IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Sam* v. *Hamilton*, 2005 YKSC 13 Date: 20050208
Docket: S.C. No. 03-B0043
Registry: Whitehorse

BETWEEN:

LAURA DALE SAM

Plaintiff

AND:

MICHAEL DALE HAMILTON
and DIANE CAROL JIM

Defendants

Before: Mr. Justice L.F. Gower

Appearances:
David J. Christie For the Plaintiff
Malcolm E.J. Campbell For the Defendants

REASONS FOR DECISION
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): The plaintiff asks to adjourn her application, which essentially seeks liberal and generous access with the young child born April 15, 2001, in variation of an earlier order of this Court under the *Children's Act*, R.S.Y. 2002, c. 31.

[2] The defendants are the mother and father of the child and are represented by Mr. Campbell.

[3] The last step taken in this proceeding was an order made August 19, 2003, granting the plaintiff interim interim access to the child on two days of each week. The plaintiff now seeks to expand that access.

[4] The application was served on the father on January 20, 2005, and on the mother, February 7, 2005. Mr. Campbell made a submission, at the outset of the plaintiff's application for an adjournment, to have the application struck with respect to both defendants, because the plaintiff has not served upon the defendants a notice of intention to proceed pursuant to Rule 3(4), *Rules of Court*, B.C. Reg. 221/90. That rule states:

> "In a proceeding where judgment has not been obtained and no step has been taken for one year, no party shall proceed until
>
> (a) the expiration of 28 days after service of notice of that party's intention to proceed on all other parties of record, and
>
> (b) a copy of the notice and proof of its service has been filed."

[5] Mr. Campbell argues, therefore, that the application is a nullity and should be struck.

[6] Mr. Christie, on behalf of the plaintiff, acknowledges that there was a mistake made, on counsel's part, in not serving and filing a notice of intention to proceed pursuant to Rule 3(4). However, he says that I should exercise my discretion by allowing the notice of motion to continue and adjourn this matter sufficiently down the

road so that the defendants each have the equivalent of the 28 days of notice under Rule 3(4).

[7] I note that there are a number of Rules which purport to give this Court discretion in situations where the Rules themselves have not been strictly adhered to:

> "Rule 1(5): The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> Rule 1(12): When making an order under these rules the court may impose terms and conditions and give directions as it thinks just.
>
> Rule 2(1): Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding.
>
> Rule 2(2)(e): Subject to (3) and (4), where there has been a failure to comply with these rules, the court may . . . make any other order it thinks just."

[8] There is also a provision in Rule 3(2) to extend or shorten any period of time provided for in the Rules; however, I do not find that particularly applicable in these circumstances. Nevertheless, the previous Rules that I have just quoted seem to make it abundantly clear, contrary to Mr. Campbell's submission, that this Court does have discretion in a situation where Rule 3(4) has not been technically adhered to.

[9] If I were to grant Mr. Campbell's application, I expect the result would be that Mr. Christie would then serve Mr. Campbell, now the defendants' counsel of record, with a notice of intention to proceed under Rule 3(4) as well as a fresh notice of motion and essentially the same supporting affidavit material as the defendants currently have. I

cannot see how Mr. Campbell's clients would be in any better position if we went that route, as opposed to the alternative of simply adjourning this matter far enough down the road to allow the 28 days of notice to the defendants.

[10] Striking the application would also, incidentally, incur additional costs to the plaintiff. A filing fee would be required for the new notice of motion. There would also be some administrative costs associated with the preparation of new documents by counsel.

[11] I cannot see the advantage of that approach. It seems to me that the purpose of Rule 3(4) is to allow a significant notice period of 28 days, where a matter has been truly dormant for over a year, to allow the responding parties to become reacquainted with the circumstances of the litigation and to provide proper instructions to counsel. If that can be done through the course of an adjournment, then I see no prejudice to the defendants.

[12] On the other hand, I want to point out that this is not to be taken as a precedent for ignoring the import of Rule 3(4). I note that it has been followed to the letter in previous cases in this Court and I expect it will be complied with in the future whenever and wherever practicable. I also want to make it clear that I do not necessarily adhere to or accept Mr. Christie's submission that somehow there is a different playing field in the area of family law, as compared to contracts and torts and other civil matters. Litigants in family law are expected to comply with the *Rules* just as any other litigant is. On the other hand, I accept Mr. Christie's submission that some flexibility is necessary on a case by case basis, and I see this as one of those cases.

[13] Therefore, I am ordering that this matter be adjourned.

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GOWER J.

Post-script:

Subsequent to this matter being argued in chambers, the following came to my attention. Rule 60 generally deals with divorce and family law and subrules (7) and (8)(a) provide:

> "Rule 60(7): An application to rescind, vary or suspend an order made by the court in a proceeding brought under the Family Relations Act or the Divorce Act (Canada) must be brought by notice of motion in the proceeding.
>
> Rule 60(8): Without limiting subrule (7), if no step has been taken in a proceeding referred to in that subrule for one year,
>
> (a) the applicant must
>
> i) comply with rule 3(4), or
>
> ii) by a means other than that contemplated by Rule 11(6), serve the other parties of record with the notice of motion, in which event the applicant need not comply with Rule 3(4), . . ."

Of course, s. 38 of the *Judicature Act*, R.S.Y. 2002, c. 128, provides that the British Columbia Supreme Court *Rules of Court*, B.C. Reg. 221/90, as amended, apply to matters in this Court***, with such variation as the circumstances require.*** Therefore, Rules 60(7) and (8) are applicable to this application to vary an order made under the *Children's Act*, cited earlier. The effect of Rule 60(8) is that the plaintiff may

serve the parties directly with the application, in which case the 28-day notice period under Rule 3(4) does not apply.

GOWER J.