

CANADA / JUDGMENT

Rupertus v. Rupertus

2012 BCCA 426

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 426 Rupertus v. Rupertus COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Rupertus v. Rupertus, 2012 BCCA 426 Date: 20121030 Docket: CA040270 Between: Dorothy Joan Rupertus Appellant (Applicant/Plaintiff) And Glenn Richard Rupertus Respondent (Defendant) Before: The Honourable Mr. Justice Chiasson (In Chambers) On appeal from: Supreme Court of British Columbia, August 30, 2012 (Rupertus v. Rupertus, Vancouver Docket No. E091741) Appellant appearing in person Respondent appearing in person Place and Date of Hearing: Vancouver, British Columbia October 17, 2012 Place and Date of Judgment: Vancouver, British Columbia October 30, 2012 Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

- [1] Ms. Rupertus applies for leave to appeal, a stay of an order made in this matrimonial proceeding on August 30, 2012 and for an order abridging the time for the leave and stay applications to be heard. The order has a number of provisions, including directions for establishing a process whereby the applicant and her former husband, the respondent, will obtain psychological counselling. Steps have been taken in compliance with these provisions.
- [2] The applicant wishes to overturn the judge's grant to the respondent of access to one of the children of the parties and the judge's order seizing himself of further applications in the proceeding.
- [3] In her grounds of appeal, the applicant also takes exception to the judge's refusal to order immediately a new report under s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 128. She also contends that the judge erred by interviewing the child.

Background

- [4] The parties were divorced in 2007. At that time, Mr. Justice Wilson ordered joint guardianship of the two children of the marriage. The applicant was to have day-to-day care and control of the children. The respondent's access to his daughter was suspended. He was given access to his son on alternating weekends and on Wednesdays.

- [5] At some point, the respondent's access was interrupted because the applicant had concerns for the well-being of the child. He expressed suicidal thoughts and appeared not to want to visit with his father. This led to an application by the respondent to find the applicant in contempt of court for failing to provide access. She sought to adjourn the contempt proceedings.
- [6] Eventually, the matter came before Mr. Justice Groves in August 2012. The respondent dropped his contempt allegation. Describing his task as "essentially doing damage control in regard to two children who are 13 and 11", the judge made the order that is the subject of the present applications.
- [7] The applicant filed her application for leave to appeal on September 26, 2012. Her motion and materials were filed on October 12, 2012 and served on the respondent on October 14, 2012. Discussion Preliminary considerations
- [8] I am able to deal summarily with some issues: the application for a stay; the order seizing the judge with further applications; abridging the time; the judge's interview of the child.
- [9] Rule 22.1(7) of the Supreme Court Family Rules provides: If a custody order or support order is appealed, the order remains in force until the determination of the appeal, unless the court that made the order otherwise directs. (See also: *Boleak v. Boleak*, 1999 BCCA 776, 183 D.L.R. (4th) 152.) In my view, the access order the applicant seeks to appeal is a "custody order". I am unable to order it stayed.
- [10] In addition, s. 14 of the Family Relations Act provides: Despite any other enactment, if an order made under this Act is appealed, unless the court that made it otherwise orders, the order remains in full force and effect until the determination of the appeal. Although it is not clear on the material before me on what legislation the access orders were made (that is, the Divorce Act R.S.C. 1985, c. 3 (2nd Supp.) or the Family Relations Act), the issue of a s. 15 report was very much involved and I am satisfied that s. 14 is applicable to the application for a stay.
- [11] As to the judge's order seizing himself of future applications, I note Rule 22-1(8), which states: Whenever practicable and appropriate, the same judge or master is to manage and hear all of the following in a family law case:
- (a) applications;
 - (b) judicial case conferences;
 - (c) the trial. There is nothing in the material that would support a deviation from this provision.
- [12] The respondent initially took exception to the short time he was given to respond to the applications. After considering his position, he concluded, as did the applicant, that it would be best if the applications proceeded. They did so, which effectively abridged the time as requested by the applicant.

- [13] It is not uncommon for a judge attempting to resolve difficult issues of custody and access to speak alone with the children who are involved. Generally, what they have to say is not determinative, but it may provide the judge with context in which to understand better the whole of the evidence that must be weighed. (See generally, *L.E.G. v. A.G.*, 2002 BCSC 1455.)
- [14] In the present case, the judge was very much alive to the fact he is not a psychologist. His objective was to attempt to assess the situation from the child's perspective and to obtain a sense of how the child was reacting to the situation.
- [15] In my view, there is no basis in this case for suggesting that the judge erred in speaking with the child. It was only one factor the judge took into account in reaching his conclusions.
Leave to appeal - the access order
- [16] There is no suggestion that the applicant does not require leave to appeal in this matter. I shall proceed on the basis that she does while noting the comments of Proudfoot J.A. in *A.L.J. v. S.J.M.* (1996), 81 B.C.A.C. 268, 24 R.F.L. (4th) 189 (in Chambers) at para. 10: Access orders, in my view, would rarely be final orders. Variations are applied for and are granted. The law provides for that, circumstances change. If for no other reason but for that of public policy purposes one could only imagine the number of access appeals that would arrive in this court if leave were not required. The interim nature of the order in question on this application will become apparent when I discuss the reasons of the chambers judge.
- [17] The applicant is concerned with the mental state of the child. She states that he makes suicidal comments that appear to be related to the requirement that he spend time with the respondent. There is some support for this in the expert reports that were placed before the judge. There also is contrary evidence. The respondent states that the boy enjoys his visits with his father.
- [18] The applicant sought an order for an updated s. 15 report to assist in determining whether the boy is troubled by the required visits with his father. She takes the position that access should have been suspended pending obtaining such a report.
- [19] The criteria for granting leave to appeal are well known. In *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326, Saunders J.A. (in Chambers) stated at para. 10:
- [10] The criteria for leave to appeal are well known. As stated in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) they include:
- (1) whether the point on appeal is of significance to the practice;
 - (2) whether the point raised is of significance to the action itself;
 - (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

- (4) whether the appeal will unduly hinder the progress of the action. The overarching consideration in applying these factors is the interests of justice: *Vancouver (City) v. Zhang*, 2007 BCCA 280, per Saunders J.A. (in Chambers) at para. 10.
- [20] This case concerns the judge's exercise of discretion. Leave to appeal of such an order is seldom given (*Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2298 (C.A.), per Rowles J.A. (in Chambers) at para. 12, quoting McLachlin J.A. (as she was then) in *British Columbia Teachers' Federation v. British Columbia (Attorney General)* (1986), 4 B.C.L.R. (2d) 8 (C.A.) at 11). Leave to appeal a discretionary order will only be granted where the order is clearly wrong or serious injustice will occur, or where discretion was not exercised judiciously or was exercised on a wrong principle: *Strata Plan LMS 2019 v. Green*, 2001 BCCA 286, 152 B.C.A.C. 174, per Proudfoot J.A. (in Chambers) at para. 6.
- [21] Judges in matrimonial disputes are faced with the unenviable task of considering objectively the highly subjective perceptions of parents as to the best interests of their children. Judges may differ in their conclusions, but the orderly and effective administration of justice in this context requires appellate courts to respect and defer to those conclusions, unless they clearly are wrong or based on wrong principles.
- [22] I do not think the proposed appeal raises an issue of general significance. Like most access orders, the present order is very fact specific, as is the applicant's concern with it. That said, the point is significant to the parties. To obtain an appreciation of the merits of the proposed appeal and whether it would hinder unduly the progress of the action, it is necessary to consider what the judge was attempting to do.
- [23] As noted, he began his reasons by commenting that he was undertaking damage control with respect to two young children in what he called a "tragic situation". It was his view that this tragic situation was caused by the inability of the applicant and the respondent to communicate effectively about the best interests of their children. He hoped that effective communication between the parties might resolve some of the underlying difficulties that were being manifested by the children. He put in place a process that he hoped would see the parties embark on a serious attempt to resolve or ameliorate their communication difficulties.
- [24] The parties have taken steps to comply with the provisions in the judge's order that are designed to develop that process. They do not agree on some aspects of the steps that have been taken, but likely will return to the judge for further guidance. This is as it should be.
- [25] The judge made it clear that he was not discarding the idea of a new s. 15 report. It was his view that, before undertaking such a report, the parties should take steps to foster their communication with the hope of addressing with their children a long-term resolution of the present access impasse. He set a date in December of this year to meet again with the parties to see what progress had been made and to consider the future. This was assuming no crisis in the interim.

- [26] In my view, there is no prospect that a division of this Court would interfere with the judge's careful attempt to resolve this difficult tragic situation. I see no error of principle; I see a full appreciation by the judge of the applicant's concerns for the mental state of the child; I see a clear identification of the underlying problem; I see orders designed to address that problem; I see a judge ready to move to a different footing if it were required by developments.
- [27] I also am satisfied that an appeal at this stage of the proceedings would seriously hamper the progress of the litigation.
- [28] I refuse leave to appeal.

Conclusion

- [29] In summary, I:
1. grant the application to abridge the time for hearing these applications;
 2. dismiss the application for a stay of provisions of the August 30, 2012 order of Groves J.;
 3. dismiss the application for leave to appeal the order seizing the judge with further applications;
 4. dismiss the application for leave to appeal the orders providing the respondent's access to the child.
- [30] The applicant is concerned that the judge may have viewed her conduct harshly. It is clear that some of his comments during the course of the proceeding were pointed, but that is part of the litigation process. This is as it should be. The judge also was critical of the respondent's approach to his children. The judge's task was to provide an objective perspective driven by the need to ascertain and achieve the best interests of the child. Sometimes parents are a bit bruised in that process. It is not an unfair price to pay considering what is at stake.
- [31] At the core of the judge's approach is the policy of the law that fosters joint parenting. As a general proposition, the law considers this to be in the best interest of children. That is not always the case, but it usually is an appropriate starting point. There is no doubt in my mind that Mr. Justice Groves would depart from this approach were he to consider it appropriate to do so, but at this stage of the proceedings it is important to respect his efforts to foster effective joint parenting. To achieve that goal, both parents are likely to be obliged to reconsider their relationship with each other and with their children. That may not be a comfortable process. So be it. "The Honourable Mr. Justice Chiasson"

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