

CANADA / JUDGMENT

Benoit v. Benoit

2020 BCSC 2263

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Supreme Court of British Columbia

DECIDED

11 December 2020

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2020 BCSC 2263 Benoit v. Benoit

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Benoit v. Benoit,

2020 BCSC 2263

Date: 20201211

Docket: E56590

Registry: New Westminster

Between:

Gene Elliot Benoit

Claimant

And

Jennine Benoit also known as Jennine Kim Benoit

Respondent

Before: The Honourable Mr. Justice Kent

Oral Reasons for Judgment

Claimant appearing on own behalf:

Gene E. Benoit

Counsel for Respondent:

Jeffrey J. Thorsteinsson

Counsel for E.B. (the daughter):

Phyllis M. Kenney, Q.C.

Place and Date of Hearing:

New Westminster, B.C.

December 10-11, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 11, 2020

[1] THE COURT: I have six applications before me in a high-conflict family law case. They include:

- 1) An application by the claimant father filed October 20, 2020 for a specified regime of access to and parenting time with the two children of the marriage along with an order imposing a variety of peremptory penalties upon the respondent mother in the event of any failure to comply with that regime in the future including, among other things, a "court-mandated psychiatric or psychological assessment" of the mother and a "court-mandated Family Law Act s. 211 report" respecting the two children at the expense of the mother.
- 2) Three further applications filed by the father on December 4, 2020, seeking:
 1. the striking down of a certain protection order granted ex parte by this Court on November 17, 2020;
 2. removal of Phyllis Kenney as representative of the daughter and replacement by the state in a parens patriae role; and,
 3. appointment of Mr. J.P. Boyd as a mediator and parental coordinator in this matter and an award of damages for "bad faith bargaining" by the mother respecting custody of and access to the children.
- 3) An omnibus application filed in amended form on November 26, 2020 by the mother for some 23 orders tweaking earlier restraining orders issued by the Court granting her sole custody of the children under the Divorce Act and sole parenting responsibilities under the Family Law Act, declarations that the father has breached the terms of the earlier restraining orders and imposing penalties for such breaches, a remedial order requiring the father to remove certain specified material from the internet and any other social media sites, and an order that the mother be at liberty to pursue a Hear the Child Report or alternatively a Views of the Child Report for the purposes of the parenting dispute in this case.

- 4) A further application filed by the mother on December 2, 2020, seeking to set aside certain subpoenas issued by the father requiring the attendance of various witnesses for the chambers hearing.
- 5) An application filed December 3, 2020, by the Child and Youth Legal Centre on behalf of the daughter for an order quashing a certain subpoena issued by the father requiring the daughter's attendance as a witness for yesterday's chambers hearing.
- [2] Because of COVID-19 restrictions currently affecting court operations, these applications were set to be heard by telephone without the luxury of in-court appearances by the litigants or their solicitors either in person or by electronic videoconferencing. The presiding judge, who usually sits in Vancouver and was assigned this urgent two-day hearing in the middle of the preceding evening, travelled to the New Westminster courthouse in the morning and was confronted with 12 large binders stuffed with myriad notices of application, application responses and numerous affidavits with extensive exhibits, or, in the case of the father who was self-represented, attachments which had not been separately identified and commissioned by the notary public before whom his affidavits had apparently been sworn. The materials referred to more than 50 cases and other authorities in support of the parties' respective positions.
- [3] A remote telephone hearing is a poor substitute for in-person court proceedings, particularly in a high conflict family law case involving multiple applications, extensive evidence and one self-represented party. This is particularly so when one party, here the mother represented by competent counsel, is seeking what are, in effect, contempt of court remedies against that self-represented party, a person who is alleged to suffer from mental health problems and who, even without such problems, confronts almost insurmountable obstacles posed by what must seem to him to be the incomprehensible rules of evidence and court procedure.
- [4] Such a litigant would benefit from personal attendance in court so that the judge can more directly interact and possibly, more importantly, be seen to directly interact and appropriately assist the litigant with explanations and suggestions for navigating the process.
- [5] The hearing proceeded for a full day with no breaks except for a shortened lunch recess, an indulgence for which the Court thanks the attending clerk. Some of the applications were dealt with summarily at the outset of the hearing.
- [6] There is no specific provision in the BC Supreme Court Family Rules allowing for a subpoena to be issued requiring the attendance of witnesses to provide oral testimony at a chambers hearing such as this, and particularly so where the hearing is conducted remotely over the telephone and where the taking of oral evidence under oath is impossible.

- [7] The Rules generally require the evidence for chambers hearings to be tendered in affidavit form. It appears the father has been unable to procure such evidence, presumably because the proposed witnesses were not prepared to provide the evidence the father was seeking, and so he resorted to subpoenas to try and compel attendance for personal cross-examination.
- [8] The Court explained the proper procedure to the father and then set aside all of the subpoenas and discharged one of the witnesses who actually was on the phone.
- [9] The Court also summarily dismissed the father's other applications that were filed on December 4th, 2020. If a claim for "bad faith bargaining damages" is pursued, it must be properly framed in the pleadings, and assuming leave is even granted by the Court to include such a claim, it is a matter that must ultimately be determined at trial and not by way of an interlocutory application for interim relief.
- [10] On September 22, 2020, the father consented to an order pursuant to s. 203(1) of the Family Law Act that his daughter could be represented by counsel from the Child and Youth Legal Centre, or by a lawyer appointed by them, to provide independent legal services for the purposes of advocating her expressed views and interests. That order provided that such counsel would have full power to act for the daughter as though she was a party to the proceedings. It also provided that counsel for the daughter would be permitted to provide a summary to the Court of the information acquired without counsel being deemed to be a witness in the proceedings.
- [11] Ms. Phyllis Kenney, Q.C., has been appointed as counsel for the daughter. She has conveyed to the father the daughter's parenting preferences, and she has also prepared for the Court, a summary of the information obtained from the daughter as well as from various mental health professionals who have had contact with the daughter over the past 12 months.
- [12] The daughter has asked counsel to advise the Court that she wants:
- 1) her mother to have full custody of her;
 - 2) her father not to have any decision-making responsibilities;
 - 3) no contact with her father; and
 - 4) continuation of the ongoing protection order restricting contact and containing a police enforcement clause.
- [13] The daughter's mental health professionals have apparently confirmed that she has a very grounded understanding of the situation and that she is quite capable of articulating her views and preferences.
- [14] It is apparent that the father now seeks to challenge both what he considers to be the unacceptable views of his daughter and the information provided by her counsel and his strategy for doing so is to subpoena his daughter for cross-examination and to seek to have

counsel discharged. He suggests that counsel is conspiring with the mother in a campaign of alienation. It is an allegation that has no merit whatsoever. The lawyer in question is a Queen's Counsel, has many years of experience in family law, and has an unimpeachable reputation at the bar. There are simply no grounds upon which her dismissal is warranted.

- [15] The remaining applications all involve an assessment of the conduct of the parties, their suitability for custody and parenting of the children, and the necessity of the protection orders and other constraints directed towards the father. This entails a detailed review of the evidence and of course, the submissions of all concerned.
- [16] This occupied the rest of the hearing but was completed by the end of the judicial day. Each party was asked by the Court whether they had anything more to say on the outstanding matters and each confirmed that they had finished their submissions. In light of the urgency of the matter, the Court promised to deliver an oral decision the following afternoon, and all parties confirmed their availability for the delivery of that judgment.
- [17] During the hearing, the father did not expressly review with the Court all of the materials attached to his affidavit sworn September 21, 2020, and December 3, 2020. The affidavits themselves are a mixture of fact, accusation and argument. As noted above, the materials accompanying the affidavits in the binders were neither identified as exhibits nor separately commissioned by the notary public before whom the affidavits were sworn. It is unlikely the material was actually before the notary public at the time. Indeed, a portion of the material accompanying the September 21, 2020 affidavit includes communications and documents related to events that occurred in the subsequent two-month period.
- [18] The materials accompanying the September 21, 2020 affidavit comprise some 769 pages along with three softcover books authored by a clinical psychologist from the United States who holds himself out as some sort of expert in the resolution of high conflict family disputes involving allegations of parental alienation. The material accompanying the December 3, 2020 affidavit comprises some 220 pages, mostly email and text communications.
- [19] I appreciate that, as a self-represented litigant, the father may believe he has been given short shrift by the Court and that his evidence and submissions are being ignored in favour of those submitted by counsel for the other parties who have far more experience in family law litigation. He claimed during the hearing that his treating medical professionals will not provide him with reports or affidavit evidence supporting his position without first being ordered to do so by the Court. He says he is being prevented from providing the Court with relevant evidence from witnesses who are uncooperative, hence, in his view, the need for subpoenas. He asserted time and again, reciting the work of a US psychologist, that he is the victim of a campaign of parental alienation by the mother and others who support her. He demands that the Court order a psychiatric or psychological assessment of the mother and children, either pursuant to s. 211 of the Family Law Act or otherwise, as he is presumably confident his accusations will be substantiated, restraining orders can be set aside, and at

least a shared parenting regime can be put in place.

- [20] I want to assure the father that I spent several hours last night and earlier today reviewing every single one of the almost 1,000 pages of material attached to his affidavits and that I have also scanned the three books written by the US psychologist. His evidence and submissions have not been ignored.
- [21] I turn now to address the substance of the outstanding applications. I start by setting out some of the background facts and a chronology of events in this litigation.
- [22] The father is 51 years old. His occupation is a paramedic with the BC Ambulance Service, although for the past two or more years, he has been on leave, apparently because of post-traumatic stress disorder triggered in the workplace. He advises that a finding of disability will be confirmed by WorkSafeBC very shortly and he will be receiving a financial award relating to same.
- [23] The mother is 45 years old. She is presently employed as a receptionist at a chiropractor's office.
- [24] The parties were married on July 15, 1995, and separated on November 4, 2018. The father initiated this litigation one month later on December 5, 2018.
- [25] There are two children of the marriage, a son that was born January 8, 2003, who is currently 17 years old, and a daughter that was born October 20, 2004, who is currently 16 years old. Both children reside with their mother.
- [26] The mother has acknowledged that the father has never been physically abusive. She swears, however, that he has been verbally and emotionally abusive both before and after separation.
- [27] The family home was sold on June 13, 2019. The net proceeds of the sale were deposited in the trust account of counsel for the mother. The mother and the two children thereafter moved into a townhouse, refusing to provide the father with the address of that townhouse, allegedly for safety reasons.
- [28] The children do not wish to have any contact with the father. The daughter's information and rationale are set out in the summary of evidence referred to above. The son's rationale is set out in various emails exchanged with his father.
- [29] The father blames the mother for the state of affairs, accusing her of alienating the children from him. The mother denies any such alienation, and rather says the estrangement arises from the actions and behaviours of the father toward the children in the period of time since separation including, among other things, inappropriately sharing information connected to the separation with the children; inappropriately sharing documentation with the children such as the pleadings and affidavits filed in the lawsuit; inappropriately sharing information and documentation with third parties including private information related to the children; aggressively arguing with and criticizing the children.

- [30] On September 17, 2019, the mother filed a notice of application seeking various orders against the father including conduct orders. With the assistance of legal counsel, the parties were able to settle those applications, resulting in a consent order obtained before Mr. Justice Branch on October 24, 2019. Mr. Justice Branch's order contained 15 separate provisions. It provided for interim child support and spousal support to be paid by the father to the mother. No less than 10 of the provisions imposed communication and conduct restraints that were mostly mutual in nature. These included communications restricted to email, staying away from each other and premises regularly attended by the other, no communications with certain third parties, refraining from negative or hostile criticism or communication as between themselves or with the children or the mother's lawyer and the like.
- [31] The parties then attended a mediation on November 13, 2019, at which time a settlement was reached. That settlement was documented by way of certain minutes attached to which was a draft final order comprising some 50 paragraphs dealing with custody and parenting of the children, child support, spousal support, division of assets and liabilities and the like.
- [32] Insofar as custody and parenting were concerned, both parties were to participate in a counselling process. The parties were to share joint custody. On an interim basis, the children were to reside primarily with the mother, but the father was to have parenting time as facilitated through the counselling process and taking into consideration the wishes of the children. Any such parenting time schedule was subject to review after one year, and the same and similar constraints set out in the Branch order were also included.
- [33] Matters deteriorated significantly in early January 2020. The mother says there has been a significant deterioration in the father's emotional health, and that included an escalating pattern of erratic behaviour starting with a sit-in at her lawyer's office by the father on January 7, 2020.
- [34] The mother, therefore, resiled from the settlement terms respecting custody and parenting of the children. The father accuses her of wrongly breaching the settlement agreement, which, in retrospect, he says, was bargained by her in bad faith. Counsel for the mother summarizes his client's position that the father's conduct is "inconsistent with the best interests of the children such that the terms of the minutes of settlement relating to the children are no longer appropriate, workable or in the best interest of the children."
- [35] On February 14, 2020, the mother obtained an ex parte order from Master Keighley of this Court pursuant to ss. 222, 225 and/or 227 of the Family Law Act which, among other things:
- 1) restrained the father from publishing, posting, disseminating, sharing or otherwise distributing any information, documentation or materials relating to these proceedings, any issues in these proceedings, the children of the marriage, the mother or her legal counsel including, without limiting the generality of the foregoing, publications on the internet and any social media sites; and

- 2) also restrained the father from publishing, posting, disseminating, sharing or otherwise distributing on the internet or otherwise inclusive of any social media sites any materials filed in these proceedings.
- [36] The Keighley order also contained a provision granting the father liberty to apply to set it aside. It appears no such application was made at the time.
- [37] As indicated above, on September 22, 2020, the parties obtained a consent order permitting the daughter to be represented by counsel from the Child and Youth Legal Centre for the purposes of advocating the daughter's expressed views and interests.
- [38] On November 17, 2020, an ex parte protection order was obtained by the mother before Mr. Justice Ball of this Court. That Ball order contains 12 separate provisions, 9 of which impose various restraints on the father's conduct and communications, including:
- 1) amendment of the Branch order to delete the mutuality of the restraints imposed;
 - 2) no communication or contact directly or indirectly with the children;
 - 3) no attendance at places regularly attended by the children and no following of the children;
 - 4) no direct or indirect communication or contact with counsel for the mother or the daughter or the staff in their respective offices except as prescribed; and
 - 5) no attendance at the office of the mother's legal counsel or that of the daughter's counsel.
- [39] The Ball order also contained a police enforcement provision that included the authority to arrest the father for breaching the order and to use reasonable force in that regard if necessary.
- [40] The materials before Mr. Justice Ball included two voluminous affidavits sworn by the mother on October 27 and November 9, 2020, as well as an affidavit sworn by a certain Mr. Lawson on February 18, 2020. The hearing before Justice Ball lasted two hours. The father has since listened to the recording of that application.
- [41] I do not intend to give a detailed review here of the materials before Mr. Justice Ball. Counsel reviewed several of the highlights in the course of his submissions before me, and I have since read both those materials and the other affidavits subsequently sworn by the mother. Suffice it to say, they contain ample evidence which demonstrates an escalating pattern of erratic and volatile behaviour on the part of the father. He has engaged in an unrelenting campaign of inappropriate, insulting, abusive and often profane communications with the mother, the children, the lawyers and various third parties. There are some 1,400 emails that have been issued by the father in the period between January 7 and November 2020.
- [42] There are numerous bizarre tweets that may rightly be interpreted as threats. There can be no doubt that the father's conduct meets the definition of family violence set out in the Family Law Act. It is readily apparent why the mother and the children may well be fearful

and why they might wish to have no contact with the father. The material raises significant concerns respecting the father's mental health. While we do not have the benefit of any reasons for judgment from Mr. Justice Ball, I am satisfied that the evidence before him justified the granting of a protection order at that time.

- [43] Before me, the father did not dispute the validity of the evidence before Mr. Justice Ball. He does not deny issuing the emails, tweets or other communications. Indeed, many of them are included in the materials accompanying his own affidavits. Rather, he justifies the events as a rational response of an exasperated person who is wrongly denied his parenting role as a result of alienation on the part of the mother and supported by others.
- [44] It is, however, a characterization of events with which I cannot agree. He has reported the mother's lawyer to the Law Society for alleged misconduct. He has written letters to the prime minister and other government officials pleading his case. He has recently been subjected to involuntary hospitalization under BC's Mental Health Act. He has been arrested and has as yet unresolved charges relating to his communications with the mother.
- [45] The father's more recent evidence and submissions do not persuade me that the Ball order should be set aside and that the father should now be granted access to and parenting time with the children contrary to their express wishes.
- [46] I recognize that any family law litigant, let alone a self-represented litigant, faces considerable judicial and practical constraints in alienation cases. Indeed, I discuss these at length in the case of *L.C.T. v. R.K.*, 2018 BCSC 1016, and will not repeat them here. If the father seeks to persuade the Court of the existence of alienation in this case, he is obliged to tender, whether at trial or on an application such as the present ones, admissible evidence to that effect from a properly qualified expert. There is no such evidence here. Nor, beyond mere accusation, has he tendered any admissible evidence which warrants an investigation into the mental health of the mother or the children.
- [47] I am not prepared to grant the father's request for an order authorizing any full assessment under s. 211 of the Family Law Act at the mother's sole expense. I do agree that such a report would likely be very helpful for the judge ultimately called upon to decide the parenting issues at trial, and I strongly recommend that one be obtained from a properly qualified local expert with the necessary experience on a 50/50 cost-sharing basis. If the father changes his position that he cannot afford and will not pay for such a report, the Court will likely entertain a further application on that point.
- [48] In the result:
- 1) The father's applications are all dismissed with costs in the cause.
 - 2) In light of counsel's submissions at the conclusion of yesterday's hearing, the mother's application for relief in paras. 1 to 13 and 20 of the amended motion filed November 6, 2020, is dismissed as withdrawn.

- 3) The mother is granted sole custody of and sole parenting responsibilities for the children on an interim basis only, i.e., pending trial, which is set for September 2021.
- 4) The Court grants the declarations sought in paras. 15, 16 and 17 of the amended motion, but declines to impose financial penalties on the father at this time given the Court's concern about the role played by the latter's mental health issues.
- 5) The Court grants the orders sought in para. 19 of the amended motion except that the period for compliance is set at 30 days instead of seven days.
- 6) The father has consented to para. 22 of the amended motion and the order goes on that basis.
- 7) The relief sought under para. 21 of the amended motion is dismissed as premature, but liberty is granted to reapply in the event the father has not within 60 days agreed to pay for a full s. 211 report as per the court's recommendation above.
- 8) Counsel for the mother will prepare the formal orders arising from today's judgment and will send the same by email to the father for approval and return. If the orders are not returned within 10 days, counsel is granted leave to file the same with the registry without any further approval of the father endorsed thereon.

[49] That concludes the reasons for judgment. Thank you very much.

"Kent J."

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Prepared on 26 October 2026 · Esheria