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B.C. FAMILY PRACTICE MANUAL

EXCERPT FROM CHAPTER 11

Using Alternatives to Trial in a Family Law Case

1. APPROPRIATENESS OF SUMMARY TRIAL PROCEDURE IN A FAMILY LAW CASE [§11.5]

Counsel considering a summary trial application in a contested family law case should first determine whether the case is appropriate for summary trial. The leading case on the appropriateness of summary trials is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) (see also *Gichuru v. Pallai*, 2013 BCCA 60).

The following case law reflects the law as determined under the *Family Law Act*, as well as case law determined under the former *Family Relations Act*, which continues to inform counsel's decision whether to attempt to proceed summarily under the *Family Law Act*.

Although there is no rule that parenting arrangements, including responsibilities and parenting time (referred to generally here as "parenting"), and contact issues cannot be determined in a summary trial, historically, courts have been reticent to determine custody and access issues by summary trial. For example, in *Braich v. Braich* (1995), 1 C.P.C. (4th) 375 (B.C.S.C.), the court refused to order sole custody on summary trial when the evidence before the court directly conflicted on the issue of the appropriateness of a joint custody or guardianship order, and credibility was in issue. The court highlighted the difficulties involved when attempting to determine custody using summary trial procedures (at para. 15):

> In many respects, the determination of a custody dispute holds a unique position in these courts. Unless the evidence is perfectly clear and uncontroverted, it seems to me that it would be a rare case that a judge would not wish to see and hear the parties to the dispute and their collateral witnesses. As one might expect, much of the evidence one hears in a custody dispute can be described as impressionistic.

Similarly, in *Keith v. MacMillan*, 2014 BCSC 1352 the court found that parenting issues (among other issues) were not appropriate for determination by summary trial. In *Keith*, the children had disclosed significant incidents of family violence to the author of a report on the views of the child, which incidents had not been raised in either party's affidavits. The court found that a conventional trial was necessary, as it would be unjust to the children to determine crucial issues such as parenting responsibilities and parenting time in the absence of full and complete evidence, including expert evidence regarding the impact of the family violence on the children.

In more recent cases the courts have been willing to address disputed issues relating to parenting, custody, guardianship, and even allegations of family violence or child abuse, by way of a summary trial where the trier of fact is able to make the necessary findings to resolve the matter. For example, in *P.A.L. v. L.A.L.*, 2015 BCSC 2369 and *S.L.B. v. M.D.R.B.*, 2015 BCSC 478, where the parties consented to the process and conducted cross-examination on affidavits, and the affidavit evidence was augmented by other evidence, each court was satisfied that a summary trial was appropriate.

Discrete issues such as parenting arrangements and contact with a child or relocation applications under the *Family Law Act* may also be suitable for summary trial in certain cases. For example, in *Stonier v. Stonier*, 2004 BCCA 307, the court granted summary judgment on custody in the terms of an earlier interim consent order as there was evidence of the settlement and no material suggesting that the issue of custody needed to be explored in a full trial.

In *Mahonin v. Eyberson*, 2006 BCSC 489, the trial judge held that a mobility application was appropriate for determination by summary trial because the affidavit material setting out the history of the lengthy litigation between the parents was comprehensive; the parties had been cross-examined on the affidavit material; the dispute was not complex; and the application was urgent given the child's need for finality. The trial judge found that the evidence obtained by the cross-examination of the parties on their affidavits allowed him to assess their credibility. In *Walker v. Maxwell*, 2014 BCSC 2357 (appeal dismissed 2015 BCCA 282), the court likewise made a final order on a relocation application by summary trial procedure despite evidentiary contradictions where the evidentiary record was extensive, enabling the court to determine what was most important relating to the best interests of the child from the evidence before it.

The court will not determine the issue in a summary trial when the court cannot do justice for the parties due to the inadequacy of the material put before the court, even when the fault lies with the respondent or respondent's counsel (*Heemskerk v. Musgrove* (1996), 21 R.F.L. (4th) 457 (B.C.C.A.)). Parties are obliged to take every reasonable step to put their cases in the best position possible for a summary trial. Failure to take such steps cannot frustrate the summary trial process and the respondent cannot simply insist on a full trial in the hopes that, with the benefit of *viva voce* evidence, something might turn up (*Jeerh v. Jeerh*, 2015 BCSC 1614 at para. 86).

There is no hard and fast rule as to whether other family law issues will be appropriate for determination on summary trial. In general, the key factor will be the nature and quality of evidence placed before the court. Consider whether the evidence of a witness would be more compelling if given by affidavit or by oral testimony. Summary trials have been found to be appropriate under Rule 11-3 and the *Family Law Act* and under former Rule 18A and the *Family Relations Act* in the following circumstances:

(1) to determine prospective and retroactive child and spousal support claims, as well as applications to vary child or spousal support, including imputing income to one or both parties (*Baker v. Baker*, [1993] B.C.J. No. 1385 (QL) (S.C.), affirmed (1994), 1 B.C.L.R. (3d) 220 (C.A.); *Forest v. Forest*, 2014 BCSC 1862, affirmed 2015 BCCA 328; *Chu v. Eastman*, 2014 BCSC 1928; *Henry v. Newton*, 2014 BCSC 2106; *J.D.S. v. D.Y.C.P.*, 2014 BCSC 1577; *MacCarthy v. MacCarthy*, 2014 BCSC 2229, affirmed 2015 BCCA 496; *Dorie v. Dorie*, 2016 BCSC 307);

(2) to determine whether one joint custodial parent could remove the children to another province in light of an agreement requiring the other parent's consent (*Marcoux v. Marcoux*, [1995] B.C.J. No. 1709 (QL) (S.C.));

(3) to determine whether a particular asset, such as a parcel of land (*Brown v. Nygren-Stewardson Brown*, [1994] B.C.J. No. 616 (QL) (S.C.)), or a pension and an RRSP (*Campbell v. Campbell*, [1995] B.C.J. No. 770 (QL) (S.C.)) is a family asset;

(4) to obtain an order dividing family assets where terms are agreed to by the parties' counsel, where there is little dispute as to the facts, where a settlement is alleged, or where both parties are seeking judgment by summary trial (*Sudmant v. Campbell* (1993), 46 R.F.L. (3d) 29 (B.C.C.A.); *Helmes v. Helmes*, [1995] B.C.J. No. 360 (QL) (S.C.); *Ross v. Ross* (1995), 3 B.C.L.R. (3d) 345 (S.C.));

(5) to decide whether to set aside a separation agreement that one party alleged was signed under undue influence and duress (*Chan v. Murray*, 2005 BCCA 81);

(6) to determine the effect a second separation agreement has on an earlier agreement (*Kingan v. Kingan*, [1995] B.C.J. No. 164 (QL) (S.C.), appeal dismissed [1995] B.C.J. No. 1107 (QL) (C.A.));

(7) to interpret disputed terms of a separation agreement when the agreement is unambiguous on its face but requires the consideration of extrinsic evidence (*Milne Estate v. Milne*, 2014 BCSC 2112; *Moreau v. Moreau*, 2014 BCSC 1176);

(8) to determine whether to strike claims filed against a company owned by a party to a family law proceeding on the basis that they revealed no genuine issue for trial either on a claim or defence (*Jeerh v. Jeerh*);

(9) to determine issues relating to identification of excluded property, the division of family property and debt, spousal support, and a spouse's claim for occupational rent of the former matrimonial home (*Andermatt v. Tahmasebpour*, 2015 BCSC 1127; *Kalmiakov v. Shylova*, 2016 BCSC 2095);

(10) to determine trust and unjust enrichment property-based claims by a common-law partner under the former *Family Relations Act* (*Rasmussen v. Larsen*, 2015 BCSC 651);

(11) to determine disputed issues relating to custody, guardianship, and parenting schedules, and family violence, after conducting cross-examination on affidavit evidence (*P.A.L. v. L.A.L.*; *S.L.B. v. M.D.R.B.*);

(12) to determine sole custody and guardianship where, despite some factual disputes, there was sufficient independent evidence to resolve the disputes about relevant issues (*Di Guistini v. Toth*, 2016 BCSC 334); and

(13) to determine that parties were "spouses" under the *Family Law Act* (*Weber v. LeClerc*, 2015 BCSC 650, appeal dismissed 2015 BCCA 492, leave to appeal refused [2016] S.C.C.A. No. 19 (QL)).

Courts have exercised their discretion not to grant relief pursuant to a summary trial in the following circumstances:

(1) to order a divorce without resolving the issues of spousal support and division of property, where the divorce would be financially catastrophic to one of the parties (*Hill v. Hill*, [1993] B.C.J. No. 1784 (QL) (S.C.)), or to order a divorce where parenting and property issues were not suited to summary resolution and there was no good reason to split the issues (*W. (K.M.) v. W. (M.D.)*, 2016 BCSC 228);

(2) to determine whether a trust interest is a family asset, where the task of valuing the trust interest, if a family asset, would be made at trial and deciding such an issue in isolation from other issues could "embarrass the further trial of the proceeding" (*McCarlie v. Bogoch*, 2002 BCSC 560);

(3) to divide family assets in accordance with an oral separation agreement where the parties asserted widely divergent views as to its terms (*Carlson v. Carlson*, 2003 BCSC 1273; *Martyniuk v. Frederickson*, 2014 BCSC 909);

(4) to resolve custody, support, and property issues, even if both parties want a resolution of the issues, where there are substantial inconsistencies in the evidence (*Wong v. Wong*, [1995] B.C.J. No. 1657 (QL) (S.C.));

(5) to determine whether a relationship was "marriage-like" where the parties' affidavits presented "diametrically opposed" versions of critical facts (*Cantelon v. Wall*, 2015 BCSC 810);

(6) to determine paternity in the absence of testing (*Hayter v. Safty* (1993), 86 B.C.L.R. (2d) 294 (C.A.));

(7) when credibility is at issue, material facts are in dispute, and the dispute cannot be resolved through consideration of other objective evidence in the record (*Finch v. Bell*, 2011 BCSC 1480; *N.J. v. Aitken Estate*, 2014 BCSC 419);

(8) when a determination on a discrete issue does not resolve the ultimate issue and fails to assist in the efficient resolution of the family law case (*Kaler v. Kaler*, 2013 BCCA 57);

(9) when the litigation involves multiple parties and the summary trial application will not resolve the claims of all parties, resulting in the potential for duplicative proceedings or inconsistent verdicts (*N.J. v. Aitken Estate*; *Dudley v. Dudley*, 2014 BCSC 2035); and

(10) to order sale of the family home where there was insufficient evidence of the state of the parties' financial relationship, the value of the property, or the effect of the sale of the house and relocation on the children of the marriage (*M. (S.) v. M. (B.)*, 2016 BCSC 2126).

An agreement between the parties that the issues in dispute should be resolved by summary trial does not abrogate the judge's discretion as to the appropriateness of the summary trial. See *Lewis v. Lewis*, 2005 BCSC 34.

For further discussion of the circumstances in which a summary trial may be appropriate, see §11.4 to §11.7 of the *Family Law Sourcebook for British Columbia*, 3rd ed. (CLEBC, 2002–).

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