COURT OF APPEAL OF YUKON

Citation: *L.K. v. D.W.D.*,
2024 YKCA 11

Date: 20240821
Docket: 23-YU903

Between:

L.K.

Respondent
(Plaintiff)

And

D.W.D.

Appellant
(Defendant)

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Smallwood
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of Yukon, dated August 22, 2023 (*L.K. v. D.W.D.*, 2023 YKSC 48, Whitehorse Docket 18-B0064).

The Appellant, appearing in person:	D.W.D.
Counsel for the Respondent:	K. Kinchen
Place and Date of Hearing:	Whitehorse, Yukon June 18, 2024
Place and Date of Judgment:	Whitehorse, Yukon August 21, 2024

Written Reasons by:
The Honourable Mr. Justice Voith

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Madam Justice Smallwood

Summary:

The parties brought cross applications dealing with the care of their children and the division of family assets. The applications proceeded by way of summary trial and resulted in final orders being made by the judge. The appellant, who was at all times self-represented, appeals the judge's orders on the basis that he was denied procedural fairness. The appellant argues he was not provided with notice that the applications were proceeding by way of summary trial. Held: Appeal allowed. None of the respondent's application materials indicated there would be a summary trial. Nor was a summary trial discussed at any of the case management conferences leading up to the hearing. The appellant had attempted to seek clarification prior to the hearing about the nature of the proceeding but received inaccurate information. The failure to provide the appellant with notice of the nature of the hearing he faced and of the precise nature of the relief being sought therefore gave rise to a breach of procedural fairness. The order below is set aside and the matter is remitted to the Supreme Court for a rehearing of the parties' applications.

Reasons for Judgment of the Honourable Mr. Justice Voith:

[1] This appeal arises from a family law dispute where the parties brought cross applications that dealt with the care of their two children and the division of assets. Those applications were heard on April 11, 2023. The appellant, who was at all times self-represented, contends he did not appreciate, and was provided with no notice, that these various applications were to proceed by way of a summary trial until the hearing was well underway. He appeals the judge's orders on the basis that he was denied procedural fairness. He seeks to have the judge's orders set aside.

[2] For the reasons that follow, I would allow the appeal.

Background

[3] The facts which underlie this appeal are straightforward and not in dispute. The appellant D.D. and the respondent L.K. were in a common-law relationship between March 30, 2010 and October 8, 2018. They have two children: Y.D. and P.D. who were 9 and 10 years old respectively at the time the judge issued her reasons for judgment. Those reasons are indexed at 2023 YKSC 48.

[4] In December 2020, L.K. commenced a family law action. She filed an amended claim in February 2021. The judge described the interaction between the

parties and their shared custody arrangement as “highly conflictual”. The parties’ interactions and the details of their ongoing difficulties are, however, not relevant to this appeal. Nor for that matter are the 39 specific orders the judge ultimately made in relation to the parties’ children or their assets and debts.

[5] Instead, a different chronology and set of facts are relevant.

i) The October 5, 2022 case management conference

[6] The parties appeared at a case management conference before Chief Justice Duncan on October 5, 2022. That conference preceded the filing of any application materials by either of the parties. The formal order arising from the conference states: “The plaintiff’s application for a summary trial shall be set down for December 5, 2022…”.

[7] The balance of the orders made generally address questions of scheduling and the exchange of materials. The formal order, as did all of the orders that were made in subsequent case management conferences, dispensed with the need for D.D. to sign the order.

[8] The appellant obtained the transcript from the October 5 case management conference. That transcript reveals the purpose of the conference was to fix a date for a hearing and to deal with certain procedural issues. There was, however, no reference at any time during the conference to a “summary trial”. Counsel for the respondent, who prepared the order, accepts this. However, she explained that she believed the judge “understood” L.K. intended to bring a summary trial application and that it was on this basis she included the language of the order I have referred to.

ii) The November 30, 2022 case management conference

[9] On November 30, 2022, the parties appeared before Justice Campbell. By this time, each of D.D. and L.K. had filed applications seeking various orders pertaining to their children and to the division of property. The first order made at the November 30 conference states:

> 3. The December 5, 2022 date for the hearing of the [respondent's] application for a summary trial is (*sic*) released.

[10] Once again, the balance of the formal orders made dealt with scheduling and the filing of materials. The date for the hearing of the parties' applications was now scheduled for January 18, 2023.

[11] On appeal, D.D. asserted that he understood the expression "released", in paragraph 3 of the order, to mean the applications scheduled for January 18, 2023 would not be in the nature of a summary trial.

[12] During the conference it became apparent that the custody and access report the parties were hoping to obtain would not be ready by January 18, 2023 and that the parties would not be able to address some of the forms of relief in their respective applications. The following exchange between the court and D.D. is relevant:

> THE COURT: And that the hearing on the 18th is going to be about your application to access funds and an interim order regarding communications between the parties and residency of the children. Okay?
>
> [D.D.]: Okay.
>
> THE COURT: On an interim basis to deal with the most urgent issues until we get a custody and access report.
>
> [D.D.]: Okay.
>
> [Emphasis added.]

iii) The December 16, 2022 and January 12, 2023 case management conferences

[13] Two further case management conferences were conducted on December 16, 2022 and January 12, 2023 respectively. Neither the transcripts nor the orders from those conferences make any mention of a summary trial application. Further, the various orders that were made at the conferences do not inform the issues raised by this appeal.

[14] However, the following comments made on December 16, 2022 by the case management judge, who was the eventual hearing judge, are relevant:

> THE COURT: All right. The next issue is that Ms. [B.] be your support person at trial.
>
> At this point, I believe it's an application, not a trial. Do you want Ms. [B.] there with you at the trial —
>
> [D.D.]: Yes, please.
>
> THE COURT: – sorry, at the application in January?
>
> [D.D.]: Yes, please. Yeah.
>
> [Emphasis added.]

[15] At the case management conference on January 12, 2023, the following exchange with the court is relevant:

> THE COURT: Okay. So we'll get Madam Trial Coordinator to come in to make sure those dates are – that there's court availability on those dates.
>
> (PAUSE)
>
> Okay. So Madam Clerk is telling me that Madam Trial Coordinator may be in fixed (*sic*) date right now, so what we can do is tentatively book – let's tentatively book Thursday, the 30th at 10:00 a.m. for the full day pending the availability of a courtroom.
>
> [D.D.]: Is that a hearing of applications?
>
> THE COURT: Yes, that's the hearing of the applications.
>
> [Emphasis added.]

iv) The parties' respective Notices of Application

[16] D.D. filed his Notices of Application on November 28 and 30, 2022 and an Amended Notice of Application on April 5, 2023. L.K. filed her Notice of Application on January 9, 2023. L.K. and D.D. respectively filed responses to the applications they faced on January 9, 2023 and February 27, 2023.

[17] I have referred to these various materials because none of them refer to Rule 19 of the Yukon Supreme Court's *Rules of Court*, O.I.C. 2022/168, which governs summary trial applications. Instead, they refer, for example, to the court's "inherent jurisdiction", to the "*Supreme Court Rules*" generically, or to the "*Children's Law Act*".

[18] Further, some of the orders, particularly those orders sought by D.D., expressly seek "interim" relief.

v) Further exchanges between the parties

[19] There appear to have been some communications between D.D. and counsel for L.K. about the exact nature of the applications that were scheduled to be heard, and that were then heard, on April 11, 2023.

[20] In advance of the appeal, the appellant brought a fresh evidence application to introduce some of these communications and other pieces of correspondence. In *Boone v. Jones*, 2023 BCCA 215, Justice Fitch explained that in circumstances such as the present, evidence "is tendered to enable assessment of the integrity of the trial process" and the criteria in *R. v. Palmer*, [1980] 1 S.C.R. 759, 1979 CanLII 8 is modified "to reflect the fact that the material sought to be admitted is not aimed at undermining a substantive finding adjudicated at trial": para. 34.

[21] For the most part, the documents D.D. seeks to admit are not relevant to the issue raised on appeal. However, the following exchange, between D.D. and the trial coordinator, is different. It is admissible, relevant and credible.

[22] The first email, dated March 13, 2023, was authored by D.D. and sent to the Trial Coordinator. It was copied to counsel for the respondent:

> Good Afternoon trial coordinator,
>
> I am seeking clarification as to what is actually happening on April 11th.
>
> It has been clearly stated in multiple documents that on April 11th we are scheduled for 1 full day for hearing of applications; this was also clarified in a phone call to Shauna.
>
> It has been stated by [counsel for L.K.] in multiple correspondences that she is preparing for a summary trial.
>
> I would like to know whether or not I will be informed as to what is actually happening and what I should be preparing for as we head towards our April 11th date.
>
> Thank you,
>
> [D.D.]

[23] In the second email, sent on the same day and again copied to counsel for the respondent, the trial coordinator responded as follows:

> Afternoon,
>
> The Court calendar indicates the matter is scheduled for the full day on April 11, 2023 at 10:00 a.m. to hear 3 applications.
>
> Thank you,
>
> …
>
> Trial Coordinator

vi) The April 11, 2023 hearing

[24] Well into the April 11 hearing the following exchange between the court and D.D. took place:

> [D.D.]: … So yeah. I agree that [L.K.] and I will both share 50–50 access and parenting time.
>
> I am seeking an interim order of sole custody to be awarded to me with joint custody being the long-term goal.
>
> THE COURT: Well, we are at a summary trial, which — it's a bit complicated with regards to children.
>
> [D.D.]: Yeah.
>
> THE COURT: A summary trial ends up with a final order. So this would be a final order. Having said that, where there's a material change in circumstances concerning the children, there can be a return to court. So I'm not sure that at this point you're seeking an interim order. This is a summary trial. It's a trial itself. Does that make sense?
>
> [D.D.]: Yeah, it does make sense.
>
> THE COURT: Okay.

vii) The relevant portion of the hearing judge's reasons

[25] In her reasons for judgment the judge said:

> [2] Both parties filed Notices of Application, and then agreed to proceed by way of summary trial. During the summary trial, the parties addressed issues related to care of the children and division of assets. Spousal support and child support were set aside until later.

[26] It appears to be common ground that the parties did not "agree to proceed by way of summary trial". Certainly, they did not do so prior to the April 11 hearing.

Analysis

[27] Procedural fairness is a foundational principle of our legal system. It presupposes that justice can only be achieved if the process leading to a decision is fair: *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para. 313. What is fair in a particular case will depend on the context of that case: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 683, 1990 CanLII 138; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 21, 1999 CanLII 699; *Silverfox v. Chief Coroner*, 2013 YKCA 11 at paras. 35–36.

[28] There is also a continuum to the various requirements of procedural fairness: *Bains v. Khalsa Diwan Society of Abbotsford*, 2021 BCCA 159 at para. 33, relying on D.J.M. Brown & J.M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf, (Toronto: Thomson Reuters, 2017) at 7–67 to 7–68; G. Régimbald, *Canadian Administrative Law*, 2nd ed (Markham: LexisNexis, 2015) at 292–94. Thus, the principles of procedural fairness apply most strictly to courts of law. They typically apply less strictly to administrative tribunals and still less strictly to voluntary associations and societies: *Bains* at paras. 33–34.

[29] A breach of procedural fairness can take different forms and can arise in different circumstances. For example, parties have the right to be heard as well as a right to a fair and reasonable opportunity to make submissions: *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536 at para. 27, 1995 CanLII 52; Lorne Sossin, Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters) (loose-leaf updated 2024, release 7) at § 13:11. They are entitled to know the case they have to meet: *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 at para. 40. They are entitled to an unbiased decision maker: *Bains* at para. 36; Sossin, Macaulay & Sprague at § 13:12. They are entitled to adequate reasons: *R. v. Aguilera Jimenez*, 2020 YKCA 5 at paras. 31 and 34. Importantly, they are entitled to proper notice of the procedure and the relief being sought: *Naderi v. Naderi*, 2012 BCCA 16 at para. 18; see also *Beals v. Saldanha*, 2003 SCC 72 at para. 65.

[30] Several aspects of “context” are relevant in this case. D.D. was, at all times, self-represented. I will return to this issue, but his understanding of litigation procedure was necessarily informed by his status as a self-represented litigant. Second, the interests involved in the applications, particularly if they were summary trials where final orders would be made, were significant. Those interests involved both final custody and access orders that pertained to their children as well as final orders that pertained to family property worth significant sums of money. Further, this appeal arises in the context of a court proceeding where the procedural fairness rights of both parties would be at their highest.

[31] Additional factors are relevant. It is clear from the chronology and record I have outlined that D.D. was never advised that the applications scheduled for April 11 would be conducted as a summary trial at which final orders would be made. This was not made clear in any of the respondent’s application materials. Nor was there any such discussion at any of the case management conferences that took place.

[32] Further, the exchange between D.D. and the trial coordinator that I have referred to reveals both that D.D. was uncertain about the nature of the process he was to prepare for and that he was provided with no meaningful guidance on the issue. In the context of the question he asked, the information he received was inaccurate. In saying this, I am not being the least bit critical of the administrative staff who interacted with D.D. However, the fact that D.D. continued to misapprehend the nature of the application he faced is apparent from the fact he believed or understood he was applying for interim relief when he addressed the hearing judge.

[33] These circumstances can be compared, for example, with those in *Hegel Estate v. Logan*, 2015 BCCA 197 where Justice Harris found “no basis in the record to support any reasonable inference that [the appellant, who was self-represented] did not or could not understand the nature of the [summary trial] application that he was facing or the evidentiary basis upon which it would proceed”: para. 32.

[34] In dismissing the appeal, Harris J.A. emphasized that opposing counsel had informed the appellant as to their intention to apply for summary trial and then later reconfirmed that intention, the appellant was provided the summary trial application materials and took them to a lawyer to receive advice (although he remained self-represented at the summary trial itself), and the respondent's application materials expressly identified the applicable rule for summary trial. The court found the appellant could afford counsel but had instead chosen to represent himself. The court concluded the appellant was "given proper notice of the summary trial application": para. 29.

[35] The case of *Murphy v. Szulinszky*, 2016 YKCA 16 also involved a self-represented litigant and a summary trial involving the division of family assets. Though procedural fairness was not an issue on appeal, Justice Charbonneau identified that the appellant had been "served with a notice of application to proceed by way of summary trial" and had been "on notice for a long period of time that [the respondent] wished to settle the division of their property": paras. 4 and 14.

[36] The present case is markedly different. There simply was never any formal notice from counsel for the respondent, nor any discussion with the court, that expressly alerted D.D. to the nature of the application he faced (a summary trial) or to the fact that the respondent was seeking final orders on a broad range of issues.

[37] The respondent raises two issues in response. First, she contends that it should have been obvious from her Notice of Application that she was seeking final orders. This is true as it relates to many of the orders for property division that were sought. However, even here it is apparent from the record I have referred to that D.D. sought interim orders to access funds so that he could retain counsel. Further, many of the orders that pertained to custody and access could well have been for interim relief.

[38] Further, respectfully, the respondent's submission seeks to remove any responsibility on her part to clearly identify the processes she relied on and the form of orders she sought. It similarly removes any responsibility on the part of the court

to assist a self-represented litigant in the most basic of ways. The submission essentially devolves to saying the appellant should have been able to figure things out by himself.

[39] However, courts have long recognized that what will readily be understood by a lawyer may not, with the best of intentions, be understood by a lay litigant: see e.g., *Naderi* and, in particular, paras. 18–19.

[40] The exchange between D.D. and the trial coordinator is illustrative of this. D.D. drew a distinction between an “application” and a “summary trial”. So too did the case management judge on December 16, 2022. Nevertheless, most individuals who are trained in the law will appreciate that an “application for a summary trial” is both an “application” and a “summary trial”.

[41] I would also note that Rule 8-1(4) of the British Columbia *Supreme Court Civil Rules*, B.C. Reg. 168/2009 states that notices of application must set out certain kinds of information, including the “rule, enactment, or other jurisdictional authority relied on for the orders sought” (Rule 8-1(4)(c)). Justice Adair discussed these requirements in *Dupre v. Patterson*, 2013 BCSC 1561 at paras. 45–56. Justice Adair noted Rule 8-1(4) represented a change from former practice and that a failure to comply with the rule means a party has failed to provide proper notice:

> [51] If a notice of application does not contain the information now required under the *Rules*, the party filing it has failed to give proper notice – to the opposing party and to the court – of the nature of the application. However, all too frequently, counsel in both civil and family cases are signing and filing inadequate notices of application and application responses. The notice of application filed in this case was not at all unique. However, such documents do not comply with the *Rules*.

[42] The Court of Appeal for British Columbia endorsed Adair J.’s comments in *Boury v. Iten*, 2019 BCCA 81 at paras. 57–63, noting that the usual remedy in situations where there has been non-compliance with Rule 8-1(4) is an adjournment of the application and possibly an award of costs against the applicant.

[43] The Supreme Court of Yukon's *Rules of Court* do not, however, have a rule that mirrors Rule 8-1(4) of the B.C. *Supreme Court Rules* with respect to the contents of a notice of application. Rules 47(1) and (1.1) of the *Rules of Court*, which govern applications, only require that notices of application must be in Form 52 and must contain "a concise statement of the facts that support the relief claimed, as well as reasons for the relief". Rule 19(8), which governs summary trials, states that notice must be given on an application for summary trial of the evidence that will be relied on. There is no explicit requirement under Rule 47 or 19 that an applicant must set out the rule, enactment or jurisdictional authority being relied on.

[44] Nonetheless, in my view, it is good practice for parties to expressly state the jurisdiction, statutory authority or rule being relied on in a notice of application. Doing so fulfills the purpose of providing notice to the opposing party and to the court of the nature of the proceeding and the kinds of orders being sought. Simply asserting, for example, that a party relies on the "*Supreme Court Rules*" is of little value. As Justice Adair observed, inadequate materials "are incompatible with the efficient and timely disposition of applications": *Dupre* at para. 55.

[45] Second, the respondent argues that D.D. is not able to establish that he actually suffered prejudice or harm as a result of the orders that were made and that the same result would, on the record before the judge, have ensued in any event.

[46] I do not accept this for several reasons. First, as a matter of principle, a breach of procedural fairness generally renders a decision invalid regardless of the likely outcome following a fair hearing: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 661, 1985 CanLII 23; *Boone* at paras. 47 and 50; *Mountainstar Gold Inc. v. British Columbia Securities Commission*, 2022 BCCA 406 at para. 56. This is because "[i]t is not for a court to deny [the right to a fair hearing] and sense of justice on the basis of speculation as to what the result might have been…": *Cardinal* at 661. The unfair process, in and of itself, gives rise to a failure of justice and is a self-standing, crystallized legal wrong: *Cardinal* at 661; *Boone* at para. 47. Though there are two exceptions to this general principle, neither of those exceptions are engaged

in this case: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228–229, 1994 CanLII 114.

[47] Further, it is not at all clear that D.D. did not suffer harm as a result of how the April 11 hearing unfolded. This is the second area where D.D. seeks to admit fresh evidence and where I would, for the reasons I described earlier, again admit such evidence. I would, however, limit that evidence to a single exchange between D.D. and counsel for the respondent.

[48] Prior to the hearing, D.D. had prepared various summaries or charts to address the financial aspects of the child and property division issues that arose from the parties' respective applications. He wrote an email to counsel for L.K. on February 15, 2023 indicating he had "hundreds, possibly thousands" of receipts that underlay his summaries and enquiring whether counsel wished to see copies of this financial information. Counsel responded she did not unless they pertained to expenses the respondent questioned.

[49] However, at the April 11 hearing, and at different times in the judge's reasons, the judge was critical of D.D. for not filing the detailed information he relied on. D.D. advised the judge of his earlier conversations with counsel for the respondent but the judge pressed on. At one point in her reasons, the judge said:

> [111] … At the hearing, D.D. offered to collect receipts to prove his expenses if I needed them. Fairness dictates that the parties file all their evidence in advance of a summary trial, not after it.

[50] The judge's statements are not, as a general matter, incorrect. Nevertheless, they do signal that she treated the evidence before her more formally than she would have on an interim application because she was dealing with a "summary trial".

[51] In addition, a separate matter arises from the judge's comments that I only wish to identify and need not develop further. In my view, it may well be that the judge erred in not allowing D.D., in the particular circumstances I have identified, to file the financial records he had in his possession at a later date and, potentially,

adjourning the hearing of the applications before her on those finite issues where those records were relevant.

[52] Certainly, all parties, including self-represented litigants, are required to follow the rules of court as well as the rules of evidence. At the same time, there will be cases where some modest accommodation to assist a self-represented party, that does not prejudice the opposing party, will, in the interests of justice, be necessary and appropriate: see e.g., *Rahman v. Windermere Valley Property Management Ltd.*, 2022 BCCA 258 at paras. 42–45. This appears to have been such a case.

Disposition

[53] In my view, the failure to provide the appellant with notice of the nature of the hearing he faced and of the precise nature of the relief being sought, gave rise to a breach of procedural fairness. I would allow the appeal, set aside the order below and remit the matter to the Supreme Court for a rehearing of the parties' applications.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Madam Justice Smallwood"