

CANADA / JUDGMENT

T.R. v. D.R.

2017 BCCA 203

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 203 T.R. v. D.R. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: T.R. v. D.R., 2017 BCCA 203 Date: 20170519 Docket: CA43715 Between: T.R. Appellant (Claimant) And D.R. Respondent (Respondent) Before: The Honourable Mr. Justice Groberman The Honourable Mr. Justice Harris The Honourable Madam Justice Fenlon On appeal from: An order of the Supreme Court of British Columbia, dated May 17, 2016 (T.R. v. D.R., 2016 BCSC 875, Vancouver Registry E131449). Oral Reasons for Judgment Counsel for the Appellant: M.L. Taylor Counsel for the Respondent: L.A. Cruickshank Place and Date of Hearing: Vancouver, British Columbia May 19, 2017 Place and Date of Judgment: Vancouver, British Columbia May 19, 2017 Summary: This is an appeal of an order dismissing the appellant's application to vary parenting arrangements of a child C. Appeal dismissed: the appeal is an attempt to reargue the case at first instance. The judge did not make palpable and overriding errors of fact warranting interference by this Court, nor did she err in the principles to be applied in assessing the evidence.

- [1] HARRIS J.A.: This appeal arises out of a family law dispute concerning parenting and custody of an infant child, C. An original order concerning these matters was made after trial on June 9, 2014 (the "2014 Order"). The 2014 Order provided that T.R. and D.R. have joint custody of C. and provided for parenting time during the week and holidays. The reasons for judgment are indexed at T.R. v. D.R., 2014 BCSC 1027.
- [2] The 2014 Order was varied on February 3, 2015 (the "2015 Order") in reasons indexed at 2015 BCSC 148. The 2015 Order granted D.R. sole custody of C. with reasonable access to the claimant. In the application leading to this appeal the claimant sought an order varying the 2015 Order as follows:
1. An Order that the Order of Madam Justice Hyslop, made February 3, 2015, be varied to return to a parenting plan which provides joint and equal parenting time with the infant child of the marriage, [C.], to the Claimant and the Respondent.
 2. An Order that the Claimant have parenting time with C. from the last day of school for Christmas holidays, from after school until Boxing Day, 2015.
 3. An Order that child support payable by the Respondent to the Claimant be reinstated pursuant to the Child Support Guidelines.

4. Costs of this Application.

[3] The judge dismissed the application and rendered the following decision:

[46] It is not in the best interests of C. to restore joint custody of her to her parents. D.R. shall continue to have the sole custody of C. pursuant to my 2015 order and the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.).

[47] T.R. shall have access to C. every second Saturday between 10 a.m. and 7 p.m., and on the alternate week, two days per week after school until 6:30 p.m. When school is not in session, C. will be picked up at 2:30 p.m. at D.R.'s residence or at a place designated by D.R. The two days shall be agreed upon by T.R. and D.R. and if no agreement, then D.R. will determine those days.

[4] She went on to make additional orders dealing with the modalities of picking up and dropping off C., and the claimant's entitlement to receive information about medical, dental and educational matters. She also provided:

[55] Clauses 4 and 5 of my order of June 9, 2014 shall be varied so that D.R. will make all decisions relating to C.'s therapy, medical, educational and social activities.

[56] D.R. will advise T.R. of all significant decisions made by him pursuant to the above paragraph.

[57] Clause 6 and 7 of my order of June 9, 2014 shall continue. Clauses 8, 9, 10, 11 and 12 are no longer in effect. In their place, during the months of July and August, D.R. may have C. for one week in each of those months, starting in 2016 and in each year thereafter. If D.R. leaves Sechelt overnight with C., D.R. must advise T.R. of the address and telephone number where C. is.

[5] The judge dealt with a variety of other matters involving telephone contact, arrangements for Christmas and Mother's Day and other incidental matters.

[6] The claimant appeals seeking an order to set aside the order under appeal in its entirety and granting "the relief sought by the Claimant/Appellant for a return to a joint custody and equal access as ordered by Madam Justice Hyslop following the trial in these proceedings on June 14, 2015 (sic) be reinstated". I observe that in the application before the judge leading to the order under appeal, the claimant did not seek a return to joint custody, rather she sought return to joint and equal parenting time.

[7] The claimant alleges the judge made a number of errors.

[8] At the core of the appeal, as it was argued today, is the contention that in respect of a number of important matters bearing on the best interests of the child the judge misapprehended the relevant evidence or failed to take into account evidence that demonstrated that the circumstances that had led to a change in the parenting arrangements in 2015 were no longer pertinent. The 2105 order had been triggered by the

appellant's breakdown and treatment. The contention is ultimately that the judge failed to appreciate the true current circumstances of the mother and placed emphasis on matters that are now well in the past, relating to such matters as allegations of inappropriate sexual behaviour, sobriety and instability in the life of the mother, and so forth. The judge is contended misapprehended the evidence about whether the appellant continues to maintain a belief in the allegations of sexual misconduct or whether she continues to advance them. The judge misapprehended the evidence of the appellants' recovery from her health or substance abuse issues. The judge improperly failed to weigh in the balance evidence attesting to her current stability, her current personal circumstances and her capacity to act as a good mother capable of building a healthy relationship with her daughter and fostering her daughter's relationship with her older half-sisters.

- [9] Cumulatively, she contends, these errors led the judge to fail properly to consider the concept of maximum contact found in s. 16(10) of the Divorce Act, R.S.C. 1985, c. 3, and led her to take into account irrelevant past conduct of the appellant contrary to s. 16(9) of the Divorce Act. In all of this, she argues, the judge erred in law in not providing a thorough examination of the best interests of the child.
- [10] At the outset, it bears repeating that our role on an appeal of a matter such as this is necessarily deferential. We are not a trial court or a second trial court. It is not our function to provide a second forum in which to reargue the case. Our role is to examine whether the judge who heard the application made the kind of legal error that requires us to interfere with the result. It follows that we interfere only in limited circumstances, such as where a judge has erred in principle. We do not reweigh the evidence or reinterpreted it unless it is demonstrated that the judge's findings rest on a palpable and overriding error. As has frequently been pointed out to litigants, there are important reasons in family law matters, including those involving a determination of the best interests of a child, to defer to the findings and exercise of discretion of a trial judge in order to promote finality and certainty and to bring stability and security to family arrangements.
- [11] Given the view that I take of this case, I do not find it necessary to rehearse the factual circumstances underlying the litigation or the decisions that have been made by the trial judge. I do think it important to emphasize that the judge has had the benefit of conducting a trial and because she is seized of this litigation is intimately familiar with the factual circumstances of the parents, and the needs and progress of C. since her original trial order. The judge is far better placed than we to appreciate the nuances of the facts as they have evolved over time, to assess the credibility of the parties, to appreciate the special needs of C. and the conditions under which she has the best prospects to flourish and to develop as she grows. In my view this appeal was an attempt to reargue the case at first instance and an invitation for us to reweigh the evidence and substitute our view of the facts for those found by the judge.

- [12] I have no hesitation in saying that I do not accept the suggestion that the judge lost sight of the maximum contact principle or the relevance of the past conduct of the parties. Neither of those principles is absolute. The maximum contact principle is, as the respondent submits in his factum, tempered by the fact that such contact must be in the child's best interests: *Young v. Young*, [1993] 4 S.C.R. 3 at para. 56. Similarly, the past conduct of a person may be taken into consideration where it is relevant to the ability of a person to act as a parent. Judges are presumed to know the law and I see nothing in the reasons for judgment which suggests that the judge failed to appreciate the proper application of these principles to the circumstances before her.
- [13] In brief, it is apparent from a review of the record and the reasons for judgment that the judge focused her analysis on the assessment of what kind of parenting arrangements were in C.'s best interests. To make that assessment the judge had to consider evidence related to C.'s circumstances and the progress that she was making in dealing with her autism. The judge had to examine the circumstances of both parents and given those circumstances what kind of relationship C. should have with them would best promote C.'s interests. I do not think the judge took into account irrelevant considerations. It was necessary for her to make some findings of credibility of the claimant's personal and health circumstances and previous conduct which were directly relevant to protecting and promoting C.'s best interests in her relationship with her parents.
- [14] The judge also had to weigh and balance conflicting evidence from persons other than the parties. The judge placed little weight on some of the evidence provided in support of the claimant's position. It was for the judge to weigh that evidence and I cannot see that the judge made any error in principle in assessing that evidence on in reaching her conclusions. Her assessment certainly did not rest upon palpable or overriding errors.
- [15] In brief, I do not think the judge made any error of principle in her evaluation of the issue she had to decide. Her findings of fact are rooted in the evidence and were open to her. In my view this appeal is an attempt to reargue the application and a plea to have us substitute a different view of the facts from that taken by the judge. That is not our function. In my view the appeal should be dismissed.
- [16] I would dismiss the appeal.
- [17] GROBERMAN J.A.: I agree.
- [18] FENLON J.A.: I agree.
- [19] GROBERMAN J.A.: The appeal is dismissed. "The Honourable Mr. Justice Harris"

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