

CANADA / JUDGMENT

Campbell v. Chan

2020 BCSC 665

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 665 Campbell v. Chan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Campbell v. Chan,

2020 BCSC 665

Date: 20200424

Docket: E191991

Registry: Vancouver

Between:

Alicia Ann Campbell

Claimant

And

Yu-Tung Terence Chan also known

as Terence Yu Tung Chan

Respondent

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

Counsel for the Claimant:

B.M. Carlson

Counsel for the Respondent:

C. Linde

Place and Date of Hearing:

Vancouver, B.C.

April 24, 2020

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Vancouver, B.C.

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- [1] This application was heard by telephone pursuant to the court's modified processes articulated in this Court's notice issued March 30, 2020: "COVID-19: Suspension of Regular Court Operations" (since revised April 16, 2020).
- [2] The parties are parents of two children aged 10 and 8. The parties separated in January 2018.
- [3] The claimant (mother) and the children are currently in Campbell River, British Columbia staying with her parents. The mother's and children's usual residence is Vancouver. The respondent (father) also resides in Vancouver.
- [4] The father seeks an order that the claimant return the children to Vancouver.
- [5] He filed a request for an urgent hearing, which this Court approved resulting in the hearing before me.

BACKGROUND

- [6] In March 2019, the Provincial Court granted a protection order, which restricted the father's interaction with the children and the mother. On April 25, 2019, that order was extended to September 30, 2019. In addition, the April 25, 2019 order varied the existing order to allow the father supervised parenting time as agreed between counsel. However, the first supervised parenting time did not take place until June 1, 2019.
- [7] Since that time, the parties have a routine that the father's supervised parenting time takes place for two hours every Sunday afternoon. The first visit was done in the presence of a professional supervisor. Professional supervisors were utilized until the parties agreed on a private supervisor.
- [8] The last time the father exercised in-person supervised parenting time was March 15, 2020.

Alteration to the Parenting Time

- [9] Like many families, the current global pandemic caused by COVID-19 has affected this family's parenting arrangements.

- [10] There is no dispute that due to the lack of available supervisors, the parties agreed the father would have telephone parenting time instead of in-person parenting time on Sunday March 22, 2020.
- [11] However, the parties disagree on the significance of the content of their agreement and the significance of that event.
- [12] The mother deposed that she found out on March 14, 2020, that the supervisor scheduled for the father's parenting time on March 22, 2020 would not be available because the supervisor would be self-isolating. The mother deposed that meant, "the respondent did not have a scheduled supervisor for March 22, 2020 and therefore had no in-person parenting scheduled".
- [13] She further deposed that the father sent a text message "proposing a phone call instead of the usual face-to-face supervised visits in order to support isolation" and that she "agreed to this new schedule".
- [14] The father denies that his text was a suggestion to change the parenting regime. Instead, he says it was a one-time accommodation necessitated by the social isolation measures and unavailability of supervisors.
- [15] He also deposed that on March 22, 2020 he believed the claimant and the children were in Vancouver. He deposed that he found out during his telephone visit with the children on March 22, 2010 that the children were in Campbell River staying with their grandparents. He also deposed that the children told him the mother had driven them to Campbell River.
- [16] The mother stated that her parents came to stay with her and the children on March 15, 2020. She deposed that "[t]he plan was for [her] parents to care for the children during the school spring break, from March 16 to 27, 2020, at their home in Campbell River". She added that the children travelled to Campbell River on March 18, 2020.

[17] In the next paragraph, she deposed:

Due to COVID-19, I began working remotely from home on March 18, 2020. After the respondent requested phone parenting time, I decided to travel to Campbell River to stay with my parents and the children.

[18] It was not disputed that the father has had telephone parenting time with the children, but has not been in their presence since March 15, 2020.

LEGAL PRINCIPLES

- [19] These are unusual times. The global COVID-19 pandemic has thrown everyone's life into turmoil and has had a dramatic impact on all aspects of life. Even this Court has been drastically affected. As of March 18, 2020 all court proceedings were suspended, but for those that were established to qualify as "urgent". This suspension, as of today, remains in effect until at least May 31, 2020.
- [20] Thus, this application was first assessed by this Court to most probably meet the urgency requirements, and on that basis the hearing was scheduled and took place by telephone.
- [21] The father emphasized that the existence of this pandemic has not resulted in any change to the law. More specifically, he says numerous cases decided under these extraordinary circumstances coalesce to form a consistent group of principles upon which he relies. His main point is that there is nothing about the pandemic alone that justifies parents not obeying existing parenting orders.
- [22] The mother submits no case matches the facts at bar, and the cases cited by the father can be distinguished.
- [23] Some of the cases relied upon by the father are:
- a) *Ribiero v. Wright*, 2020 ONSC 1829 - the mother sought to suspend all in-person access because of the pandemic. She expressed concern in her application that the father would not adhere to safe social distancing guidelines. The judge determined the matter would not proceed to a hearing. Thus, this was a determination on the urgency of the mother's application. Nevertheless, I find the following general principles from that case helpful.
- [24] At paragraph 10, the judge wrote that: "Children's lives -- vitally important family relationships - cannot be placed 'on hold' indefinitely without risking serious emotional harm and upset".
- [25] The judge also noted parents "should not presume that the existence of the COVID-19 crisis will automatically result in a suspension of in-person parenting time", nor that "raising COVID-19 considerations will necessarily result in an urgent hearing" (para. 20). Ultimately he urged the parties to resolve matters co-operatively and declined to allow the urgent hearing.
- b) In *Guerin v. Guerin*, 2020 ONSC 2016, the parents had decided to reside together in the matrimonial home during the crisis. However, the mother brought forward evidence that the father was not adhering to guidelines regarding social distancing, and he left the house numerous times. Upon returning, he did not wash his hands. On that basis, the mother was entitled to an order for exclusive possession of the matrimonial home.
 - c) In *Chrisjohn v. Hillier*, 2020 ONSC 2240, the mother refused to return the parties' child to the father, in contravention of the existing court order. She alleged the father should have no in-person parenting time because he lived with other people, and she could better reduce the

risk of infection to their child. The court held the evidence did not establish the mother's allegation that the father was placing their child at risk. The court concluded she had "adopted a self-held approach" which was inappropriate. The court ordered the child be returned to the father.

- d) The father in *Zee v. Quon* (27 March 2020), Toronto FS-16-412436 (Ont. S.C.J.) suspended the mother's parenting time relying on her work in the health profession. The court was concerned by the evidence indicating possible alienation by the father. Also, the court found no evidence the mother was not following appropriate protocols. The court reinstated equal parenting time.
 - e) In *Skuce v. Skuce* 2020 ONSC 1881, the parties attended a mediation and consented to an order regarding parenting on March 16, 2020. The father had scheduled parenting time with the children, which was supervised in the community by the mother or her husband. The mother had suspended in-person parenting and only wanted the children to have contact with the father by video or phone, citing concerns about COVID-19. The court agreed the matter was urgent and modified the existing order to allow the father to have supervised parenting with the children at his parent's home.
- [26] Among other things, the judge noted that the consent order was after the declaration that COVID-19 was a pandemic, but before strict measures were put in place for closure of non-essential businesses, banning of gatherings and directives for social distancing. Therefore, the court decided the mother bore the onus to satisfy the court that the parenting plan was no longer in the children's best interests. The court also noted the mother had engaged in a self-help remedy despite a clear consent order and the court could not be seen to condone that behaviour.
- [27] Three cases cited by the father are from the BC Provincial Court:
- a) In *N.J.B. v. S.F.*, 2020 BCPC 53, the parties had an existing court order granting the mother parenting time twice a week. On March 24, 2020 the father unilaterally suspended the mother's parenting time citing concerns about COVID-19. The court stated the specific issue was whether the COVID-19 pandemic was a change in circumstances justifying a variation in an existing parenting order. On the facts of that case, it was not and the father was ordered to reinstate the mother's parenting time.
 - b) In *T.C. v. R.E.*, 2020 BCPC 65 the father sought a drastic change to the existing parenting arrangement, justified in part by his decision to move to Maple Ridge from Vancouver to live with his current partner so they could both work from home. Previously, the parents lived within walking distance of one another in Vancouver. The court found the father failed to inform the mother of the steps he would take to ensure his adherence to appropriate COVID-19 protocols. However, once that information was provided, the court did not find the increased distance to be a reason to alter their agreed parenting schedule. However, he did not agree to increase the father's time either. In concluding the judgment, the court stated the following:

- [17] Finally, I will say that it is incredibly important that separated parents communicate effectively in co-parenting their children. That communication should not focus on the rights of the parents to see their children, but rather on the rights of their children to have parents that can share important information about the children's safety and welfare respectfully and effectively.
- [18] This case is an example of one party placing his perceived right to his children over the mother's right and responsibility to ensure the children are protected during an unprecedented crisis. I recognize that the parties' different views of the residence issue may have ultimately landed them before the court, in any event. However, it is appalling that the matter was brought to the court before full disclosure had been made to R.E. as to what T.C.'s intentions were and as to what precautions had been taken to ensure the children would be safe. I hope that this exercise will bring home to both parties the meaning of co-parenting in the children's best interests.

c). In *S.R. v. M.G.*, 2020 BCPC 57, the mother is a licensed practical nurse working weekends only. Both parents had concerns about the risk of exposure of their child because of her work. At paragraph 22, the court stated a number of factors to consider:

I find a constellation of factors to consider, in assessing what is in a child's best interests. In this situation, the following factors are relevant:

- a) Whether the child is at an elevated risk of suffering the more severe consequences of the virus;
- b) Whether either party, or those in their household are at an elevated risk of suffering the more severe consequences of the virus;
- c) Each party's exposure to the risk of contracting the virus;
- d) Steps taken by each party to mitigate the risk of exposure;
- e) All of the relevant factors listed under s. 37 of the Family Law Act, including:
 - a. The child's health and emotional well-being;
 - b. The child's views, where appropriate;
 - c. The child's relationship with each parent;
 - d. The history of the child's care;
 - e. The child's need for stability, given his age and stage of development;
 - f. Each parent's ability to exercise his or her parental responsibilities;
 - g. The ability of each party to cooperate in parenting the child; and

- f) In the larger context, society's need to maintain and access resources in the community, including health care and other ventures that provide services and income for families in a safe manner over an extended period of time.
- [28] The court was satisfied on the evidence that the mother was taking all appropriate precautions ("and then some"). Therefore, the risk to the child was appropriately mitigated. The court also noted the benefit to the child of continuing to see the mother, and therefore her parenting time should not be altered.
- [29] Turning back to the legal principles, the mother agrees the pandemic has not changed the legal landscape. However, as her counsel correctly points out, the only consideration in any application regarding parenting time is the best interest of the children, codified in s. 37 of the Family Law Act. No order is in the children's best interest unless it protects to the greatest extent possible the child's physical, psychological and emotional safety, security and well-being (s. 37(2) FLA). These principles are not disputed.
- [30] The mother's counsel submitted all the cases relied upon by the father are distinguishable because none, but two, occur in instances of supervised parenting. I agree arrangements that required supervised parenting will add to the complications of shared parenting during this pandemic. Counsel also submitted the two involving supervised parenting (Skuce and N.J.B.) are also distinguishable on their facts. I agree.
- [31] Ultimately, my task is to consider all the evidence and determine whether it is in the children's best interest to order them returned to Vancouver. While the pandemic has complicated shared parenting arrangements, it is not, without more, reason to interfere with established parenting regimes. At the same time, it would be irresponsible to ignore the realities of the current situation.

ANALYSIS

- [32] The father submitted that there is no application to vary before the court and therefore, absent compelling evidence as mentioned in some of the cases (which does not exist here), the mother is presumptively in breach of an existing Provincial Court order. He contends "[i]f there were no social quarantine recommendations extant right now, there would be no argument required here" because "the mother would be unarguably in breach of the existing court order".
- [33] I do not agree. The existing court order is that the father have supervised parenting time "to be as agreed between counsel". Therefore, there is no prima facie breach of a court order.
- [34] There are two important points that flow from this.
- [35] First, contrary to the father's position, I am not dealing with a situation of a clearly worded court order that has been violated. In my view, that answers most of the father's submissions, and certainly responds to the tenor of his position.

- [36] Secondly, the court order requires the parties to work through their counsel to arrange the father's parenting time. I have a letter dated April 13, 2020 from Ms. Campbell's counsel explaining the reason why staying in Campbell River was, in her view, in the children's best interests.
- [37] The court order requires that the parties work together to arrange parenting. In these extraordinary times and given the change in the court's operations, the court expects parents to address disputes with utmost reasonability and flexibility.
- [38] I find on the evidence the father did not do so. Instead, it appears that the father requested an urgent hearing on April 16, 2020, and his application was filed on April 21, 2020. There was no response on the record before me to counsel for the mother's April 13, letter.
- [39] In *Johansson v. Janssen*, 2020 BCSC 469, Justice Smith confirmed at para. 16 that passing the screening for RUH process "does not constitute a final determination that a matter is urgent" and "[i]t remains for the judge or master hearing the application to determine whether it is in fact urgent".
- [40] In all these circumstances, I am not satisfied this matter fits the court's criteria for urgency. For family cases, that criteria is a family proceeding in which relief is sought by way of:
- Order relating to safety of a children or parent due to risk of violence of immediately harm;
- Orders relating to risk of removal of a child from jurisdiction;
- Order relating to wellbeing of a child (essential medical decisions urgent issues relating to parenting time, contact, or communication with a child that cannot reasonably be delayed).
- [41] The only possible ground is urgency in relation to parenting time or contact.
- [42] The father's position is that the phone and video time the mother suggests arranging amounts to a denial of parenting time, thus justifying an urgent hearing. I do not agree. Telephone and video contact is a common form of parenting time. The mother concedes it is not ideal, but given the circumstances, it does facilitate parenting time. I find this situation is not the same as a complete denial of parenting time.
- [43] Accordingly, the application is dismissed on the basis that it is not urgent and should not have been brought.
- [44] Specifically, before parties rush to court in situations where the court order requires arrangement between counsel, I would expect to see in the evidence a reasonable amount of time and courteous correspondence trying to resolve matters before filing a court application.

Best Interest of the Children

- [45] However, in case I am wrong on the issue of urgency, I confirm I would have dismissed the application in any event.

- [46] The father's notice of application alleged at paragraphs 5 and 6, that the mother "moved" with the children to Campbell River and that she is using the virus as an excuse not to return to Vancouver, and to deny his parenting time. His written submission put it this way: the safety protocols currently in place "are being used by the mother as just another mechanism to disrupt the father/child relationship".
- [47] The evidence does not bear out these allegations. The mother is ensuring the children's continuing relationship with the father. The children have had telephone contact and the mother confirms she will continue to facilitate that (and video contact if available). She offered to travel to Nanaimo (an appropriate mid-way point) where the father could exercise in-person parenting time.
- [48] I appreciate that the father's counsel clarified during submissions that he was not alleging there had been a relocation. However, his complaint is that the situation is analogous to a relocation.
- [49] I do not agree. Relocation refers to removing children from the court's jurisdiction and the strict requirements parents must adhere to regarding notice.
- [50] In this case, the children went to see their grandparents during spring break on Vancouver Island. It is simply unreasonable to suggest that was akin to the mother "kidnapping" the children (as the father stated in one of his text messages to the mother).
- [51] In my view, the only issue properly raised by the father's application is the increased complications of exercising supervised in-person parenting because the mother and children are in Campbell River.
- [52] The evidence does make two things clear:
1. The parties had an established regime, even if not reduced to a court order, that the father had supervised, in-person parenting time every Sunday for two hours.
 2. Due to no one's fault, the ability of the father to exercise that time has been compromised. I emphasize that on the evidence before me, no blame can be laid on either party for this disruption.
- [53] The father submits because there is no application before me to vary the current parenting time, the evidentiary burden is on the mother to prove that the "children should be prevented from being parented by their father". Again, this submission does not accurately represent the mother's position, nor reflect the facts before me.
- [54] There is only one issue: should I grant the order sought by the father that the children return to Vancouver? The legal test is simple: would that be in the best interest of the children? For the reasons I now explain, if I had considered this application was appropriately urgent, I would have answered both questions "no".

- [55] I find the mother is not relying on the pandemic as an excuse to stay in Campbell River, thereby making in-person visitation with their father extremely difficult. However, the existence of the pandemic is relevant to her actions.
- [56] Her position is that for the time being, it is in the best interest of the children to stay with her in Campbell River living with her parents. She offers a couple of reasons for this.
- [57] First, she is working remotely because of the pandemic. Her parents are caring for the children while she works and helping them with their home schooling. She deposed she would have no help with either were she to return to Vancouver. She stated, "If I have to care for the children during the day and do their homeschooling, it will impact my ability to perform my work duties".
- [58] She emphasized the importance in her situation of continuing to work, and do so well, because she is concerned she could lose her job. She further confirmed she only began receiving child support this past January in the amount of \$250 per month. The only importance of that point is that her income is extremely important to continue to provide for the children.
- [59] This reason alone is compelling. Specifically, I do not accept para. 23 of the father's affidavit where he purports to express a view about the mother's work. It is not within his knowledge to know what impact being in Vancouver versus Campbell River might have on her livelihood.
- [60] Secondly, she is concerned about the possibility that the father may still encounter difficulty arranging supervisors for visits in Vancouver. This concern is supported by her evidence that two supervisors have informed her they will not continue to do supervision.
- [61] The father counters this evidence with information that he had successfully arranged for a supervisor for April 9, 2020.
- [62] I appreciate and have considered that evidence. However, in the current environment, the mother's concern is not unreasonable. Simply put, there is no guarantee of continued availability of supervisors every Sunday.
- [63] Travelling back to Vancouver (apart from the complication it will add to the mother's ability to perform her job) also presents the possibility of an increased risk of infection. The risk is mitigated by the advantage to the children enjoying in-person parenting time with their father.
- [64] However, the court must balance that risk against the possibility that the two-hour weekly supervised parenting may not occur. I find the mother's concern justified and reasonable. Accordingly this is a relevant consideration.

- [65] The mother expressed a concern about the father's adherence to guidelines established by public health authorities. She suggested the respondent might have visited his parents who are currently in quarantine. The father has not responded to this assertion of fact in his affidavit, which is reasonable given the timing of how this matter got to a hearing. It is my understanding the father only received the mother's affidavit yesterday. Therefore, I am not prepared to take that information into account.
- [66] I add that if the information is true, the father should have shared that directly with the mother. Any contact with anyone who has travelled internationally has been identified by public authorities as a risk factor and the mother was entitled to know what measures he would take to mitigate that risk before he saw the children.
- [67] However, what is relevant about her concern, is that it prompted her to seek additional information from the respondent. It was only then that she learned for the first time the father was living with two other people, whom she does not know. If those people are new to the family, several issues arise. Specifically, what, if any, measures the father needs to take to ensure safety if he did have in-person visits with the children. He would need to provide information about what contact he has with those people, whether he shares any shared living space with them, whether any of them are or have been in quarantine, whether any of them are essential workers being exposed to the community, etc. None of these would necessarily preclude in-person supervised parenting, but that information may necessitate that he maintain social distance from the children.
- [68] None of these things have been addressed by the father. In my view, that evidence would be critical before the court would order a return to the parties' routine on parenting.
- [69] More to the point, this information should have been disclosed by the father without the mother having to seek it out. It is unfortunate that did not happen.
- [70] The father's main complaint is that he was unaware of the children's travel to Campbell River. Ideally the mother should have informed the father of this. However, it is unclear on the evidence whether and how the information was conveyed.
- [71] The mother does not specifically identify the date and time she travelled to Campbell River. Also, she does not specifically depose with whom the children travelled to Campbell River on March 18, 2020.
- [72] The father deposed that the children told him their mother had driven them to Campbell River. If true, it draws into question the reliability of her statement that it was only after the request for phone parenting time (the request was March 21, 2020) that she decided to travel to Campbell River. She confirms the children were in Campbell River on March 18, 2020.
- [73] Given the short time in which these materials were prepared, I do not draw any conclusions from what might be possible gaps in the mother's information.

- [74] Furthermore, having reviewed all the evidence, I am satisfied on a balance of probabilities that the children's trip to Campbell River was for purpose of visiting their grandparents during spring break. The timing was unfortunate in that it was around the same time that health authorities imposed strict measures, and recommended social distancing and advised against non-essential travel. Coincidentally, the children travelled on the same day that this Court suspended all operations except for urgent matters. The point is that the situation changed rapidly in mid-March. No one could predict what was going to happen.
- [75] In all the circumstances, I do not find on the evidence before me that the children being in Campbell River was in any way attempt to interfere with the father's parenting. It may be that there needed to be better communication from the mother about that travel, although I do not make a finding on that point. However, on that issue (communication) the evidence demonstrates the father too has not always exercised the best judgment.
- [76] The mother deposed she intends to return to Vancouver when she can arrange appropriate childcare. She deposed that her parents are not comfortable coming to Vancouver to provide that child care because the travel would increase their exposure to possible infection. They are both over 65 and her father has a heart condition, a known factor making him extra vulnerable. In those circumstances, even travel on the ferry would be ill-advised in the current circumstances. Their caution is reasonable and warranted.
- [77] For all those reasons, the father's application is dismissed. I am satisfied that it would not be in the children's best interest on the facts of this case to return to Vancouver.
- [78] In the alternative to his primary position, counsel for the father asked the court to impose parameters with regard to the mother's stated intention to remain in Campbell River.
- [79] As noted, she deposed she would return "when social distancing protocols are lifted such that I can obtain appropriate childcare". I agree that wording is somewhat vague. However, I have dismissed the application as not being urgent, so there is no basis for me to impose any conditions on the mother's return at this time.
- [80] Although I did not make an order to this effect, it was encouraging that the parties agreed on the record that the children could have FaceTime parenting with the father three times a week.
- [81] I reiterate that the court expects the parties to cooperate and be flexible during these trying times. Given that the existing court order requires the parents to determine the father's supervised parenting time through counsel, that expectation is heightened in this case.

Sharma J.

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