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CANADA / JUDGMENT

## S.M.M. v. J.P.H.

2015 BCSC 1042

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COURT

Supreme Court of British Columbia

DECIDED

18 June 2015

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2015 BCSC 1042 S.M.M. v. J.P.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.M.M. v. J.P.H.,

2015 BCSC 1042

Date: 20150618

Docket: E75985

Registry: Nanaimo

Between:

S.M.M.

Claimant

And

J.P.H.

Respondent

Corrected Judgment: The text of the judgment was corrected on the front page and at paragraphs 6 and 11 on June 23, 2015

Before: The Honourable Madam Justice Gray

Reasons for Judgment

In Chambers

The Claimant, S.M.M.:

In Person

The Respondent, J.P.H.:

In Person

Place and Date of Hearing:

Victoria, B.C.

June 11, 2015

Place and Date of Judgment:

Nanaimo, B.C.

### June 18, 2015

- [1] This is a high conflict divorce proceeding. There was a trial in 2011 before Mr. Justice Macaulay, and there have been numerous post-trial applications, particularly regarding the parenting of the parties' three children, who are now 16, 13 and 11 years of age. I have been seized of issues in this matter since August, 2013. The claimant mother ("Mother") has provided a notice of application which has been tentatively set for hearing before me on Monday, June 29, 2015. The respondent father ("Father") has applied for an order that I recuse myself from the case on the basis that there is a reasonable apprehension that I am biased. The Father's application was heard by telephone for about 30 minutes. Both parties acted for themselves in that hearing.
- [2] The parties' difficulties appear to be insoluble. The evidence at the trial in 2011 was that the parties had incurred \$80,000 in fees for counselling and parenting coaching. I have been told that the parties have taken training suggested by William Eddy through his High Conflict Institute and New Way 4 Families. There appear to be continuing difficulties despite over 28 court orders, as discussed in my reasons for judgment of June 19, 2014, indexed at 2014 BCSC 1118.
- [3] My order of June 19, 2014, consolidated all the prior orders regarding parenting. In brief summary, it provides that the children will spend 6 nights out of 14 with the Father except during holiday breaks, when they will spend equal time with each parent. The order also permitted the two older children to choose to spend up to one extra night per week with either parent.
- [4] The June 19, 2014 order sets out requirements for the children, including that the Children could stay overnight with their Father in Courtenay if the residence provided a piano plus one bedroom for the two sons, a second bedroom for the daughter, and a third bedroom for the Father. The order also has terms providing that the parents are not to leave the children alone overnight except in specific circumstances and that if a parent could not care for the children for a period of over four hours in a row on a school day, the other parent would have the opportunity to care for the children. The order also provides that the Father is to take the children to piano lessons and soccer practises, unless either the children are ill or if

the children ask to miss such an event in certain circumstances.

[5] The test for reasonable apprehension of bias was discussed by the Court of Appeal in *R. v. Krawczyk*, 2009 BCCA 250, leave to appeal ref'd [2010] S.C.C.A. No. 33, as follows:

[11] The test for reasonable apprehension of bias is set out in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 111, 151 D.L.R. (4th) 193, quoting from the dissent of de Granpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394, 68 D.L.R. (3d) 716:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. "

[12] The test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. The reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *S. (R.D.)*, at para. 111.

[13] The onus of establishing an apprehension of bias is on the applicant. The threshold for a finding of real or perceived bias is high: *S. (R.D.)*, at paras. 113-114. This presumption of judicial impartiality carries considerable weight and the law should not carelessly evoke the possibility of bias in a judge: *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259 at paras. 57-59. Despite this high threshold, "cogent evidence" can displace the presumption of judicial integrity and impartiality: *S. (R.D.)*, at para. 117.

[6] The Father's affidavit and submissions include statements which incorrectly describe the existing order. For example, he states that "I must follow an access schedule set solely by the Mother". In fact, the existing order provides that "commencing Thursday, January 2, 2014, on alternate weeks, the [Father] will pick up the children after school on Thursday, and return them to school the following Wednesday". The existing order also provides that the ordinary parenting schedule can be varied by agreement between the parties in written form, and that when considering whether to agree to a variation, both parents agree to consider the best interests of the child or children involved, including the need for time with family and friends, the need for stability, the need for one-on-one time with each parent, and the need for proper rest.

[7] In his oral submissions, the Father argued that my decisions were "universally in favour" of the Mother.

- [8] The Father is incorrect to say that my decisions have "universally" favoured the Mother. Of course, to use a sports analogy, the fact that an umpire calls three strikes does not establish that the umpire is biased, because the pitcher may have thrown three strikes. Similarly, if a judge repeatedly finds in favour of one litigant, it does not establish bias.
- [9] In addition however, even a quick review of my decisions demonstrates that the Mother has not always succeeded. For example, in my reasons for judgment indexed at 2014 BCSC 1118, I dismissed the Mother's application for a finding that the Father was in contempt of his obligation to produce financial information and for an order that he was in contempt of the order of Mr. Justice McKenzie pronounced November 7, 2013.
- [10] It is the Father's view that the existing court orders are not working well for the children. He hopes that a "fresh pair of eyes" from a different judge may lead to a different approach.
- [11] However, that does not establish that there is a reasonable apprehension that I am biased in handling this case. The Father's application is dismissed.
- [12] At the start of the telephone application, I asked both parties if Nanaimo would be a more convenient court location for them, and they both said it would be more convenient. The Mother's June 10, 2015 affidavit provides a Courtenay address and the Father's June 9, 2015 affidavit provides a Powell River address. As a result, by consent, I moved this case to the Nanaimo Registry for all purposes.
- [13] This is a case which will benefit from judicial management because there have been so many post-trial applications. The Chief Justice has appointed Mr. Justice Thompson, who ordinarily sits in Nanaimo, to continue with the management of this case. As I have said, I have been seized of this matter since August 2013. Judges often seize themselves of matters for periods in the range of two years. In light of the appointment of Justice Thompson as the case management judge, it is not necessary for me to continue to be seized of this case.
- [14] The Mother's application, which was tentatively set to proceed before me on June 29, 2015, is confirmed to proceed before me on that date. The Registry advised me that there is no courtroom available that day in the Nanaimo courthouse, but there is a courtroom available that day in the Courtenay courthouse.
- [15] As a result, the hearing will proceed before me on June 29, 2015, at the Courtenay courthouse. However, the Nanaimo Registry remains the Registry for all purposes other than the June 29, 2015, hearing. The Father is required to file any responding material with the Nanaimo Registry by June 19, 2015. Applications after June 29, 2015, will be managed by Justice Thompson and should be set for hearing through the Nanaimo Registry.

"Gray J."

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