

CANADA / JUDGMENT

Routkovskaia v. Gibson

2020 BCCA 189

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 189 Routkovskaia v. Gibson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Routkovskaia v. Gibson,

2020 BCCA 189

Date: 20200702

Docket: CA46228

Between:

Olga Routkovskaia

Appellant

(Respondent)

And

Michael Gibson

Respondent

(Applicant)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

June 19, 2019 (Routkovskaia v. Gibson, 2019 BCSC 2186,
New Westminster Docket D056257).

The Appellant, in person

(via videoconference):

O. Routkovskaia

Counsel for the Respondent

(via videoconference):

P.M Mennie

Place and Date of Hearing:

Vancouver, British Columbia

June 17, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 2, 2020

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant appeals from a Supreme Court order quashing her appeal of a Provincial Court order. The Supreme Court judge found that the order appealed from was an interim order from which no right of appeal lies pursuant to s. 233(1) of the Family Law Act, S.B.C. 2011, c. 25. The appellant argues that the judge erred by characterizing the order as interim. Held: Appeal allowed, with the matter remitted to the Supreme Court for the hearing of the appeal. The order was pronounced after 14 days of trial, and it resolved the issues of custody and access put before the judge in the pleadings. The judge included in the order a term providing that "any changes that need to be made shall be reviewed during April of 2019." The provision of a review hearing does not transform a final order into an interim one. Moreover, it is clear on a review of the transcripts that the purpose of the review was to re-assess the details of a complex custody and access order, not to alter the fundamentals. The trial was completed and the parties were not to bring new evidence on the review. The order appealed from settled the parties' rights on a point

in issue. The judge's own view, expressed at the review hearing, that the original order was not a final order is not dispositive of the issue, as it is the nature of the order at the time it is made that is relevant. The order was final. The appellant's argument that the Supreme Court order was tainted by a reasonable apprehension of bias was not strongly pressed on appeal and is rejected.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] This is an appeal of a Supreme Court order quashing the appellant's appeal of a Provincial Court order on the basis that the Provincial Court order was an interim order, from which no right of appeal lies. The judge, having found that the order under appeal was an interim order, applied s. 233(1) of the Family Law Act, S.B.C. 2011, c. 25 which provides:

233 (1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.

[2] It is beyond question that if the Provincial Court order was an interim order, the Supreme Court judge correctly quashed the appeal.

Background

[3] This appeal arises from a long-standing child custody and access dispute.

[4] Ms. Routkovskaia and Mr. Gibson have a child born in 2008. They have been involved in legal disputes about child access and custody since 2010. In 2010, Judge Steinberg of the Provincial Court ordered that Mr. Gibson have weekly access visits with the child. In 2012, Judge Buller Bennett ordered, by consent, that Ms. Routkovskaia and Mr. Gibson have joint guardianship, and that Mr. Gibson have certain access.

[5] In August 2016, Mr. Gibson applied for access and full custody and sought to replace an attached access order granting weekly access visits. That order did not in fact reflect the more generous access arrangements set out in the 2012 consent order, referred to above. I take it, however, that, in substance, Mr. Gibson was seeking to have the child live with him. In October 2016, Ms. Routkovskaia disputed the requests for parenting time, contact with the child, allocation of parental responsibilities, and the request to alter the previous order. She also counterclaimed for increased child support (premised on alleged income of \$350,000 a year), an order for retroactive support and a protection order rooted in allegations of family violence. These then were the issues requiring adjudication in the proceedings from which this appeal arises, at least as set out in the pleadings.

[6] A trial before Judge Steinberg took place over 14 days between November 2017 and September 2018. On September 7, 2018, the Provincial Court judge issued the following orders (the "September 2018 Order"):

1. The Applicant, Michael E. Gibson ("Mr. Gibson") and the Respondent, Olga Routkovskaia ("Ms. Routkovskaia") shall have joint guardianship of the child ("the Child");
2. Primary residence of the Child shall be with Ms. Routkovskaia;
3. Mr. Gibson shall have parenting time with the Child every second weekend from Thursday to Monday morning, the Child will be picked up from school or after school program on Thursday and returned to school Monday morning;
4. If there is a Professional Development day or statu[tory] holiday following the weekend of Mr. Gibson's parenting time with the Child, Mr. Gibson will have the Child from Friday to Tuesday. The Child will be picked up from school or after school program on Friday and returned to school on Tuesday morning;
5. Mr. Gibson shall have telephone access with the Child 1 time a week. Each call is not to exceed 15 minutes and the Child is to be permitted to call his father, Mr. Gibson anytime the Child wishes;
6. Mr. Gibson's calls will be on the Thursday before the weekend the Child is not with Mr. Gibson and on the Tuesday of the following week;
7. Each parent is to treat the other with courtesy and respect and will limit communication to factual information necessary for the other parent's care of the Child;
8. Each parent will advise the other of any medical, dental or similar appointments;
9. Each parent is to notify the other at the earliest possible opportunity of their plans to travel outside the country and if written permission is required for that travel the other parent is to immediately supply that written permission unless there is a good reason not to;
10. Subject to further Court Order, for the Child's school winter break and spring break, each parent is to have alternating weeks, the week is to be scheduled so that it does not interfere with the overall cycle of the exchanges;
11. Mr. Gibson's parenting time during the summer will [be 2] weeks in July and 2 weeks in August;
12. The Child will be with Ms. Routkovskaia during the day of Mother's Day and with Mr. Gibson on Father's Day. Pick-up and drop-off will be by Mr. Gibson from 10:00 am to 7:00 pm;
13. Any changes that need to be made shall be reviewed during April of 2019;
14. Mr. Gibson, Ms. Routkovskaia and the Child shall each attend counselling, for the parents counselling is to be focussed on improving communication and for the child counselling is to be focussed on how to cope with differing parenting styles;

15. Each parent is to prepare a list of three things that have improved between them for the period from this date until the appearance in April 2019 and present that list to the Court at that appearance.
- [7] The order does not address child support, which appears from the transcript to have been adjourned, or the application for a protection order.
- [8] At the end of the proceedings, the judge indicated that proceedings were adjourned, although it is not clear whether he was indicating that the case was adjourned to a date to deal with the financial matters, arrangements for access over Christmas, or that the trial was adjourned as well so that the April hearing should be treated as a continuation of the trial.
- [9] In October 2018, Ms. Routkovskaia appealed the September 2018 Order to the Supreme Court. She alleged as grounds of appeal that the Provincial Court judge improperly considered the best interests of the child and incorrectly assessed family violence. She also argued the Provincial Court judge exceeded his jurisdiction by requiring Ms. Routkovskaia and Mr. Gibson to report on three things that have improved between them and that any changes that needed to be made shall be reviewed in April.
- [10] Although the first ground of appeal is directed to the "reasons for judgment" and does not specify the orders under appeal, I take it that the appellant intended to put in issue each of the orders dealing with parenting arrangements and access. This is certainly the inference to be drawn from the materials to which we were referred. It does not appear that what may have been the effective dismissal of the application for a protection order was appealed. The appeal does not put in issue child support.
- [11] The appeal to the Supreme Court was not heard until after the review hearing in the Provincial Court. The appellant had attempted to have it heard, but the appeal was adjourned in light of the pending review. At that review, Ms. Routkovskaia did not identify three things that had improved, but she did apply for a declaration that the September 2018 Order was final. In dismissing that application, the Provincial Court judge commented as follows:
- It's hard to call what I did in September a final order because if you read the order it's coming back today for a review of its terms and any changes that may be necessary. That doesn't sound like a final order. You're free to appeal it. I don't have the slightest hard feeling about that. I don't think any, the less or more of you, for it. You have an absolute right to appeal. So you know, maybe you'll be successful, maybe you won't.
- [12] No changes of significance to the orders appealed from were made at the April review, and the judge did not issue new formal reasons for judgment.
- [13] The appeal of the September 2018 Order was heard on June 19, 2019. The judge concluded that the order was an interim order and that, therefore, no appeal lay from it. He quashed the appeal.

- [14] At the hearing, the judge had the benefit of transcripts of the Provincial Court proceedings. The Supreme Court judge noted that there had been a conversation between Ms. Routkovskaia and the Provincial Court judge, and that the Provincial Court judge was consistently interrupted while giving his reasons. The Supreme Court judge concluded that the September 2018 Order was "simply a conversation intending to lead to a further hearing" and not a final order. The Supreme Court judge also found that the April 2019 review was inconsistent with the September 2018 Order being a final order.

On Appeal

- [15] The appellant contends on appeal that the order was final, that the Supreme Court justice's comments or conduct gave rise to a reasonable apprehension of bias, and that the original order contained errors relating to family violence and the best interests of the child.
- [16] The appellant argues that the order came at the end of a 14-day trial and it should not be regarded as an interim order, which is usually understood as an order providing for stop-gap, temporary measures to maintain the status quo or provide short-term solutions. Typically, such orders arise out of summary proceedings and bridge the gap until a trial, where final orders can be made after the parties have had a proper opportunity to assemble and lead the necessary evidence.
- [17] In this case, she contends, the orders followed a 14-day trial and the contemplated review was limited to a consideration of the implications of potential improvements in the situation between the parties and did not contemplate calling further evidence. In short, she argues, if the September 2018 Order is treated as interim, the normal system of justice has been inverted. The system contemplates and requires that trials will lead to final orders, not interim ones, and that merely inserting a review requirement cannot convert what is in its nature a final order into an interim order. Final orders are necessary to bring certainty and finality to litigation in the trial court, particularly in the family law area, in the interests of justice and for all of the participants. Orders made at the end of trial lay a foundation for appeal rights that should not be frustrated by expressing orders in terms that make them appear superficially to be interim in nature. The fact that final orders may be subject to variation does not convert them into interim orders for in that case there never could be a final order.

Discussion

- [18] I observe that the Family Law Act does not define the difference between an interim and a final order but the Act does provide jurisdiction to make interim orders. Section 216 contemplates that interim orders are temporary pending trial, intended to preserve the status quo or put in place arrangements that bridge the gap to trial. Conversely, it seems to me, the section contemplates that orders emerging from the adjudication of the issues on the merits at trial, *prima facie* lead to final and not interim orders. Section 216 provides:

216 (1) Subject to this Act, if an application is made for an order under this Act, a court may make an interim order for the relief applied for.

- (2) In making an interim order respecting a family law dispute, the court, to the extent practicable, must make the interim order in accordance with any requirements or conditions of this Act that would apply if the order were not an interim order.
- (3) On application by a party, a court may change, suspend or terminate an interim order made under subsection (1) if satisfied that at least one of the following circumstances exists:
 - (a) a change in circumstances has occurred since the interim order was made;
 - (b) evidence of a substantial nature that was not available at the time the interim order was made has become available.
- (4) In making an order under subsection (3), the court must take into account all of the following:
 - (a) the change in circumstances or the evidence, or both, referred to in subsection (3);
 - (b) the length of time that has passed since the interim order was made;
 - (c) whether the interim order was made for the purpose of having a temporary arrangement in place, with the intention that the arrangement
 - (i) would not adversely affect the position of either party during negotiations, during family dispute resolution or at trial, and
 - (ii) would not necessarily reflect the final arrangement between the parties;
 - (d) whether a trial has been scheduled;
 - (e) any potential adverse effect, on a party or a child of a party, of either making or declining to make an order under subsection (3).

[19] In brief, I accept Ms. Routkovskaia's submission that in the ordinary course interim orders are time limited and interlocutory in character. They are intended to be stop-gap, to bridge the parties to trial, so that a trial can take place in which parties lead their evidence and a judge can assess all relevant evidence to adjudicate the dispute on its merits. At the conclusion of trial, a judge is expected to make an order in relation to the relief sought in the proceeding. The relief may be granted in whole or in part or it may be refused, but the trial is at an end and a definitive result is provided. That result provides certainty to the parties. It is the adjudication of their rights that have been in dispute in the proceeding. It is by its nature final and it provides a basis for appeal, if a right of appeal lies.

- [20] I accept that there is a sense in which orders in family matters are never, in a colloquial sense, "final", because the law makes provision for them to be "revisited" in a variety of different circumstances. And, indeed, the orders themselves may make provision for subsequent review. These facts alone do not support an argument that such orders are not properly viewed, in the legal sense, as final.
- [21] Having said this, it is of course possible that a court may make interim orders at the conclusion of the dates set for trial. If that were to occur, one might expect the trial to be adjourned to another date to be completed, at which time final orders would be anticipated to replace those interim orders. In effect, this is what Mr. Gibson says has occurred here. And this may be how the Provincial Court judge apprehended the situation in his commentary on the status of the September 2018 order in April 2019.
- [22] It is necessary then to assess whether the order under appeal is interim or final. Doing so requires an analysis of the true nature of the order and whether it is a determination of the issues that were before the court for adjudication. That analysis can be undertaken only by appreciating the issues before the court calling for determination and how they were disposed of by the judge. In this respect the observation of Justice Donald writing for a five judge division in *Forest Glen Wood Products Ltd. v. British Columbia (Minister of Forests)*, 2008 BCCA 480 at paras. 20 and 34 is helpful:
- [20] the ultimate question is what kind of order is challenged on appeal, the answer should be found in the true nature of the matter, not its surface appearance
- [34] The classic formulation of the order approach refers to disposition of all the rights of the parties. It should now be understood to include partial dispositions whereby the order determines a substantive issue in the litigation. The reformulation responds to the fact that it has become increasingly common for parties to seek rulings on substantive issues that only partially disposed of the matters in dispute.
- [23] Since it is the nature of the order that counts, I do not think the manner in which the order is pronounced is decisive, although it may illuminate the nature of the order. Here, the order was not pronounced as a conclusion to formal reasons for judgment. Rather, the various orders emerged from an extensive running conversation, indeed at times almost a negotiation, between the judge and the parties. The judge's evident purpose was to convey the thrust of his order, and to ensure both that the parties understood it and it was practical. The judge accepted rolling submissions from the parties about the scope of the order and its terms before the terms were finally pronounced. In assessing the issue before us, I do not draw any inferences from the process followed here about the nature of the orders that were pronounced. Nor do I criticize any of the participants for the process that was followed.

- [24] At this point, I note that I do not agree with the Supreme Court judge's characterization of the proceedings in Provincial Court. The proceedings were not "simply a conversation intending to lead to a further hearing": *Routkovskaia v. Gibson*, 2019 BCSC 2186 at para. 3. Orders were clearly made, and the conversation focused on the terms of those orders. Moreover, the conversation was not just between Ms. Routkovskaia and the judge. It involved Mr. Gibson just as much as Ms. Routkovskaia.
- [25] Similarly, since what matters here is the nature of the order pronounced, I do not think that the Provincial Court judge's expression of his opinion in April that he did not think he was making a final order because it was coming back for a review, is decisive. What matters is an objective analysis of the terms of the order as pronounced, not the judge's assessment after the fact. That analysis may be illuminated by the judge's own view, but his view is not determinative.
- [26] Finally, I agree that the fact that the September 2018 Order provided for a review is not necessarily decisive of the nature of the order. An illustration of this proposition is found in a judgment of Justice Saunders where, in *Harras v. Lhotka*, 2015 BCCA 329 at paras. 12-16, she concluded that the mere ability to review the amount of child support in the future did not make the order interim, because the court had given a complete answer to the only issue before it.
- [27] I turn now to orders pronounced. After hearing submissions, and near the beginning of his discussion with the parties, the judge asked the parties if they wanted formal reasons for judgment. The judge then said that what he wanted to do was to make an order. Shortly thereafter he pronounced the following orders:

THE COURT: Okay, I don't think either of you are the devil incarnate. So there is an order for joint guardianship, primary residence will be with mom. Dad will have parenting time with the child every second weekend from -- any reason why it shouldn't be on Thursday after school?

- [28] In my respectful view, those orders were objectively in the nature of final orders, representing a decision on those issues as they fell for adjudication in the trial. I see nothing interim about them. The subsequent conversation turned on the details of the orders to render them efficacious in light of the particular circumstances of the parties. After extensive discussion about the minutiae of the access arrangements the judge said:

THE COURT: I'm not prepared to enter into a conversation -- we've already had a conversation about it. There is going to be a return to court -- to late for me to fix the date, but in April 2019, to review any changes that need to be made. And a further order, each party is to provide the court with a list of three things that have improved since September the 7th, 2018.

- [29] It is these words that led the judge in April and the Supreme Court judge to conclude the order was interim.

- [30] The order was the subject of further discussion in the following extract:

OLGA ROUTKOVSKAIA: But what are -- what are we to expect in April 2019, you were asking us to --

THE COURT: I'm sorry?

OLGA ROUTKOVSKAIA: What are we to expect in April 2019 in asking us to return to court?

MICHAEL GIBSON: Three -- list of three things --

OLGA ROUTKOVSKAIA: That's it?

THE COURT: Three things that have changed for the better, which is done deliberately to try and provide an incentive for things to improve, because you -- you're obviously gonna have to work hard to try and impress each other that your ways truly have changed.

OLGA ROUTKOVSKAIA: So is there gonna be changes to this arrangement or what are we -- I mean, what - what -- what's happening --

THE COURT: Hopefully not, but there might be.

OLGA ROUTKOVSKAIA: So are we supposed to bring evidence again or ...

THE COURT: No. You're supposed to bring what I told you to bring. I'm not scheduling it for another 13-day hearing, and the odds on me be willing to schedule it for another 13-day hearing are low, because I already have my impression of the two of you. I don't need to be -- to have the sledgehammer brought out again to impress me that Dad can act extremely inappropriately. Your son's hygiene is perfectly fine. Your son's clothing is perfectly fine. Your -- your son's mother's upbringing of him is perfectly fine. It may be different from yours. So what? We're adjourned.

[31] In my view, when set in the context of a 14-day trial, the guardianship order, primary residence and access arrangements are objectively final orders. They are the answer to the issues falling for adjudication at the conclusion of trial. This is true too of the "access arrangements" relating to how many days per week, division of spring break, summer etc. I think that they are properly viewed as final in the sense that they are not subject to variation without a material change in circumstances. However, the judge was also making some provision for some "tweaking" of the details of the order if the parties had legitimate concerns about how they were working. Details might or might not change, but the April hearing would be about the details (as opposed to the access overall).

[32] As I view the matter, the purpose of the review in April was to assess how the details of the complicated access arrangements were working in practice. The hearing was to be informed by the parties reporting on three things that had improved between them. The obligation to do so was to be an incentive to improve the quality of the overall functioning of the parties in parenting their child. This would allow the judge to modify the details of the terms of the access arrangements if appropriate. But that does not transform the nature of the order from a final to an interim order for the purposes of s. 233 of the Act.

- [33] Accordingly, I am of the opinion that the Supreme Court judge erred in his determination that the order under appeal was interim and no appeal lay.
- [34] Ms. Routkovskaia's factum invites us to consider the merits of her appeal from the Provincial Court order. In my opinion, we are not in a position to do so. Any consideration of the merits of the appeal should be undertaken in the first instance by the Supreme Court, the court to which an appeal lies. We do not have the benefit of a Supreme Court judge's assessment of those merits. In the circumstances, the appropriate order is to remit the appeal to the Supreme Court. Furthermore, although Ms. Routkovskaia was understandably concerned by some aspects of her appeal in the Supreme Court, I do not think that a foundation has been laid to find a reasonable apprehension of bias on the part of the judge.

Conclusion

- [35] I would allow the appeal, set aside the order quashing the appeal, and remit the matter to the Supreme Court.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

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