
CANADA / JUDGMENT

R.D. v. V.S.

2020 BCSC 543

COURT

Supreme Court of British Columbia

DECIDED

7 April 2020

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2020 BCSC 543 R.D. v. V.S

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.D. v. V.S.,

2020 BCSC 543

Date: 20200407

Docket: E170355

Registry: Victoria

Between:

R.D.

Claimant

And:

V.S.

Respondent

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

In Chambers

Counsel for the Claimant:

S. Hamilton

Counsel for the Respondent:

B. Cope

Place and Dates of Hearing:

Victoria, B.C.

January 20-21, 2020

February 24, 2020

Place and Date of Judgment:

Victoria, B.C.

April 7, 2020

INTRODUCTION

- [1] This matter concerns two children, A.M.S., born September 4, 2007, and A.M.S.D., born May 18, 2014.
- [2] The applicant, Mr. D., is the children's father. The respondent, Ms. S., is their mother. Mr. D. applies for multiple orders, including:
1. that this Court has and will retain jurisdiction over this matter to the exclusion of any other provincial jurisdiction until each of the children reach the age of majority in British Columbia;
 2. that British Columbia is the habitual residence of the two children and will remain so until they reach the age of majority in British Columbia;
 3. that the children be immediately permitted contact with their father by telephone, electronic means and in person, at the expense of their mother, Ms. S., and that the children resume contact with Mr. D.'s extended family;
 4. that an order of this court made September 15, 2017 be enforced, in particular the provisions that "both parties are Guardians of the Children" and "each Guardian will exercise Parental Responsibilities during their respective Parenting Time";
 5. that one of the three alternatives occur:
 - a. a subsequent order of this Court, made February 26, 2018 and not yet entered, be enforced, particularly with respect to the parenting time schedule;
 - b. the interim parenting time schedule in the order of September 15, 2017, be enforced; or
 - c. the parenting time provisions of the two orders be varied to allow Mr. D. to have parenting time during alternating spring, summer and Christmas school breaks at Ms. S.'s expense;
 6. for security under s. 64 of the Family Law Act, S.B.C. 2011, c. 25;

7. for an order that Ms. S. is to pay Mr. D. \$5,000 within 30 days, pursuant to s. 230(2) of the Family Law Act;
8. for an order that Ms. S. be held in contempt of court for removing the children from British Columbia;

BACKGROUND

- [3] Mr. D. and Ms. S. had a relationship between 2006 and 2013, although they do not appear to have lived together for any appreciable time. Mr. D. lives on Salt Spring Island, in a trailer on his mother's property. Ms. S. lived in Ladysmith until her house burned down in 2018.
- [4] Mr. D. began this action in early 2017, and on September 15, 2017 the parties consented to an order that provided for a number of terms. The order was entered in December 2017. The terms consented to included that both parents were guardians of their children and each would exercise parental responsibilities while the children were in their care, that the children would reside primarily with Ms. S., that Mr. D. would have parenting time on alternating weekends, with Ms. S. to deliver the children to the Crofton/Salt Spring ferry terminal on alternating Friday evenings, and Mr. D. to return them via the Gabriola/Nanaimo ferry terminal on the following Sunday evening.
- [5] Both parties were ordered not to consume alcohol while they had the children, unless a responsible third person was present, and Mr. D. was not to have the children sleep overnight in his trailer - they were presumably to sleep in his mother's house on the same property.
- [6] The December 2017 orders providing for guardianship and parental responsibilities were stated to be final. The parenting time was interim until a Judicial Case Conference scheduled in February 2018.
- [7] The Judicial Case Conference apparently led to the second order of this Court, made February 26, 2018, but never entered. That order modified drop off and pick up times for the exchange of the children on alternating weekends, and made provision for increased parenting time between Mr. D. and his older child, A.M.S., during the spring and summer breaks.
- [8] June 23 and 24, 2018, was a weekend when Mr. D. had the children in his care. He and the children were staying at a hotel near Ladysmith. Ms. S. became alarmed about the care of the children, for reasons that are in dispute, and arranged to have them picked up from the hotel.
- [9] This led to a series of text messages from Mr. D. to Ms. S. Quite apart from their vulgarity, Mr. D. said:

Keep up the kids from now on I don't want them

when those kids are old enough they will understand her father is

Current We have children together and right now you don't even understand it you are so selfish

i'm done you take care of the kids in the room with the road now

I don't want to kids anymore for the rest of your lives you can keep them I'm on the road and up there we will come and see me

From now on you can keep the kids

- [10] Ms. S. contacted the police, who charged Mr. D. with criminal harassment because of these text messages, and, according to Ms. S., voicemails he left for her at around the same time.
- [11] Mr. D. entered into an undertaking given to a peace officer by which he undertook to abstain from communicating directly or indirectly with Ms. S., or from going to her residence or any location where Ms. S. either was or was known to be.
- [12] In July 2018, Ms. S.'s house burned down. She and the children lost all of their belongings. For a time, Ms. S. and the children lived in a motor home. Ms. S. received \$60,000 as insurance proceeds for the loss of the house, and sold her lot for \$50,000.
- [13] She says she could not find a home she could afford to buy or rent in British Columbia, and so accepted a house-sitting job for the month of October 2018, in Mahone Bay, Nova Scotia.
- [14] After house sitting for a month, she decided that her \$110,000 would go further toward buying a house in Nova Scotia than it would in British Columbia. It was at this point, toward the end of October 2018, that I find Ms. S. decided to relocate to Nova Scotia.
- [15] She enrolled her daughter in school in November and bought a house in Shelburne, Nova Scotia in December 2018.
- [16] On January 24, 2019, Mr. D. resolved his criminal matters by entering into a peace bond of one year's duration, on conditions that he have no direct or indirect contact with Ms. S., and that he not go to her place of employment, education or residence.
- [17] On March 5, 2019, Ms. S. emailed Mr. D. and informed him of her decision to relocate to Nova Scotia, and that she had purchased a home and enrolled the children in school there. She also told Mr. D. that she was applying for full custody, guardianship and permission to remain in Nova Scotia. She suggested that if Mr. D. did not contest this, she would no longer request child support from him.

HISTORY OF NOVA SCOTIA PROCEEDINGS

- [18] In July 2019, Ms. S. brought proceedings in the Nova Scotia Family Court at Yarmouth seeking sole custody of the children, with supervised parenting time for Mr. D.

- [19] On October 7, 2019, the Nova Scotia Family Court ordered that Ms. S. have sole custody of the two children, and that Mr. D. have supervised access to them. Mr. D. had notice of this application, and had instructed counsel in Nova Scotia to appear as his British Columbia lawyer's agent and oppose the application. The lawyer instructed to appear has said that she attempted to appear by telephone, but there was a problem. The order granted on that day indicates that no one appeared for Mr. D.
- [20] The question of jurisdiction with respect to the Nova Scotia Family Court was set for hearing, initially in late October 2019, then November 26, 2019.
- [21] Both Ms. S. and Mr. D. were represented by lawyers in Nova Scotia at the November 26, 2019 hearing. Mr. D.'s lawyer in British Columbia arranged for Mr. D. to be represented by the same lawyer in Nova Scotia that was instructed to appear at the October 7, 2019 hearing. Both parties tendered evidence by affidavits described by the Court as "lengthy."
- [22] At the November 26, 2019 hearing, both Ms. S. and Mr. D. accepted that the Nova Scotia Family Court had jurisdiction as well as territorial competence to deal with the matters before it in relation to the custody application, and that "British Columbia, the Province the children were removed from 15 months ago, would also have jurisdiction." The Court recognized the children had relocated to Nova Scotia and that proceedings existed in British Columbia. Thus the issue before the Nova Scotia Family Court became whether it should exercise or decline to exercise its jurisdiction.
- [23] Following the November 26 hearing, the judge of the Nova Scotia Family Court delivered a decision on November 29, 2019, opting to maintain and exercise jurisdiction with respect to the children and matters related to their custody and parenting.
- [24] In considering whether it should exercise or decline to exercise its jurisdiction, the Nova Scotia Family Court applied the Court Jurisdiction and Proceedings Transfer Act, S.N.S. 2003 (2nd Sess.), c. 2, as amended (the "Nova Scotia Act"). The Nova Scotia Act is sufficiently similar to the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 ("CJPTA") that I accept the two statutes have similar origins, as described in *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at paras. 5-18.
- [25] Section 12(2) of the Nova Scotia Act sets out factors that must be considered by a court in deciding whether to exercise or decline to exercise jurisdiction. The Nova Scotia Family Court in this case considered those factors, the evidence presented, and Nova Scotia authorities in arriving at a decision that it would maintain and exercise its jurisdiction.
- [26] The order that resulted from the jurisdiction hearing in the Nova Scotia Family Court has been proved under s. 26 of the Evidence Act, R.S.B.C. 1996, c. 124 by producing a certified copy. That order states:

THAT the Family Court for the Province of Nova Scotia has jurisdiction and will exercise its jurisdiction over this matter in determining the custody of A.M.S. and A.M.S.D.

LEGAL FRAMEWORK

[27] Ms. S. argues that as a result, this Court has lost territorial competence. "Territorial competence" is the modern equivalent of the former jurisdiction simpliciter, and is governed by the CJPTA: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 31.

[28] But s. 12 of the CJPTA specifically provides that if there is conflict or inconsistency between Part 2 of the CJPTA, which governs territorial competence and the discretion as to its exercise, and another Act of British Columbia or Canada that expressly confers or denies jurisdiction or territorial competence, that other Act prevails.

[29] Division 7 of Part 4 of the Family Law Act, S.B.C. 2011, c. 25 deals with jurisdiction so must be considered. It provides:

Part 4 -- Care of and Time with Children

Division 7 -- Extraprovincial Matters Respecting Parenting Arrangements

Definitions and interpretation

72 (1) In this Division:

"extraprovincial order" means an order of an extraprovincial tribunal that is similar in nature to an order respecting guardianship, parenting arrangements or contact with a child;

"extraprovincial tribunal" means a court or tribunal, outside British Columbia, having authority to make an extraprovincial order.

- (2) For the purposes of this Division, a child is habitually resident in the place where the child most recently resided
 - (a) with his or her parents,
 - (b) if the parents are living separate and apart, with one parent
 - (i) under an agreement,
 - (ii) with the implied consent of the other parent, or
 - (iii) under an order of a court or tribunal, or
 - (c) with a person other than a parent on a permanent basis for a significant period of time.
- (3) The removal or withholding of a child without the consent of a guardian does not affect the child's habitual residence unless the guardian from whom the child is being removed or withheld acquiesces or delays in applying for an order of a court or an extraprovincial tribunal.

Purposes

73 The purposes of this Division are as follows:

- (a) to ensure that court applications respecting guardianship, parenting arrangements or contact with a child are determined on the basis of the best interests of the child;
- (b) to avoid the making of orders respecting guardianship, parenting arrangements or contact with a child, respecting the same child, in more than one jurisdiction;
- (c) to discourage child abduction as an alternative to determining by due process the guardianship of, or parenting arrangements with respect to, a child;
- (d) to provide for effective enforcement of orders respecting guardianship, parenting arrangements or contact with a child, and for the recognition and enforcement of extraprovincial orders.

Determining whether to act under this Part

74 (1) This section applies if an order respecting guardianship, parenting arrangements or contact with a child may be made, respecting the same child, in more than one jurisdiction.

- (2) Despite any other provision of this Part, a court may make an order under this Part respecting guardianship, parenting arrangements or contact with a child only if one of the following conditions is met:
 - (a) the child is habitually resident in British Columbia when the application is filed;
 - (b) the child is not habitually resident in British Columbia when the application is filed, but the court is satisfied that
 - (i) the child is physically present in British Columbia when the application is filed,
 - (ii) substantial evidence concerning the best interests of the child is available in British Columbia,
 - (iii) no application for an extraprovincial order is pending before an extraprovincial tribunal in a place where the child is habitually resident,
 - (iv) no extraprovincial order has been recognized by a court in British Columbia,
 - (v) the child has a real and substantial connection with British Columbia, and
 - (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia;
 - (c) the child is physically present in British Columbia and the court is satisfied that the child would suffer serious harm if the child were to
 - (i) remain with, or be returned to, the child's guardian, or
 - (ii) be removed from British Columbia.

- (3) A court may decline to make an order under this Part if the court considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.

Recognition of extraprovincial orders

75 (1) A court must recognize an extraprovincial order if all of the following apply:

- (a) the extraprovincial tribunal would have had jurisdiction to make the order under the rules that are applicable in British Columbia;
 - (b) each party to a proceeding in which the extraprovincial order was made had
 - (i) reasonable notice that the order would be made, and
 - (ii) a reasonable opportunity to be heard respecting the order;
 - (c) the extraprovincial tribunal was required by law to consider the best interests of the child;
 - (d) it would not be contrary to public policy in British Columbia to recognize the order.
- (2) On recognition by a court,
- (a) an extraprovincial order has the same effect, and may be enforced, as if it were an order made under section 45 [orders respecting parenting arrangements], 51 [orders respecting guardianship] or 59 [orders respecting contact], as applicable, and
 - (b) the court may, if necessary to give effect to the extraprovincial order, make any order that the court may make under this Act.
- (3) If an application is made to recognize more than one extraprovincial order and the orders conflict, the court must recognize the order that is most consistent with the best interests of the child.

Superseding extraprovincial orders

76 (1) On application, a court may make an order that supersedes an extraprovincial order that has been recognized under section 75 [recognition of extraprovincial orders] if satisfied that

- (a) the child would suffer serious harm if that child were to
 - (i) remain with, or be returned to, the child's guardian, or
 - (ii) be removed from British Columbia, or
 - (b) a change in circumstances affects, or is likely to affect, the best interests of the child and subsection (2) of this section applies.
- (2) For the purposes of subsection (1) (b), an order may be made only if
- (a) the child is habitually resident in British Columbia when an application is filed, or

- (b) the child is not habitually resident in British Columbia when the application is filed, but the court is satisfied that
- (i) the circumstances described in section 74 (2) (b) (i), (ii), (v) and (vi) [determining whether to act under this Part] apply, and
- (ii) the child no longer has a real and substantial connection with the place where the extraprovincial order was made.

Wrongful removal of child

77 (1) This section applies if a court

- (a) may not make an order or declines to make an order under section 74 [determining whether to act under this Part], or
 - (b) is satisfied that a child has been wrongfully removed to, or is being wrongfully retained in, British Columbia.
- (2) In the circumstances set out in subsection (1), a court may do one or more of the following:
- (a) make any interim order that the court is satisfied is in the best interests of the child;
 - (b) stay an application to the court for an order, subject to
 - (i) the condition that a party to the application promptly start a similar proceeding before an extraprovincial tribunal, or
 - (ii) any other conditions the court considers appropriate;
 - (c) order a party to return the child to a place the court considers appropriate and, in the discretion of the court, order a party to pay all or part of the expenses reasonably and necessarily incurred for travel and other expenses of the child and of any parties to or witnesses in the proceeding.

Extraprovincial evidence

78 (1) In this section, "senior legal executive" means the Attorney General, Minister of Justice or similar officer of a place outside British Columbia.

- (2) If a court considers it necessary to receive evidence from a place outside British Columbia before making an order respecting guardianship, parenting arrangements or contact with a child, the court may send to the senior legal executive of the place a request, along with any necessary supporting material, that
- (a) the senior legal executive take any necessary action to require a named person to attend before the proper tribunal in that place and produce or give evidence respecting the subject matter of the application, and

- (b) the senior legal executive, or the tribunal, send to the court a certified copy of the evidence produced or given before the tribunal.
- (3) A court that acts under subsection (2) may order payment of all or part of the expenses reasonably and necessarily incurred for the purposes of this section.

Referral to court

79 (1) If the Attorney General receives from an extraprovincial tribunal a request similar to that referred to in section 78 [extraprovincial evidence], along with any necessary supporting material, the Attorney General must refer the request and the material to the proper court.

- (2) A court to which the Attorney General refers a request under subsection (1) must require the person named in the request to attend before the court and produce or give evidence in accordance with the request.

ANALYSIS

- [30] There is no question that this Court had territorial competence over its proceedings when they were first brought. There is also no question that territorial competence continued through the Order of December 2017 and into early 2018. The question of whether this Court lost territorial competence as a result of Ms. S.'s move with the children to Nova Scotia, as she has argued here, does not require an answer, as will be seen below.
- [31] I pause to note that Ms. S. has not disputed this Court's jurisdiction due to a lack of territorial competence, nor has she sought an order transferring the British Columbia proceeding to Nova Scotia.
- [32] Mr. D. has argued that Ms. S. has in effect abducted the children by moving them to Nova Scotia. He points to the order of December 2017, making him a guardian of the children, and to s. 66 of the Family Law Act which provides:

Notice of relocation

66 (1) Subject to subsection (2), a child's guardian who plans to relocate himself or herself or a child, or both, must give to all other guardians and persons having contact with a child at least 60 days' written notice of

- (a) the date of relocation, and
- (b) the name of the proposed location.

- [33] Ms. S. responds that Mr. D. renounced any right to notice by his text messages of June 23-24, 2018. She also argues that she should be exempted from the notice requirement pursuant to subsection 66(2), which provides:

66

- (2) The court may grant an exemption from all or part of the requirement to give notice under subsection (1) if satisfied that
- (a) notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child, or
 - (b) there is no ongoing relationship between the child and the other guardian or the person having contact with the child.
- [34] Whether this Court has jurisdiction to decide the issues raised in this application is dependent on whether this case can be brought under Part 4, Division 7 of the Family Law Act. Referring to s. 74, I note that an order respecting guardianship, parenting arrangements or contact with the children may be made in more than one jurisdiction, that is British Columbia and Nova Scotia. I may only make such an order if one of the three conditions within s. 74(2) are met. The children are not habitually resident in British Columbia at this time, as defined in s. 72, nor are they physically present here and thus the conditions in subsections 74(2)(a) and 74(2)(c) are not met. I find that Mr. D.'s text messages evidenced his acquiescence in the change of the children's habitual residence for the purpose of s. 72(3). With respect to subsection 74(2)(b), in order for this condition to be met, I must be satisfied that the six enumerated factors apply. I am not. The children were not physically present in British Columbia when the application was filed and I conclude that the balance of convenience favours Nova Scotia.
- [35] That last conclusion is based primarily on a finding, which I make, that the children and their mother are now settled in Nova Scotia, and that they became settled after Mr. D. gave every indication of renouncing his rights to, or interest in, parenting the children.
- [36] As I do not make an order under s. 74, s. 77(1) applies. However, I decline to exercise my jurisdiction under s. 77(2) as again, the children are now settled in Nova Scotia and Mr. D. gave every indication of renouncing his rights to, or interest in, parenting the children.
- [37] Returning to the applications brought by Mr. D., the application for an order that this Court has and will retain jurisdiction over this matter to the exclusion of any other provincial jurisdiction until the children reach the age of majority is dismissed.
- [38] The application for an order that the children's habitual residence is and will remain British Columbia is dismissed. The children's present habitual residence is in Nova Scotia.
- [39] Orders respecting guardianship, parenting time, and contact between Mr. D. and the children, and enforcement of existing British Columbia orders are best left to the Nova Scotia Family Court. These applications are dismissed.
- [40] Applications for security, for Ms. S. to pay Mr. D. \$5,000, and that Ms. S. is to be held in contempt, are dismissed.
- [41] Ms. S. is entitled to her costs.

"The Honourable Mr. Justice Johnston"

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