
CANADA / JUDGMENT

T.L.M. v. L.V.M.,

2011 BCSC 1774

COURT

Supreme Court of British Columbia

DECIDED

18 July 2011

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.L.M. v. L.V.M.,

2011 BCSC 1774

Date: 20110718

Docket: E060594

Registry: Vancouver

Between:

T.L.M.

Claimant

And:

L.V.M. also known as

L.V.S.M.

Respondent

Before: The Honourable Madam Justice Gray

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

G.E. Edwards

The Respondent, L.V.M.:

In Person

Place and Date of Trial:

Vancouver, B.C.

July 18, 2011

Place and Date of Judgment:

Vancouver, B.C.

July 18, 2011

- [1] THE COURT: The application before me is in a custody battle. The claimant is the father and the respondent is the mother of a 10-year-old girl. There is an order of Madam Justice Humphries of March 23, 2011, dealing with the applications that are before me. Paragraph 6 said the balance of the applications are adjourned to a date to be agreed following May 8, 2011, for one day, for a final determination of custody, at the discretion of the trial judge. Paragraph 7 said the respondent shall have all of her materials filed and served on the claimant by April 15, 2011, and the claimant shall file and serve all response materials by April 29, 2011, and counsel for the claimant shall file a joint chambers record book.
- [2] Well, what has happened is that there have been affidavits filed subsequent to that. The trial record I was provided with has the eighth affidavit of Ms. M., filed July 6, 2011, and then the affidavit of Mr. M. of July 13, 2011. Today is July 18, 2011. The application before me right now is Ms. M.'s application for me to consider affidavit number 9, which was sworn today and filed today, and also her notice of application dated July 14, 2011, and stamped at the court on that date.
- [3] I am going to first deal with the affidavit number 9. Mr. Edwards, who is counsel for the claimant father, has had an opportunity to read this, although he was only given it this morning, and he has told me that his client would not intend to respond to anything in this further affidavit. I have read the affidavit and it does repeat much of what is already in prior affidavits.
- [4] The court order was plain that the mother should have filed all her materials by April 15 and the father all of his response by April 29. What has happened is that there was a delay on that. She filed hers by July 6 and he responded by July 13, which was last Wednesday. Today is a Monday. I am not certain that there are new items that have to be in this affidavit but I am not prepared to proceed with something as serious as custody unless all of the evidence that the parties seek to have before the court is before the court, and for that reason I am allowing Ms. M. to rely on her ninth affidavit, sworn today, which Mr. Edwards has said he will not be responding to.

- [5] The next matter is whether I should consider the notice of application. It has 22 paragraphs of orders that are sought and it was dated on Friday, filed with the court on Friday, and given to Mr. Edwards this morning. I am not prepared to consider that notice of application. It is too late, and it is also seeking to expand the issues that were set for hearing today. Madam Justice Humphries, on March 23, 2011, which is almost four months ago, set for hearing today a specific number of applications, and so those are the ones that must proceed today, and I will adjourn generally the applications in Ms. M.'s July 14, 2011 notice of application. She is raising new matters and they are not appropriate to proceed today.
- [6] So we will proceed today on the issues in the prior notices of motion, with the chambers record supplemented with Ms. M.'s affidavit number 9.

[SUBMISSIONS ON APPLICATION FOR CUSTODY AND RESIDENCE]

- [7] THE COURT: The cross-applications before me relate to a 10-year-old girl who I will refer to as "Z". Her father is the claimant, and the father lives in B., British Columbia, not too far from K. The father was represented by counsel, Mr. Edwards, on this application. The mother lives in Richmond and she acted in person on this application.
- [8] There were a series of applications brought by both the mother and the father that were set for hearing today for a full day. Because I thought it might move things along, we started with one issue, which was the question of custody and residence. There is an existing order that the girl will be in the custody of her father, that he will have sole interim custody, and that she will primarily reside with her father. I am just going to try to find the date of that interim order so that my note is clear.
- [9] L.V.M.: I guess it was February 22, 2007, My Lady.
- [10] THE COURT: Thank you. You are right. So the order of Madam Justice Sinclair Prowse, pronounced February 22, 2007, paragraph 4, provides that the plaintiff father shall have interim sole custody of the child. And then it went on and dealt with access matters. Item 8 said:

This order continues until further order of the court or written agreement of the parties.

- [11] The applications as they came before me were first, that the father was asking for a final order that he have sole custody of the child and that she be resident with him. So he was seeking to have this resolved under the summary trial rule, which was formerly Rule 18A, and it presently Family Rule 11-3. The mother wants the child to be in the joint custody of her parents, and in fact wants the child to spend more time with her.

[12] The child spent her youngest years in the care of her mother. The child has been in the care of her father for the last period of about four years. There have been two psychologists involved in this case who have both given reports. The first report was that of a Mr. C., and it is what we often call a s. 15 report, prepared to assist the court in determining custody and access issues. That report was dated September 17, 2007, so it was prior to the order of Madam Justice Sinclair Prowse. Nothing has changed the interim custody arrangement.

[13] I am not going to go through Mr. C.'s report at length, but there are a number of recommendations. It does include the recommendation in paragraph 5 of the recommendations on page 54 of the report. I will just read the beginning of that paragraph:

With the significant distance between the parental homes, it is necessary that [Z] spend as much time available with her mother as possible to maintain the quality of that relationship.

[14] There was an order requiring a views-of-the-child report, and that gave rise to the report of Dr. A., which is dated February 6, 2011. Preparation of this report included some testing of the girl. It also included Dr. A. interviewing the girl. The report is 13 pages long. It includes a great number of very troubling comments about how the girl is doing right now. It concludes, on paragraph 13, with the psychologist saying:

Last but certainly not least, [Z] is in great need of psychological help. She needs to be seen regularly in therapy.

[15] Now, Dr. A.'s report includes reports of Z talking extensively about being afraid of her mother. It talks about Z having stomach problems, especially when she comes to Vancouver, which is where her mother is, and that when she comes to Vancouver she always feels tense and has trouble sleeping and her stomach hurts.

[16] Also in this report are things that are positive about the relationship between the mother and daughter. For example, on page 5, Dr. A. reported that on January 17, 2011, she did not observe any tension between mother and daughter, and "They were both smiling and they greeted me with enthusiasm." Later in that paragraph, Z is quoted as saying that at her mother's home they essentially had a good time, but she goes on to say that her mother got angry and yelled at her. The mother, in fact, denies, in that particular place, getting angry and yelling at her daughter.

[17] The psychologist asked the child what she would like the psychologist to tell the judge. The psychologist reported that Z replied without any hesitation, "tell him that I don't want to come to Vancouver that often."

[18] These are very concerning comments relating to how a child is doing. It is a difficult situation for the child to have parents who live so far apart that it is a long journey and is only worth making if there is going to be a significant amount of time to be spent together with either parent.

- [19] I am being asked to make a final order. I have concluded that I cannot make a final decision on the evidence before me. I wish I could, because I think it would help the two parents and the child if this were resolved, but I cannot do it unless I have all of the necessary evidence.
- [20] In this case, one of the things that, in my view, the mother would be entitled to do would be to cross-examine Dr. A. about some of the things that were said and some of her conclusions. I refer to the decision of the Court of Appeal in *K.M.W. v. L.J.W.*, 2010 BCCA 572. The court said, in paragraph 65, that:
- ... a trial judge should rarely preclude the cross-examination of the author of a s. 15 report by a parent ...
- However, the Court of Appeal said that cross-examination of the expert was not an absolute right. In paragraph 61, the court, and it was Madam Justice Huddart writing reasons that were agreed to by the other two members of the panel, cited with approval a quote from Justice Parrett where he referred to the safeguards built into the s. 15 process as including the opportunity to call the investigator to the witness stand.
- [21] In this case, the mother challenges some of the things that are said by Dr. A.. With some of her objections, it may be the child said these things to Dr. A., but the mother does not agree that the child was correct in what the child said. In those circumstances, it may be helpful to the court to understand whether it matters whether what the child said was true, or whether the fact that the child is saying it is of sufficient concern to affect a final custody decision.
- [22] In this case, there were two other matters that troubled me. One was having some information about what changes had occurred with the child in counselling. Z has been taking some counselling. She has gone for counselling on a number of dates, including April 14, May 12, June 7, and June 21. I just know the dates. There was little evidence about what occurred in the counselling.
- [23] The evidence also showed that the father had been away from his home, as I understand it, for a six-week period, and the evidence was not entirely clear how the care of the child was dealt with during that period. The father says he hired a nanny. The mother says that what the child has said does not support that assertion, and that there was not a nanny, but that the paternal grandmother was caring for the child.
- [24] I should say, I think there is some evidence on which I could come to some conclusion about what had happened when the father was away, but I am troubled that I do not have evidence about the views of the child about how she felt when her father was away and how she wanted to deal with that.
- [25] So I have concluded that I cannot find the facts necessary to come to a decision on the final issue of custody. I will refer to Family Rule 11-3(15):

On the hearing of a summary trial application, the court may

- (a) grant judgment ... unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law ...

That subsection describes the problem here. I am not confident that I have everything I need to make a decision on what is in the best interests of this child on a permanent basis for custody.

- [26] I can say that, on the evidence that is available to me, I am not inclined to change the existing interim order that the child be in the custody of her father and primarily resident with her father, but I am not prepared to make that a final order. In my view, the mother should have the right, at the very least, to cross-examine Dr. A..
- [27] I am prepared to make an order for an expedited trial. This trial could continue before me with cross-examination of the parties on a schedule, on the basis of their affidavits, and with cross-examination of Dr. A., but I will wait to hear from Mr. Edwards how he wants to deal with that.
- [28] There are also, I understand, pressing issues of how to deal with access, and unfortunately it is already after four o'clock today. I would certainly like to do what I can to help here, but I will hear first from Mr. Edwards about what he thinks we can do.

[DISCUSSION]

- [29] THE COURT: All right. I have spoken to Trial Division and I can suggest four possible hearing dates: Nine o'clock on Tuesday, August 16; nine o'clock on Thursday, August 18; nine o'clock on Tuesday, September 6; nine o'clock on Thursday, September 8.
- [30] MR. EDWARDS: And this is with yourself?
- [31] THE COURT: With me. Will any of those work for you?
- [32] MR. EDWARDS: In talking to Mr. M., his concern, he wants time to consider, there is going to be substantial cost and he has to look at his finances and of course he is going to have to pay for Dr. A. because Ms. M. cannot. So all those factors are weighing on him at the moment.
- [33] THE COURT: Well, we could set a date and if your client does not want to proceed, I will have to find out what Ms. M.'s position will be.
- [34] MR. EDWARDS: Yes.

[DISCUSSION]

- [35] THE COURT: I will set it then for nine o'clock on Thursday, September 8.

[DISCUSSION]

[36] MR. EDWARDS: For the clerk, My Lady, the balance of the applications of both parties are adjourned generally?

[37] THE COURT: Yes. Yes, adjourned generally. We can reset them on September 8 if that is what is required.

"This copy of the Reasons for Judgment has been edited for publication to protect privacy. Gray J."

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