

CANADA / JUDGMENT

Harrison v. Haramati

2022 BCCA 302

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 302 Harrison v. Haramati

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Harrison v. Haramati,

2022 BCCA 302

Date: 20220908

Docket: CA47839

Between:

Jessica Christine Harrison

a.k.a. Christine Haramati

Appellant

(Claimant)

And

Yaniv Haramati

Respondent

(Respondent)

Corrected Judgment: The text of the cover page was corrected on September 21, 2022

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia,

dated September 28, 2021 (Harrison v. Haramati, 2021 BCSC 2141,

Chilliwack Docket E14683).

Counsel for the Appellant:

F.A. Nudel

M. Kamangari

A. Semke, Articled Student

The Respondent, appearing in person:

Y. Haramati

Place and Date of Hearing:

Vancouver, British Columbia

May 5, 2022

Place and Date of Judgment:

Vancouver, British Columbia

September 8, 2022

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Willcock

Summary:

The appellant appeals from an order which, in part, dismissed her application for final decision-making authority over the parties' three children. She alleges that the judge failed to provide sufficient reasons, focused on the relationship between the parties rather than the best interests of the children, and misapprehended the evidence. Held: Appeal allowed. The reasons were sufficient to permit appellate review, but the judge erred in dismissing the application for decision-making authority. The judge failed to consider the mandatory factors relevant to the best interests of the children under s.37 of the Family Law Act, S.B.C. 2011, c. 25. Instead, the judge focused on the relationship between the parties and speculated that they needed to resolve cross-cultural communication styles. The judge also failed to appreciate the nature of the

interventions that had already been tried, as well as their ineffectiveness. The appropriate remedy is for this Court to make the order sought, granting the appellant final decision-making authority with respect to the children.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Introduction

- [1] Jessica Harrison appeals the order of a chambers judge dismissing her application for final decision-making authority in relation to the parties' three children. She submits the judge made three errors: first, by failing to provide reasons sufficient to permit appellate review; second, by focusing on the parties' relationship rather than the best interests of the children; and third, by misapprehending the evidence.

Background

- [2] It is common ground that the parties' relationship has been marked by significant conflict. The respondent, Yaniv Haramati, was born and raised in Israel. He and the plaintiff met when Mr. Haramati came to Canada to attend university. They married and were together for about six years, separating in December 2016. They have two daughters, L and S who are ten and seven, and a son, T, who is five years old. T was born after the parties separated and has a medical condition that requires physiotherapy, occupational and speech therapy, and home support. The older two children, L and S, have received counselling since their parents separated, while T has been engaged with a neuropsychiatrist for services related to his medical condition.
- [3] The parties were initially able to agree on division of property, support, and a parenting schedule that divided the time of the two older children equally between them, with more limited contact between T and his father given his young age. Those terms were incorporated in a consent order pronounced by Justice MacDonald on August 13, 2018 (the "Consent Order").
- [4] Under the Consent Order, the parties were required to retain a co-parenting counsellor for a minimum of six months, with any disagreement about the children to be resolved with the co-parenting counsellor's assistance--or by way of a mediator or family justice counsellor--before going to court. In September 2018, the parties retained Irene Peterson as a co-parenting counsellor. Their daughter L began counselling with Ms. Peterson at that time as well. Ms. Peterson resigned as co-parenting counsellor shortly thereafter because the respondent refused to accept the advice given by the counsellor in the first individual co-parenting counselling session he attended, refused to attend further sessions, and refused to allow L to receive further counselling from Ms. Peterson.
- [5] At that point, the parties agreed to retain G.C. Scott as a parenting coordinator, incorporating that term into a court order pronounced by Master Scarth in February 2019. Mr. Scott worked with the family for one year, making determinations about T's pick up and

return (April 2); the exchange of the children generally (July 11); the appointment of another co-parenting counsellor, Leanne Harder (July 15); make-up parenting time and child support (September 16); the respondent's refusal to sign release forms required by the co-parenting counsellor (September 24); and parent scheduling issues around Hanukkah and Christmas (November 28).

- [6] Mr. Scott withdrew as parenting coordinator on February 6, 2020 citing the respondent's refusal to engage, his failure to follow the first determination, and his failure to pay the parenting coordinator's outstanding account.
- [7] The appellant then filed a notice of application seeking, among other things, final decision-making authority, variations to the Consent Order to address counselling services for the children, and the preparation of a s. 211 report. That application was heard on October 16, 2020 by Justice Norell who dismissed the application for final decision-making authority, but ordered that a s. 211 report be prepared by Robert Colby. She granted the parties liberty to apply to vary the Consent Order once the s. 211 report was received.

The Hearing Below

- [8] After Dr. Colby's report was provided to the parties on January 29, 2021, the appellant again applied for final decision-making authority as well as variation of multiple aspects of the Consent Order relating to the parenting schedule, including counselling, communication between the parties, s. 7 expenses, holiday scheduling, and exchange of the children's belongings. The respondent was self-represented in the court below, as he was on appeal.
- [9] The application was heard in chambers over three days in September 2021. The judge provided oral reasons for judgment immediately following the hearing. She found there had been a change of circumstances warranting a variation of the Consent Order, primarily because "of conflict and the inability of the parties to come to agreement even about the simplest of issues": at para. 9. She agreed with Dr. Colby's assessment that the children "are distressed by the conflicted dynamic": at para. 10. The judge then turned to the need to consider the best interests of the children, saying:
 - [11] To grant a variation order, I have to be satisfied that there has been a change in circumstances. I have said that I found that. Most importantly, every order that this court makes is bound by the duty that we must consider what is in the best interests of the children. I think one of the overlying features when we are considering the best interests of a child is that if a parent can parent safely, they should be supported in doing so. It does not mean they have to like the other parent. If they can parent safely with some separation between the parents, and the child's relationship with each parent can be maximized, and if the children's immersion and ability to belong to the culture, religion and beliefs of both of their parents can be maximized, that too is important. That is in their best interests.

[Emphasis added.]

- [10] The judge then immediately made orders addressing all of the extensive relief sought. For the purposes of this appeal, it is necessary to relate only that the judge dismissed the appellant's application for final decision-making authority.
- [11] After making the detailed orders, the judge gave further reasons for judgment saying:
- [20] I was originally of the opinion that appointing another parenting coordinator would not be helpful. I was concerned that the record showed that whenever we got the two parties into the same room for a parenting or counselling session, it seemed to get worse rather than better. I was prepared to order the parties to utilize shuttle or distance mediation, given what seemed to be a history of conflict escalation.
- [21] However, the parties both made further submissions suggesting a parenting coordinator be appointed. I suggested they find someone capable of working cross-culturally between them. At a continuation on October 18, 2021, they identified Dr. Ellie Bolgar as a mutually agreeable person.
- [Emphasis added.]
- [12] Although it is not entirely clear from the reasons, it appears that the judge first ordered the "shuttle or distance mediation" described in para. 20 of her reasons above. After the judge concluded her oral judgment, the parties asked to stand down for a few minutes, returning to make a joint request for the appointment of a parenting coordinator instead--effectively seeking to maintain the status quo rather than revert to mediation. The judge acceded to that request, as noted in her reasons at para. 21.
- [13] On October 18, 2021, the judge held a brief hearing to clarify her rulings.
- [14] On November 2, 2021, the judge released written reasons incorporating both the change made at the request of the parties immediately following the oral judgment, and the clarifications made at the subsequent hearing on October 18, 2021 as is evident from paragraph 21.
- [15] I note parenthetically that oral reasons for judgment should not be altered substantively when transcribed. As this Court observed in *M. McIsaac Family Holdings Ltd. v. Tolam Holdings Ltd.*, 2020 BCCA 371 [McIsaac] "There is nothing wrong with a judge editing an oral judgment for such things as: correcting typographical or grammatical errors or misspoken words; adding in full citations and quotes from authorities or the evidence or other matters that were referred to in point form only when the oral judgment was read out; improving the organization through definitions and headings; and similar changes. All of these types of edits are intended to add to the clarity of the judgment in written form": at para 169. But there are limits to the edits that can be made--"written reasons must not deviate from the general thrust of their oral predecessor": at para. 170. Changes to the substance of a judge's reasoning after giving an oral judgment could create the appearance that a judge is attempting to engage in result-driven reasoning, defend a verdict rather than arrive at it, or defeat an appeal: at paras. 171-172.

[16] If a judge hears further submissions after a judgment is delivered and decides to change an order, the judge should issue supplemental reasons explaining the change, leaving the original judgment unaltered. In this case, an appeal had been filed before the revised judgment was released. I do not in any way suggest that the judge altered her oral reasons with an eye to the appeal, but substantively altering an oral judgment can make assessing grounds of appeal more difficult and may necessitate a rehearing. It is a practice that is to be assiduously avoided: *McIsaac* at para. 173.

On Appeal

[17] With that background, I turn to the first of the three grounds of appeal.

1. Are the judge's reasons sufficient to permit appellate review?

[18] Failure to provide sufficient reasons to permit appellate review is an error of law reviewable on a standard of correctness: *R. v. Sheppard*, 2002 SCC 26 at para. 28. This Court, in *K.L.K. v. E.J.G.K.*, 2011 BCCA 276 set out the test for sufficiency of reasons as follows:

[25] The function of reasons in the civil context is to justify and explain the result, to tell the losing party why he or she lost, to provide for informed consideration of the grounds of appeal, and to satisfy the public that justice has been done: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41.

The Supreme Court of Canada in *R. v. Walker*, 2008 SCC 34, described the approach to be taken in assessing the sufficiency of reasons:

[20] Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confere[r] entitlement to appellate intervention" (*R. v. Sheppard*, 2002 SCC 26] para. 53).

If the error is made out, the matter must be sent back for rehearing.

[19] The appellant submits the judge did not explain why she did not accept Dr. Colby's recommendation that she should be given final decision-making authority. The appellant acknowledges that the court is not required to follow the expert's recommendations, and that it is for the court to decide the matters at issue: *M.F.W. v. M.A.H.*, 2020 BCCA 284 at para. 22. But she submits that the judge was required to grapple with the live issue of how the parties' ongoing disputes over the children were to be addressed, and to explain why she rejected the mother's application to have the final say as recommended by the s. 211 report writer: *M.F.W.* at para. 25.

- [20] Although the judge's analysis on this issue is limited, in my view the judge gave two main reasons for her refusal to make the order sought. First, she was of the view that giving final decision-making authority to the mother would further divide the parties, and that the children's distress could be better addressed by "creating space" between their parents by using distance or shuttle mediation. This reasoning is evident in the following paragraphs:
- [26] I heard you, Mr. Haramati, that you are perceiving this differently. You do not necessarily think there is a communication problem. When I read the s. 211 report, I am seeing the children kind of saying, I am paraphrasing as well, "we need help to fix this somehow". It seems to me we are trying to make an order that does not further divide the parties. I am not prepared to make a variation that provides final decision-making to the claimant. I am not prepared to do that, but we need to reset for the children, to take steps to try to achieve some sort of peace.
- [29] I wish you good luck. I really have looked at the report, and I think that your children are hurting. I do not think that the way to resolve that is to remove one parent from final decision-making, but to create a bit of space between the two of you. To be very clear, that when that space does not exist, the children are hurting. When we say something bad about the other parent, even if it is that someone is mean or whatever that is, that hurts the children because they see themselves as being the two of you. So to some extent, when we speak badly about the other, they perceive that that is about them as well.
- [Emphasis added.]
- [21] Second, the judge was of the view that the s. 211 report had not addressed what she viewed as the inter-cultural differences in the parties' communication styles. That reasoning is evident in the following paragraphs:
- [12] I am very cognizant of the recommendations in the s. 211 report. Looking at the record, I noticed that the cultural difference that may occur between the parents or in the way the respondent expressed himself was not something particularly that the report addresses. I am conscious that some misunderstandings may have occurred due to intercultural differences in communication styles. I am curious about the degree to which that may have been an issue.
- [21] However, the parties both made further submissions suggesting a parenting coordinator be appointed. I suggested they find someone capable of working cross-culturally between them. At a continuation on October 18, 2021, they identified Dr. Ellie Bolgar as a mutually agreeable person.
- [Emphasis added.]
- [22] I would accordingly not accede to the first ground of appeal, as the basis for the judge's decision to dismiss the mother's application can be gleaned from the reasons. Whether those reasons contain reviewable errors is a distinct question, however, to which I now turn.

2. Did the judge err in her analysis of the best interests of the children?

[23] The order appealed in this case is a discretionary one entitled to considerable deference on appeal. In *Callaghan v. Charbonneau*, 2022 BCCA 167, Justice Harris, writing for the court, described the standard of review:

[8] [T]his Court approaches appeals of orders of this kind with a high level of deference. There are compelling policy reasons why that is so. A highly deferential approach promotes finality in family litigation, provides certainty to the parties and family members, and avoids offering an incentive to appeal discretionary judgments in the hope that another court will take a different view of the evidence and the circumstances of the parties. Orders [of this kind] are typically fact intensive and inherently discretionary. Appellate courts, accordingly, do not reweigh or re-evaluate the evidence, will interfere only in clear cases of legal error, will read judgments under appeal generously, assuming that the judge understands or appreciates the evidence, and will not search assiduously for error

[24] The appellant contends the judge made two legal errors in assessing the best interests of the children: first, by failing to consider the mandatory factors required by s. 37 of the Family Law Act, S.B.C. 2011, c. 25; and second, by focusing on irrelevant considerations such as the parties' relationship and cross-cultural differences in the parents' communication styles. For the reasons that follow, I conclude that the appellant has made out these errors and that appellate intervention is warranted.

[25] Although the judge recognized that she was required to consider what is in the best interests of the children, she did not refer to s. 37 of the Family Law Act, which provides:

37 (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

[Emphasis added.]

- [26] Consideration of the factors listed in s. 37(2) is mandatory: *N.R.G. v. G.R.G.*, 2017 BCCA 407 at para. 43. Of particular relevance to the issue before the judge and on appeal are ss. (d), (e), (f) and (i), underlined above.
- [27] Instead of focusing on these factors, the judge focused on the parents' relationship, noting that giving decision-making authority to one parent would further divide them, and considering the need to resolve their cross-cultural communication styles: at paras. 11-12.
- [28] The judge's consideration of the parties' cultural differences as a source of conflict was without any support in the record, and entirely speculative. Neither the parties, nor any of the experts who had worked with the family, identified such a concern. The parents had disagreed about the parenting schedule around Hanukkah and Christmas, but disagreement over who had the children for the holidays each celebrated did not mean the parties' inability to come to a solution had anything to do with communication styles rooted in their cultural backgrounds.
- [29] Further, and respectfully, it was an error for the judge to focus on improving the parent's relationship rather than the best interests of the children: *N.R.G.* at paras. 44-45; *Vincent v. Roche-Vincent*, 2013 BCCA 304 at paras. 31-32. Although it is certainly better for children if their parents are able to cooperate in making decisions about them (and orders such as counselling may be put in place to that end), the court in making orders is required to address the best interests of the children in their current circumstances. On the record before the judge, the evidence squarely established that the respondent was not capable of cooperative parenting. It was for that reason that Dr. Colby recommended co-parenting counselling for the respondent, a recommendation the judge accepted. When asked to clarify how often and for how long the respondent should engage in that treatment, Dr. Colby wrote:

It is advisable that the individual therapist providing services to Mr. Haramati be afforded a copy of the above Report which outlines issues of concern regarding ability to engage in a co-parenting process and presents concerns about the difficulty for him to be able to so engage. I cannot define for a therapist their professional process. A qualified professional who is authenticated by a professional regulatory process is competent in defining the therapeutic process. Likewise in regard to further question about frequency and timeline, that is a dynamic that is part and parcel of the therapist's intervention process and I cannot define that other than

to say that without a concerted engaged effort to functionally create change, the needs of the children in regard to coparenting cannot be met.

[Emphasis added.]

- [30] In the s. 211 report Dr. Colby explained that the parties had very different views of the children's need for counselling and medical interventions, noting that the respondent did not see the problems identified by the appellant. In his assessment he noted there was a paucity of cooperation between the parents on almost all issues, concluding it was "unlikely that these parents can reach any resolution to problem-solving as there is no agreement about whether or not there are problems that require solving." He therefore recommended:
9. that these parents reach consent on matters of Sec. 41 of the Family Law Act across a wide spectrum of decisions regarding the children's status including matters of education, religion and medical care. If there is a disagreement between these parents, it is recommended that Ms. Harrison be afforded decision-making authority in that regard as she has been most actively engaged in the children's care since their birth.
- [31] The respondent submits that Dr. Colby gave a very thin reason for recommending final decision-making power should be held by the appellant, referring to only the mother's historical involvement in the children's care. However, the recommendation must be read in the context of the report as a whole which identified the father's failure to "see the problems", and recognized the appellant as the parent who had identified problems and obtained the care the children needed.
- [32] Further, Dr. Colby observed that all therapists he spoke to raised concerns about Mr. Haramati's communication skills:

There are serious issues raised in terms of Mr. Haramati's emotional and psychological status and communication skills. It is noted that all therapists who were approached and are listed as professional collaterals have validated and raised concern regarding Mr. Haramati's communication skills. He presents as someone who is not willing to accept input from others that he does not agree with. He will terminate services, refuse to pay for services or simply ignore the direction that is provided to him. This presents as a serious matter in terms of both his use of control in regard to matters of dispute and allegations that are raised in regard to his engagement in more direct physical confrontation. The factors that result in the discrepancy between his statements and the observations of others is significant and raises issues regarding matters of credibility.

[Emphasis added.]

Dr. Colby noted that in parenting coordinator G.C. Scott's assessment, the respondent was more focused on his needs rather than the children's, and on power and control.

- [33] Having found sustained acrimony between the parties (at para. 8) and that the children were distressed by the conflicted dynamic (at para. 10), the judge was required to consider how to relieve that distress in the best interests of the children. Her focus on the relationship between the parents distracted her from that task and led her into error.
3. Did the judge misapprehend the evidence?
- [34] The appellant submits the judge misapprehended the evidence about what interventions had been tried to resolve the parties' ongoing conflicts about the children. It appears the judge's initial view was that the parties should be required to utilize shuttle or distance mediation "given what seemed to be a history of conflict escalation": at para. 20--despite evidence that the parties had tried mediating with Ms. Peterson as a parenting counsellor who met with the parties together and individually. It is unclear from the reasons whether the judge misapprehended this evidence or simply did not consider it. As outlined above, the respondent had refused to cooperate or to continue with that approach and Ms. Peterson had withdrawn her services. The inadequacy of a mediation order at this stage of the parties' history was evident from their request to stand down and then to ask that a parenting coordinator remain in place.
- [35] The appellant applied for final decision-making authority because the parties had already tried co-parenting mediation and a parenting coordinator without success and at considerable expense. The judge did not consider whether it would be better for the children to have decisions affecting them made by one parent. Assigning some or all of the s. 41 decision-making to one parent is an appropriate incremental step in circumstances of ongoing conflict. As this Court observed in *K.P.B. v. K.E.*, 2019 BCCA 152:
- [22] A provision granting one parent final decision-making authority is not uncommon, particularly in high conflict relationships. It provides a mechanism whereby the parties do not have to apply to the court to determine every parenting issue on which they may disagree. The purpose of the provision is to minimize the negative consequences of ongoing litigation. An alternative measure sometimes employed is the appointment of a parenting coordinator pursuant s. 15 of the FLA; however, that is at a cost to the parties and may not always be an affordable option.
- [36] Having found errors justifying appellate intervention, in my view we are in a position to make the order sought rather than remitting the matter for rehearing.
- [37] The respondent submits that the appellant should not be granted final decision-making authority for three reasons. First, he says that if the appellant was not satisfied with the judge's failure to consider the s. 37 factors, she could have asked the judge to clarify her reasons. However, the judge's invitation to the parties to seek clarification concerned the orders she had made. As noted above, it is not open to a judge to substantively alter or supplement a judgment once delivered.

- [38] Second, the respondent objects to final decision-making authority being given to the appellant on the basis that it would only lead to further conflict. In particular, he says the appellant could relocate with the children or remove them from their current school, citing past incidents that caused him concern. Without getting into the specifics of the past issues between the parties on these matters, it is evident that the respondent's concerns are not justified. Paragraph 8 of the Consent Order prohibits either party from relocating outside of the Lower Mainland or Fraser Valley without the other parent's consent, and para. 9 prohibits either party from changing the residence or school of the children without the written consent of the other parent.
- [39] Third, the respondent says that if the parties cannot agree and the appellant gets to make a decision, he will have to apply to court to challenge her decision. Although that avenue may be available to the respondent, the prospect of further court proceedings does not nullify the benefits of giving the appellant final decision making authority. It takes time for court applications to be filed and heard. In the interim, a decision can be made for the children and put into effect. Further, unreasonable challenges are likely to be met with cost awards against the applicant which will act as a disincentive to ongoing applications. I note that the appellant will still be required to consult with the respondent before making final decisions.

Disposition

- [40] I would allow the appeal and vary paras. 2 and 5 of the Consent Order to provide that in the event of a disagreement respecting the children, the appellant will have final decision-making authority.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Willcock"

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