

Citation: ☼S.T.M. v. C.G.H.
2022 BCPC 302

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IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

**IN THE MATTER OF
THE *FAMILY LAW ACT*, S.B.C. 2011 c. 25**

BETWEEN:

S.T.M.

APPLICANT

AND:

C.G.H.

RESPONDENT

**ORAL
REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE M. BRECKNELL**

Counsel for the Applicant:	G. Whidden, by telecommunication
Counsel for the Respondent:	F. MacLean, A. Sadovska and A. Tiplady, Articled Student, by telecommunication
Counsel for the Child B.:	G. Petrisor, by telecommunication
Place of Hearing:	Prince George, B.C.
Dates of Hearing:	August 25, November 16, 2022
Date of Judgment:	November 23, 2022

[1] THE COURT: This is an oral decision. In the event a transcript is ordered, I reserve the right to edit for grammar, punctuation, syntax and clarity.

[2] B. was born on [omitted for publication]. In this decision, I will refer to her as B. to maintain her privacy. Her parents are S.T.M. (Ms. M.) and C.G.H. (Mr. H.), (jointly the Parties).

[3] B. has some complex and not fully addressed mental health and behavioural issues. A diagnoses of these various challenges have been varied over the years, but it now seems to be common ground that she has a neurodiversity disorder commonly described as autism.

[4] For several years, the Parties have been unable to agree on how they should allocate their parental responsibilities and parenting time with B. Those ongoing disagreements, as well as issues around child support, have resulted in this litigation.

[5] There have been several earlier interim decisions in this matter that have summarized much of the history between the Parties and their care of B. In addition, the reasons for judgment arising from the lengthy trial between the Parties remains outstanding and will address in more detail all the issues in dispute as detailed in the pleadings, the evidence, and the submissions presented at trial.

[6] Of particular importance to this decision, as it relates to the trial proper, is that during the trial Ms. M. presented considerable evidence and made several submissions that B. is better able to function if she has consistency and routine and that Ms. M.'s living arrangement with her spouse Mr. H., and his two sons, provided that environment.

[7] Therefore, this decision will focus in on the latest application by Mr. H. to present more evidence regarding B.'s living situation in Ms. M.'s home, and in particular who is residing in that home with her and Ms. M.

[8] This is not the first application of this nature. On March 23, 2022, I gave Reasons for Judgment (the March 2022 decision) on an earlier application brought by Mr. H. concerning B.'s and Ms. M.'s living arrangement with her spouse and his

children. Those reasons were based on an application by Mr. H. to present evidence which had come to light subsequent to the end of the trial evidence.

[9] In summary, Mr. H.'s spouse, Ms. C., had received information from third parties that Ms. M.'s relationship with her spouse was not as it was presented to the Court during the trial, and in fact that Ms. M. was engaged in an intimate relationship with another person.

[10] That allegation was strongly denied by Ms. M. Initially, she sought an order that the Court not delve into the new information by permitting further evidence to be heard. However, once several affidavits had been prepared and provided to the Court by Ms. M. refuting Ms. C.'s allegations, it was Mr. H.'s counsel who sought a direction of the Court that his initial application not proceed.

[11] Ms. M.'s counsel took the position that Mr. H., through his counsel, presented an affidavit which other affiants said was not only incorrect, but false and it should be considered by the Court as part of the analysis of the trial proper regarding the credibility of Ms. C.

[12] Counsel did not present any case law at that time, but I did refer to a number of cases dealing with the calling of fresh evidence, including *Palmer v. The Queen*, [1980] 1 SCR 759; *Mohajeriko v. Gandomi*, 2010 BCSC 60; *Van de Perre v. Edwards*, 2001 SCC 60; *Luney v. Luney*, 2007 BCCA 567.

[13] The four-part test described in *Palmer* determined that evidence should generally not be admitted if, by due diligence, it could have been adduced at trial. On that point, I determined the evidence sought to be adduced at that time could not have been presented at trial because it arose after all the evidence was presented and written submissions were made.

[14] In *Van de Perre*, the Supreme Court of Canada dealt with the issue of finality by noting that it is “particularly important for the parties and children involved in custodial disputes.... Finality is a significant consideration in child custody cases, maybe more so than in support cases...”

That has been commented on in other appellate cases. In *Luney*, the Court of Appeal said evidence may be admitted:

... in the interests of justice ... otherwise the Court's decision may be regarded as resting on a misapprehension of the evidence.

[15] In the March 2022 decision, I referred to and gave consideration to the direction set out in s. 37 of the *Family Law Act*. I noted that s. 37:

... makes it crystal clear that in making an order respecting guardianship, parenting arrangements, or contact with a child, the parties and the Court must consider the best interests of the child only.

[16] I then determined that the affidavits that had been prepared could be admitted as evidence and that the affiants would be subject to cross-examination in a focused and time-limited hearing. Those cross-examinations were subsequently heard. The evidence presented and submissions made at that time is now being considered as part of the trial decision.

[17] It is noteworthy that at that time Ms. M. and her witnesses, including her spouse Mr. H. and the person who allegedly participated in the infidelity, absolutely denied Ms. C.'s evidence.

[18] In submissions, Mr. H.'s counsel urged the Court to conclude that Ms. M.'s actions could result in a destabilizing environment for B. and that evidence, if found to be true, greatly undermined her credibility with regard to the evidence she presented at trial. Ms. M.'s counsel urged the Court to determine not that Ms. C. was mistaken, but in fact she presented evidence she knew to be false, and that she and Mr. H. were desperately trying to cast Ms. M. in a negative light.

[19] Subsequent to the March 2022 decision, a further application was brought by B. to have counsel appointed for her. A hearing was held on August 25, 2022, and the application was granted on September 8, 2022. Matters were then further delayed to allow B.'s counsel to consult with and receive instructions from her.

[20] At the August 25, 2022, hearing, Mr. H.'s counsel presented an affidavit of Mr. H.'s filed that day. The affidavit alleged that on August 10, 2022, he received some communication from Mr. H. that he was no longer residing with Ms. M. and that she was conducting an intimate affair with the same gentleman that she and that gentleman had denied in the earlier filed affidavits and cross-examination. The Court did not consider the affidavit at that time, because Ms. M.'s counsel had no advance notice of its contents and wished to take further instructions. The Court asked counsel to appear after B.'s counsel had had time to consider how he would present her views to the court. That hearing was held on November 16, 2022.

[21] On that date, Mr. H.'s counsel presented a further affidavit of Mr. H.'s filed that day. That affidavit dealt with two topics, but the one of importance to this decision concerned a series of text messages exchanged between Mr. H. and Mr. H. from August 11, 2022, to October 14, 2022, in which it appears Mr. H. discussed the providing of further information of Ms. M.'s infidelity in exchange for some reciprocity.

[22] Mr. H.'s counsel now seeks to have the Court consider Mr. H.'s two recently filed affidavits and provide direction on how that evidence should be considered as part of the final decision process.

[23] Mr. H.'s counsel submits that the changed living arrangements in Ms. M.'s home disrupts the consistency and routine she promoted as one aspect of B.'s best interests in remaining primarily under her care at this time. In addition, he maintains that Ms. M. and the other witnesses who responded to Ms. C.'s earlier affidavit, and were cross-examined, misled the Court, and as such Ms. M.'s credibility is greatly undermined. Those two issues directly impact B.'s best interests as described in s. 37 of the *FLA* and, as such, should be given consideration by the Court.

[24] Ms. M.'s counsel submits that Mr. H. had the first affidavit he seeks to have the court consider prepared and filed in August 2022, but took no steps to seek any relief from the Court until the appearance in November 2022. He maintains that the issues raised by Mr. H. were already canvassed in the earlier affidavits and hearings that are under consideration by the Court.

[25] In particular, Ms. M.'s counsel relied on the recent decision of *A.D.J. v. F.J.*, 2022 BCSC 1974, a decision of Justice Francis released on November 10, 2022, in support of his position that the Court should not reopen the case. In *A.D.J.*, the court describes the circumstances of that case in the introduction as follows.

[1] The parties separated in 2011 after a fifteen-year marriage. Despite early success in resolving some of their differences by way of Minutes of Settlement dated June 30, 2011 (the “MOS”), the parties have remained locked in acrimonious litigation for the last nine years. In November and December 2021, I heard an 18-day trial of the outstanding issues between the parties. The issues included arrears of child support, ongoing child support, variation of spousal support under the MOS, unpaid special and extraordinary expenses, division of family property, and division of family debt. My reasons for judgment are indexed at 2022 BCSC 600 (the “Reasons for Judgment”).

[26] The Court then went on to describe that one party was seeking to reopen the trial on three points concerning the payment of child support in one year, some historic child support arrears, and an alleged error concerning the calculation of the parties' income in some past years.

[27] The Court then reviewed the previous case law on the issue of reopening a trial prior to the entry of an order. That case law referred to several principles, including:

[4] The discretion should be exercised rarely and only when the interests of justice clearly require prolonging the litigation in order to avoid a miscarriage of justice: *Bajwa v. Habib*, 2020 BCCA 230 at para. 48.

[5] The fundamental consideration in exercising the discretion to re-open [the] trial is whether a miscarriage of justice would occur if the trial were not re-opened: *Stevens v. Plachta*, 2006 BCCA 479 at para. 15, citing *Bell v. Bell*, 2001 BCCA 148.

[6] A judge should address two primary considerations in deciding whether to re-open: first, is it probable that a miscarriage of justice would occur without re-opening and, second, would a re-hearing probably change the result? In general, a party should not be permitted to re-open if the sole purpose is to re-argue or re-cast its case: *Grewal v. Grewal*, 2016 BCCA 237 at para. 71. ...

[8] One of the reasons why the authorities have laid out a relatively strict test for re-opening a trial, is that to do so creates risks to the finality of judgments, and risks [the] party being given [the] opportunity to make their

case twice, which distorts the trial process: *Spoor v. Nicholls*, 2001 BCCA 426.

[9] In *Hansra v. Hansra*, 2017 BCCA 199, the Court of Appeal considered the above noted authorities, as well as the Supreme Court of Canada's decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 and, citing *Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670, it held at para. 59 that the following additional factors are relevant to determining whether it would be in the interests of justice to allow a matter to be re-opened:

... considerations of finality, the apparent cogency of the evidence, delay, fairness and prejudice.

[28] The Court considered the circumstances surrounding the application to reopen the case, and then said:

[17] However, even if I were to find that the new evidence would have changed the result, in this case, there is no basis on which the Mother can be said to have exercised sufficient due diligence to be entitled to re-open on this issue. Not only was she in possession of the bank statements at trial, she was expressly invited by the Court to tender them into evidence and she did not.

[18] While the considerations set out above are important, in my view the overarching principle of finality special consideration in high conflict family law matters such as this one. Since the Notice of Family Claim was filed in August 2013, there have been approximately 18 applications or appeals filed by the parties in this matter. The Mother filed her 39th affidavit in support of the application herein. The application record for the four-day hearing before me comprised 14 binders of evidence containing over 10,000 pages. Each party accused the other of "scorched earth" litigation. Irrespective of who is to blame for the expensive and protracted nature of this dispute, at the centre of this proceeding are three children whose lives have been irrevocably marked by the acrimony of ongoing litigation between their parents, not to mention the depletion of family wealth used to fund it. At some point, it needs to stop.

The Court then went on to decline to reopen the case on any of the issues raised by the parties, all of which were financial in nature.

[29] Based on the principles and considerations described in the cases reviewed in *A.D.J.*, Ms. M.'s counsel submits that Mr. H.'s application to once again address the circumstances of Ms. M.'s living arrangements should be rejected and the Court should

move on to finalizing its reasons for judgment on the trial proper subject to the inclusion of B.'s views as submitted by her counsel.

[30] There was also discussion between the Court and counsel regarding the applicability of the provisions of s. 37(4) of the *FLA* and its interplay with some of the provisions in subsection (2), particularly paragraph (f).

[31] Ms. M.'s counsel submitted, relying in part on some of the factors listed in *A.D.J.*, that regardless of what the Court determined to be Ms. M.'s conduct it would not substantially affect the Court's determination of Ms. M.'s ability to discharge her parental responsibilities as described in s. 37(2)(f).

[32] Mr. H.'s counsel submitted that if Mr. H.'s new evidence, and any evidence presented by Ms. M., is considered by the court, it is open to the court to determine that her conduct affects her parental responsibilities both from the perspective of continuing to being able to provide a home for B. with consistency and routine, and her truthfulness on this issue may undermine the veracity of her other evidence.

[33] I have considered the submissions made by both counsel and have carefully reviewed *A.D.J.* and the cases referred to in that decision. It is true that, if I accede to Mr. H.'s counsel's position, getting to the final result in this matter will be further postponed in circumstances where the Parties are seeking a final resolution. It is important, however, to note that the facts underpinning the present matter before the Court are much different than what the Court was dealing with in *A.D.J.*

[34] In that case, after reasons for judgment had been published but the order not yet entered, there was an application to reopen on various support issues which could tangentially impact the best interests of the children involved. It was based on evidence that was available at the time of trial.

[35] In this case, Mr. H. is not seeking to present his case for a second time, but rather is raising issues that were not before the Court during the course of the trial proper and were adamantly denied by Ms. M. in the hearing held this spring. Without knowing the circumstances of what occurred both prior to and subsequent to Ms. C.'s

affidavit filed in February 2022, it is difficult to ascertain the probability of whether or not there would be a miscarriage of justice, but it is possible that this further evidence could change the outcome of this case in one or more substantial ways.

[36] It remains the primary obligation of this Court, pursuant to s. 37 of the *FLA*, to make decisions considering B.'s best interests only. A change or interruption to her consistency and routine arising from a change in who is residing with her and who is associating with her may not be in her best interests. In addition, if it is demonstrated that Ms. M. and her witnesses in the previous application were purposely misleading the Court, it may cast a different light on the Court being able to accept the veracity of the other evidence presented on her behalf.

[37] In those circumstances, I am going to permit a process where Mr. H. may present evidence by affidavit from himself or others, within a certain timeframe, on the issues of Ms. M.'s living circumstances, B.'s counselling regime with Dr. Ambrose, and the summary of B.'s views. Ms. M. may present responding affidavit evidence from herself or others within a certain subsequent timeframe concerning the same matters Mr. H. is permitted to address. The Court will then permit time-limited cross-examination of the affiants. The final logistics of that process will be determined after further discussion with counsel.

(REASONS CONCLUDED)