
CANADA / JUDGMENT

R.J.S. v. M.G.W.

2020 BCSC 777

COURT

Supreme Court of British Columbia

DECIDED

25 May 2020

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2020 BCSC 777 R.J.S. v. M.G.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.J.S. v. M.G.W.,

2020 BCSC 777

Date: 20200525

Docket: E56376

Registry: New Westminster

Between:

R.J.S. and J.S.

Claimants

And

M.G.W. and D.M.W.

Respondents

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

In Chambers

Counsel for Claimants:

A. Samra

Counsel for Respondents:

S. Foo

Place and Date of Trial:

New Westminster, B.C.

November 1, 2019

Place and Date of Judgment:

New Westminster, B.C.

May 25, 2020

Introduction

- [1] The applicant, R.J.S., is applying for a series of Orders, together with J.S., to change the guardianship of two children, M.A.W. and K.W., both biological children of R.J.S. and D.M.W. J.S. is the paternal grandmother of the children.

The Facts

- [2] R.J.S. and D.M.W. met in early 2006, and married on April 19, 2008. Two children were born. M.A.W. was born in April 2007 and K.W. was born in October 2008.
- [3] R.J.S. and D.M.W. separated on October 27, 2011.
- [4] For a period thereafter, R.J.S. alleges he had visits with, and spent significant periods of time with, the children. In 2013, he asserts that he spent 110 days with the children. In 2014, he asserts that he spent 75 days with the children. From March 2014 to October 19, 2014, visits with the children continued. On January 27, 2015 an order was granted that R.J.S. would have supervised parenting time at least once a week thereafter.
- [5] For a period of time R.J.S. was incarcerated. While he was incarcerated, and during the sentencing proceedings, divorce papers and a guardianship removal application were served by D.M.W. The claimant asserts the divorce and guardianship application documents were taken by his lawyer in the courtroom and he had no opportunity to see or read these court documents. As a result, R.J.S. did not become aware of the application to remove his status as a guardian of the children in a timely way or at all prior to the court hearing that application.
- [6] On June 26, 2015, R.J.S.'s guardianship of the children was terminated in his absence, while he was incarcerated.
- [7] In November 2015, R.J.S. was released from prison on parole. On January 21, 2016, D.M.W. and M.G.W. obtained a court order to adopt the children. Again, the adoption application was heard and granted without the knowledge of R.J.S.

- [8] On April 1, 2016 a protection order was made against R.J.S. and J.S., preventing them from seeing the children or D.M.W. and M.G.W. (the "Protection Order").
- [9] On August 28, 2017 to August 30, 2017, a three-day trial was scheduled in the Provincial Court to hear an application to set aside the Protection Order. The trial was actually heard on March 6, 2018 and continued thereafter for seven non-consecutive days ending on May 28, 2018. Reasons for Judgement in that trial were rendered on June 5, 2018 and indexed at 2018 BCPC 372.

- [10] At para. 131 of the Reasons of Judge Arthur-Leung the following appears:

I am satisfied that the Ex-Parte Protection Order of April 1, 2016 should never been granted and the mother appeared before myself knowingly providing false and inaccurate information to myself on the granting of that Order. I am troubled that in the course of this protracted trial she continued to knowingly provide false and inaccurate information.

- [11] On October 17, 2017, when the claimant brought an application for leave to appeal in the Court of Appeal respecting earlier orders relating to adoption, leave was not granted. In the material filed with this Court, the circumstances of that application were not revealed, but in submissions it was suggested that order was made on a without prejudice basis. The fact that the Protection Order was set aside may have been a significant factor in the Court of Appeal, but because the Protection Order was not set aside until June 5, 2018, that Court could not have been informed of that circumstance.
- [12] Although directed to be allowed access to the children, the claimant was unable to have contact with the children due to alleged activities by D.M.W., despite the January 27, 2015 Order of the Provincial Court which remains in full force and effect. The claimant asserts that the activities of the respondents have included coaching the children against their father.
- [13] Finally, R.J.S. filed a Notice of Motion, which was heard on January 11, 2019, because R.J.S. had not seen the children despite repeated orders that he should have contact time.
- [14] The Provincial Court ordered a review of the progress of existing orders for contact time in favour of R.J.S. which review was scheduled for April 26, 2019. Following that review, a second set of Reasons were delivered by the same Provincial Court on June 11, 2019. The Court confirmed its earlier findings that D.M.S. was resisting any meetings for supervised access to the children or counselling between the children and R.J.S. The Provincial Court ordered that R.J.S. shall have contact time with the children on alternating Saturdays and Sundays commencing in June of 2019 which provided for R.J.S. to pick up the children at the home of D.M.S. for each contact time meeting with R.J.S. and D.M.W. could attend the contact time, if she wished to do so. The Provincial Court also made a number of orders dealing with the conduct of the parties in relation to dealings between the parties on an ongoing basis. Apart from general issues of credibility and reliability, there needs to be an examination in this case of the reasons that the parenting time granted to R.J.S. has not

occurred. Questions about alienation of children from their father also arise on the facts here. These issues clearly require some findings of credibility and reliability of the witnesses involved, and may require an examination of the children by a court appointed expert or similar means.

Applicable Law

- [15] The Supreme Court Family Rules provide a means for a summary disposition of a trial under Rule 11-3. However, under Rule 11-3(15), the court may not grant judgment in favour of a party, if the court is unable on the whole of the evidence to find the facts necessary to decide issues of fact or law, or if the court is of the opinion it would be unjust to decide the issues on the application.
- [16] In the case of *Strom-Postnikoff v. Postnikoff*, 2012 BCSC 1495 at para. 4, the court concluded that a case was not suitable for summary disposition, despite the views and wishes of the parties.
- [17] The governing principles for a parallel provision (Rule 9-7(15)) in the Supreme Court Civil Rules were set out in *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31:
- [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.
- [18] The principles of *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* apply to the effect that it is inappropriate to make findings of credibility based solely on affidavits where there are central disputes in the evidence.

Conclusions

- [19] In the circumstances of this case, given the volume of material placed before the Provincial Court and now before this court in the form of affidavits and transcripts (another form of sworn statement), the need to make findings of credibility and reliability make it inappropriate to proceed in this format in Chambers.
- [20] As a result, I direct this matter be placed on the trial list and that within 45 days from the publication of these Reasons, the parties shall schedule a Judicial Case Conference at the earliest date made available to the parties through the office of Supreme Court Scheduling; and, the trial of this matter will thereafter proceed in the usual way to the trial list with the application of requirements for disclosure of documents, and full rights of discovery.
- [21] The issue of costs of this application will be reserved for the judge ultimately hearing the trial.

"Ball J."

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Prepared on 26 October 2026 · Esheria