M.R.S Trust Company (1997), 88 B.C.A.C. 198 at para. 18, 1997 CanLII 4110; Creative Salmon at para. 12.

[21] In this case, though the appellant has limited or no assets, she has a steady source of income. Indeed, based on the record before me, that income exceeds the respondent's income. In light of the circumstances and considerations I have described, I consider it is in the interests of justice that the appellant pay $2,500 as security for the costs of her appeal within 60 days. The appeal is stayed pending that payment into court. The parties are to bear their own costs of this application. "The Honourable Mr. Justice Voith"

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