COURT OF APPEAL FOR BRITISH COLUMBIA

Date: 20140131
Docket: CA041370

Between:

Marissa J. Hicks

Respondent
(Petitioner)

And

Clark D. Schuler

Appellant
(Respondent)

Before: The Honourable Madam Justice Saunders
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia,
dated October 18, 2013, (*M.J.H. v. C.D.S.*, 2013 BCSC 2232,
Vancouver Registry No. E123678)

Oral Reasons for Judgment

Counsel for the Appellant:	J.L. Chapin
Counsel for the Respondent:	M.B. Thompson
Place and Date of Hearing:	Vancouver, British Columbia January 29, 2014
Place and Date of Judgment:	Vancouver, British Columbia January 31, 2014

[1] **SAUNDERS J.A.**: Mr. Schuler applies for leave to appeal the order of Mr. Justice Butler pronounced October 18, 2013 dismissing his application to terminate the parenting coordination agreement between the parties, to set aside the determination of the parenting coordinator made August 16, 2013, establishing a parenting time and ordering costs against him in favour of Ms. Hicks.

[2] The factors considered when granting leave to appeal are well known. They were set out in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326, as including:

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.

[3] Those four factors are *indicia* that help to answer the overarching consideration, whether it is in the interests of justice that leave be granted.

[4] The respondent, Ms. Hicks, says that the proposed appeal is not of significance, or is only of only minor significance, to the practice; is not significant to the action itself because whatever the outcome, Mr. Schuler will still need to apply to the Supreme Court of British Columbia to set up an access schedule; that the appeal is lacking in merit and borders on the frivolous; and that it is not in the interests of justice to grant leave to appeal.

[5] Mr. Schuler contends otherwise. He says first that the importance of the appeal to the general practice is established because the bases upon which a coordinator acting under a parenting coordination agreement may be terminated is a question that engages provisions of the *Family Law Act*, S.B.C. 2011, c. 25, not previously elucidated by the courts; he says elucidation on this issue would benefit the practice. The important issue of the broad powers of parenting coordinators, and the validity of a report prepared upon an incorrect understanding of a previous judge's order, he says, are at issue. Last, Mr. Schuler contends that the issue of costs is significant because the order he pay costs was imposed in a novel

application and without adequate consideration of its effect upon his ability to pay the costs of access. As to the importance of the appeal to the action, he says that the order he seeks to set aside will affect his parenting time while the parenting coordination agreement continues in effect, about another year and a half, and he observes that the questions he puts before the court engage the best interests of the child.

[6] The parties have a daughter born July 16, 2009, who is now four years old. She resides with Ms. Hicks and her parents in Richmond, British Columbia. The applicant Mr. Schuler resides in Calgary, Alberta, where the parties lived before their separation on about March 30, 2010, when their daughter was nine months old.

[7] By order made February 25, 2013, Mr. Justice Bowden appointed a parenting coordinator and granted Mr. Schuler certain access. The order was not entered until December 17, 2013. I will now digress.

[8] On my understanding of the file, the time lag between the date Mr. Justice Bowden made the order and the date it was entered has caused much difficulty on this file. I said during the hearing of the appeal that entry of an order should never provide an opportunity for fresh dispute between the parties themselves; it is an administrative matter for the representatives of the parties, usually lawyers, and the judge, essential to proper administration of the court process. Some comment was been made during the proceedings to the effect that the parenting coordinator should have applied to the court for an entered order. That is not so; it is the obligation of both parties to ensure the order is entered, although the burden, practically speaking, usually falls upon the person who has been substantially successful before the judge. Any order made by a judge should be entered without delay, and if it needs to be settled, that too should be done without delay. In this I am reminded of the practice followed in obtaining and enforcing interlocutory injunctions, wherein entry of the order is an important aspect of obtaining the relief from the court. It is so important that many counsel attend the hearing of the application with the proposed order prepared, for review of the judge during the hearing. I

respectfully commend that practice to counsel in this relatively new area in which it is vital for a prospective parenting coordinator to know exactly what has been ordered by the court. Much mischief is done by failing to attend to this administrative detail, and I repeat that I am told that, for some reason I cannot fathom, this detail can be seen as another point of potential disagreement between the parties. Of course it is not. The correct expression of the order already made by a judge is not an opportunity to re-engage on the issue decided, but rather simply a matter of completing the formal expression of that judgment, of simply ensuring the judge's intention is reflected in the entered document.

[9] I return to the narrative.

[10] On June 13, 2013, the parties entered into the parenting coordination agreement in issue. Mr. Schuler complains that the parenting coordinator did not schedule parenting time until August 16, 2013 contrary to the order of Mr. Justice Bowden that she did not have, and that on the 16th of August she determined Mr. Schuler's summer access in a fashion that was inconsistent with the judge's order and that did not reflect the sort of access he had had before, contrary to the *Act* and the agreement.

[11] On September 12, 2013, Mr. Schuler applied to terminate the parenting coordination agreement and asked the court to set parenting time until a new coordinator was appointed.

[12] On September 23, 2013, the parenting coordinator prepared a report. In para. 16 of that report she refers to the Clerk's Notes concerning the then un-entered order of Mr. Justice Bowden, said that they contained errors when compared to the transcript of the hearing and said she had relied "more heavily upon the transcripts which were not ambiguous in … intent".

[13] On October 10, 2013, Mr. Justice Butler, also without the benefit of the order which had not yet been entered, found that the parenting coordinator's interpretation of the order was correct. In particular Mr. Justice Butler upheld the interpretation of

the parenting coordinator of the un-entered order on the issue of monthly visits. Mr. Justice Butler noted that in the event the parenting coordinator had interpreted the order as giving her jurisdiction beyond that which was granted by the court, then any determination she made would be subject to being set aside and the agreement terminated, but did not find that had happened, on his understanding of the un-entered order.

[14] As I have said, the order of Mr. Justice Bowden was entered in December of 2013.

[15] It would be fair to describe the terms of the order of Mr. Justice Bowden as more consistent with the Clerk's Notes and inconsistent in some respects with the views formed by the parenting coordinator from reading the transcripts.

[16] The proposed appeal engages s. 15 of the *Family Law Act*. That section recognizes that parenting coordinators are meant to be temporary and provides for termination in accordance with the terms of the agreement or by court order made on application by either of the parties.

[17] It appears from the legislation that parenting coordinators were intended to have substantial decision-making authority and s. 19 sets criteria for court termination of the parenting coordination if satisfied that the parenting coordinator acted outside his or her authority or made an error of law or of mixed fact and law. It appears that there is some similarity between the role of parenting coordinators and that of arbitrators.

[18] I agree that the issues sought to be raised on this appeal, abstractly stated, are of some significance to the practice and may well require elucidation by this court in the appropriate case. In my view this is not the case, however, in which to engage in a wholesale discussion of the ambit of a parenting coordinator's role, given the unsatisfactory foundation for the arguments caused by the absence, in the spring and summer of 2013, of an entered order that the parenting coordinator could consult. I do not consider that a division of this court would be prepared to set aside

the judge's conclusion, and effectively terminate this agreement, given the imprecision of the foundational instructions to the parenting coordinator, i.e., the absence of the order.

[19] In other words, I do not consider in this case, that issues raised are likely to assist the practice. Nor, in my view, is this a situation in which an appeal would favour the litigation. The single point of decision that was addressed by the coordinator before the application was brought before Mr. Justice Butler concerned last summer's access. That time has now passed and to the extent decisions are required concerning access in the future, they are forward looking. In the event there are steps taken by the coordinator beyond her authority as set out in either the agreement and the now entered order, the application can be made to the Supreme Court of British Columbia as the judge has observed.

[20] Further, in any event it will be necessary for the parties to deal further in court with the issue of access and this appeal will not resolve that issue.

[21] In the result, I am not satisfied that the interests of justice favour the application. The application is dismissed.

"The Honourable Madam Justice Saunders"