
CANADA / JUDGMENT

Roberts v. Roberts

2010 BCSC 1731

COURT

Supreme Court of British Columbia

DECIDED

3 December 2010

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2010 BCSC 1731 Roberts v. Roberts

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Roberts v. Roberts,

2010 BCSC 1731

Date: 20101203

Docket: 07 2235

Registry: Victoria

Between:

Barbara Jane Roberts

Claimant

And

Neil Anthony Roberts

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 19, last three words of the paragraph on December 8, 2010

Before: The Honourable Mr. Justice Shabbits

Reasons for Judgment Relating to Costs

Counsel for the claimant:

J.A.C. Stewart

Counsel for the respondent:

R. Neary

Application in Writing

Place and Date of Judgment:

Nanaimo, B.C.

December 3, 2010

- [1] I heard the applications in this action that were made on July 22, 2010 and October 25, 2010.
- [2] I dismissed both applications, although on July 22, 2010, I gave the claimant leave to apply to Mr. Justice MacKenzie for an order granting her the relief that I had refused to order.
- [3] The respondent applies for lump sum special costs payable forthwith in connection with both applications. The respondent submits that he is entitled to those costs in any event of the cause.
- [4] The July 22, 2010 application followed oral reasons for judgment given by Mr. Justice MacKenzie in chambers in Victoria on June 17, 2010 after a two day hearing. The July 22, 2010 application was heard before an order relating to those reasons had been entered.
- [5] The respondent submits that in his reasons of June 17, 2010, Mr. Justice MacKenzie "specifically directed that the claimant bring no further applications prior to September 15, 2010".
- [6] I am of the opinion that the respondent has misapprehended what Judge MacKenzie ordered. I am of the opinion that Mr. Justice MacKenzie did not order that no further applications could be brought before September 15, 2010.
- [7] I discussed Mr. Justice MacKenzie's June 17, 2010 reasons for judgment in oral reasons for judgment given November 3, 2010. Those reasons related to the October 25, 2010 application.
- [8] I am of the opinion that what Mr. Justice MacKenzie ordered on June 17, 2010 was that the order he made defining the claimant's access to the three youngest children could be reviewed after September 15, 2010. Mr. Justice MacKenzie explained the circumstances in which the review might result in a different order. He explained the purpose of a review. It was for that reason that I referred to the Supreme Court of Canada decisions in *Willick v. Willick*, [1994] 3 S.C.R. 670 and *Leskun v. Leskun* 2006 1 S.C.R. 920. Those authorities make it clear that the issues that were before Mr. Justice MacKenzie were not to be re-litigated on the October 25, 2010 review, and that the review was not to review the correctness of Mr. Justice MacKenzie's order, and that the review was limited in scope to the reason why it was ordered.

- [9] An order that no applications could be brought for three months would have meant that neither party could seek the assistance of the court in clarifying orders, or in enforcing orders, or in addressing matters that had not been before Mr. Justice MacKenzie. Such an order would have permitted the respondent, who had interim sole care of the three youngest children, to make decisions relating to them without scrutiny. In my view, the transcript of the June 17, 2010 proceedings makes it clear that although Mr. Justice MacKenzie allowed the October 25, 2010 review, he did not order that other applications could not be brought.
- [10] I am of the opinion that the claimant was entitled to bring the July 22, 2010 application. The reason why I refused to accede to her application but permitted her to pursue relief before Mr. Justice MacKenzie was that I thought that if the relief she sought was ordered, that it should be ordered by Mr. Justice MacKenzie who had recently heard a two day chambers application relating to the same issues.
- [11] The July 22, 2010 application might not have been necessary had a formal order relating to Mr. Justice MacKenzie's reasons for judgment been entered. Either party could have taken steps to have the order settled before the July 22, 2010 hearing. The failure to enter the order led to confusion. The parties did not agree as to what was ordered.
- [12] I am of the opinion that each of the parties to the July 22, 2010 application should bear her or his own costs of the application.
- [13] The hearing that took place in October 2010 was the review ordered by Mr. Justice MacKenzie.
- [14] The respondent enjoyed substantial success in respect of that application.
- [15] Rule 16-1(9) provides that unless the court otherwise orders, the respondent is entitled to the costs of that application if he is awarded costs at trial.
- [16] I am of the view that I should make a different order. I order that the respondent recover his costs of the October 2010 application in any event of the cause.
- [17] I make that order because the review that I heard related only to interim child care issues. This proceeding relates to the care of children. It is their best interests that dictate the outcome of applications. In my view, the respondent should recover his costs of the review application, where he enjoyed substantial success, even if he does not recover costs at trial.
- [18] The British Columbia Court of Appeal discusses special costs in *Garcia v. Crestbrook Forest Industries Ltd.* [1994] B.C.J. No. 2486 45 B.C.A.C. 222.
- [19] In *Garcia*, Lambert J.A. writes for the court. He says at para. 17 that the single standard for the awarding of special costs is that the conduct in question properly be characterized as "reprehensible". He writes that the word "reprehensible" encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke.

- [20] The October 25, 2010 application was the review contemplated by Mr. Justice MacKenzie. The claimant was entitled to the review. It was not brought for an improper motive. There was no improper conduct by the claimant in bringing the application or in the manner in which it was presented.
- [21] The respondent submits that because the claimant had not engaged in psychological counselling or psychotherapy, it should have been obvious to her that the application could not succeed. I do not accept that the claimant brought an application that she knew would fail. The parties did not agree as to what had been ordered. The claimant submitted that the review ordered by Mr. Justice MacKenzie permitted decisions that he made to be reconsidered. The respondent considered that he ordered that no applications could be brought before September 15, 2010. I do not agree with either submission.
- [22] I see no reason to reprove or rebuke the claimant. I am of the opinion that there is no reason to order special costs.
- [23] Costs shall be assessed in accordance with Appendix B.
- [24] Rule 16-1(10) provides that costs will be payable at the end of the case unless the court makes a different order. I see no reason why the usual rule should not apply. The costs of the October 2010 application will be payable on the conclusion of the case.

"Mr. Justice S.J. Shabbits"

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