

CANADA / JUDGMENT

Hasan v. Hasan

2020 BCSC 862

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 862 Hasan v. Hasan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hasan v. Hasan,

2020 BCSC 862

Date: 20200609

Docket: E56159

Registry: New Westminster

Between:

Nadia Hasan

Claimant

And

Khwaja Masoodul Hasan

Respondent

Before: The Honourable Justice Shergill

Reasons for Judgment - RUH

Counsel for Claimant:

B.C. Hirsch

Counsel for Respondent:

T.A. Hakemi

Place and Date of Hearing:

New Westminster, B.C.

May 26, 2020

Place and Date of Judgment:

New Westminster, B.C.

June 9, 2020

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I. Overview

[1] This matter was heard by telephone conference call, under the BC Supreme Court's COVID-19 Notice No. 8 protocol for urgent hearings dated April 16, 2020.

[2] The parties' 19-year relationship ended with separation in September 2018. The relationship produced three children, ages 9 (L.), 13 (A.), and 18 (H.). This application concerns parenting orders in relation to the two younger children. Specifically, the claimant mother seeks an order for immediate return of the children to the lower mainland area; an order prohibiting the respondent father from travelling outside the lower mainland with the children without the express written consent of the claimant; an order that the respondent immediately surrender the children's US and Canadian passports and access cards to the claimant; and special costs fixed at \$5,000 payable forthwith, or in the alternative, costs fixed at \$1,000 payable forthwith.

- [3] The genesis of the application is the mother's concern that the father has been taking the children on trips to the United States, in the midst of a pandemic, and is thereby exposing the children to unnecessary risks of contracting the novel coronavirus (COVID-19).
- [4] The father opposes the application, arguing that it is moot because by the time I pronounce my judgment, the children will have returned to Canada; that it is premature because the parties have a consent order which requires the mother to try to mediate this issue before filing this application; and otherwise lacks merit.

II. Background

- [5] The central facts in this case are not in dispute.
- [6] These family law proceedings were commenced by the mother shortly after the parties separated in September 2018.
- [7] On May 10, 2019, the parties entered into a consent order, agreeing to joint custody and joint guardianship of the children, with shared parenting time on a week-on, week-off schedule. The following clauses of the consent order are relevant to the issues raised in this proceeding:
 - 25. BY CONSENT, the parties will be obligated to discuss with the other any significant decisions which have to be made with respect to the Children, including decisions concerning the health (except emergency decisions), education, religious instruction, and general welfare of the Children, and each shall be obligated to try to reach agreement with respect to those major decisions.
 - 26. BY CONSENT, in the event they cannot reach agreement with respect to any major decisions despite their best efforts, the parties will attend mediation or participate in some other dispute resolution process prior to making an application to the Court.
 - 32. BY CONSENT, the parties will communicate any proposed changes to the parenting schedule contained in this Order at least seven days prior to the proposed change. Changes must be agreed upon in writing.
 - 33. BY CONSENT, each of the parties shall be free to travel outside of Canada with the children and each party shall provide the Children's passports to the other and provide a travel authorization at least one week prior to the commencement of the travel. The travelling party shall provide a full itinerary with details of accommodation and contact numbers at least one week prior to the commencement of travel.
 - 40. BY CONSENT, in the event any issues arise from the orders herein, the parties shall attend mediation, with the costs to be shared equally, before bringing the matter to Court. The parties have agreed that the mediator for parenting and children's issues shall be Morag MacLeod, and for financial issues shall be Alan Schapiro.

- [8] Issues arose with respect to the children's travel shortly before Christmas of 2019. On December 16, 2019, the respondent notified the claimant that he would be travelling with the children from December 18, 2019 to December 31, 2019. By agreement of the parties, the respondent was to already have the children from 8:00 am on December 19, to December 31, 2019. However, the respondent's parenting time with the children ended at 8:00 am on December 18, such that the bulk of that day fell during the claimant's parenting time.
- [9] As the children were supposed to be in school on December 18, and were also scheduled to participate in a Christmas concert later that day, the claimant advised the respondent that she did not consent to the respondent travelling with the children on December 18. Nevertheless, the respondent proceeded with his travel plans, telling the claimant that he could not change the flight departure date. The respondent left with the children on December 18, 2019, against the claimant's wishes, and the children missed school and their Christmas concert on December 18.
- [10] In March 2020, the parties executed a final draft of a consent order in relation to parenting time for the 2020 year.
- [11] On March 11, 2020, A. told the claimant that he and L. would be travelling to Virginia with the respondent on March 12, 2020. The respondent had not provided the claimant with notice of this travel or a travel itinerary. The claimant advised the respondent that she did not consent to the travel.
- [12] Despite the claimant's position, the respondent travelled with the children to Virginia on March 12, 2020. On the same day, the children's school sent out a notice via email to all parents advising that any students travelling outside of Canada would be required to stay away from school for a period of 14 days on their return.
- [13] On March 16 and 18, 2020, the claimant asked that the respondent immediately return the children to Canada due to concerns about the pandemic. The respondent did not return the children to Canada until March 22, 2020, completing the vacation with the children as planned.
- [14] On May 5, 2020, the respondent emailed the claimant indicating that he intended to travel with the children to Virginia from May 13, 2020 to May 26, 2020. The claimant replied by email the same day, notifying him that she did not agree to this travel due to the COVID-19 pandemic. The respondent did not reply to her email until the scheduled date of departure, May 13, 2020, when he sent an email advising the claimant that he disagreed with her concerns. He left Canada with the children on the same day.
- [15] This application was heard on the morning of May 26, 2020. At that time, the children had still not returned from Virginia. Counsel for the respondent advised the court that they would be back from Virginia in time for their 4:00 pm parenting time exchange set for later the same day.

III. Legal Framework

- [16] With respect to parenting arrangements, s. 37 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] requires this court to consider the best interests of the children only. An order is not in the best interests of the children unless it protects, to the greatest extent possible, the children's physical, psychological and emotional safety, security and well-being.

IV. COVID-19 Orders

- [17] Although the parties did not refer to all the recent health guidelines and orders relating to COVID-19 from the provincial and federal governments, I find I am able to take judicial notice of these guidelines and orders: see *R. v. Find*, 2001 SCC 32 at para. 48; *A.J.H. v. J.K.H.*, 2020 BCPC 74 at para. 48; and *R. v. Morgan*, 2020 ONCA 279 at para. 8.
- [18] On March 17, 2020, the Provincial Health Officer issued a notice stating that COVID-19 constituted a "regional event" which met all of the criteria for exercise of emergency powers under Part 5 of the Public Health Act, S.B.C. 2008, c. 28. On the same day, the Provincial Health Officer issued a self isolation order directing people returning to or arriving in British Columbia from international destinations, including the United States, to self isolate.
- [19] On March 18, 2020, a well-publicized provincial state of emergency was declared to support the BC-wide response to the COVID-19 pandemic.
- [20] On March 21, 2020, the government of Canada placed a 30-day restriction on all non-essential (discretionary) travel at the Canada-US border. This order was extended and continues to remain in force.
- [21] On March 25, 2020, the federal government implemented a mandatory self isolation (quarantine) plan under the Quarantine Act, S.C. 2005, c. 20 for returning international travellers. The order is enforceable by the RCMP or local police and stipulates penalties for breaking self isolation orders including a fine of up to \$750,000 or imprisonment for six months.

V. Analysis

A. Is the Application Moot?

- [22] In her notice of application, the claimant asks that the respondent return the children to the lower mainland of British Columbia immediately. At the time that the notice of application was filed, the children were still in Virginia. However, they were scheduled to return to British Columbia later in the same day after the hearing of this application.
- [23] In light of this, I agree with the respondent that the request to have the children returned to the lower mainland of British Columbia is now moot.

B. Is the Application Premature?

- [24] The respondent argues that the application is premature because the claimant did not attempt to mediate the issues as required by clauses 26 and 40 of the consent order. I disagree.
- [25] Given the urgency and seriousness of this matter, the respondent's past conduct in making international travel plans without consulting the claimant or against the claimant's wishes, the respondent's steadfast refusal to refrain from traveling abroad with the children during a pandemic, and the potential for risk of harm to the children, it was reasonable for the claimant to seek an urgent hearing, rather than waiting for a mediation to be conducted.
- [26] At clause 25 of the consent order, the parties effectively acknowledge that a health emergency will preclude the need for consultation on matters concerning the children's health. In my view, the issue brought by the claimant was a matter of urgency relating to the children's health, and obviated the need for the claimant to attempt mediation before going to court.
- [27] I also note the inconsistency in the respondent's position. He relies on the consent order to thwart the claimant's legitimate efforts to try to ensure the children's safety and well-being. Yet, he ignores provisions of the consent order that require him to consult with the claimant on significant decisions regarding the children, and to provide details of his travel plans with the children at least one week in advance. The decision to travel during a pandemic and against government advisories restricting non-essential international travel is a major decision concerning the children's health. It was incumbent upon the respondent to discuss his plans with the claimant before subjecting the children to international travel. His unilateral decision to take the children to Virginia against their mother's wishes was a clear violation of the very same consent order upon which he now wishes to rely.
- [28] For the foregoing reasons, I conclude that the claimant was entitled to schedule this application for hearing, notwithstanding the requirement that the parties first attempt mediation.

C. Merits of the Application

- [29] The respondent argues that the application lacks merit because:
- a) the pandemic does not form a basis to vary the consent order and/or rebut the presumption that the arrangements set forth in the consent order are in the best interests of the children;
 - b) it is not in the best interests of the children to vary the consent order;
 - c) the respondent has taken reasonable and necessary precautions and acted in the best interests of the children;
 - d) the orders sought to vary the consent order are overreaching, as they give the claimant sole authority over decisions made regarding the children and are unlimited in duration; and
 - e) there is no basis for ordering special costs.

- [30] There is a presumption that arrangements set forth in a parenting order are in the best interests of a child. However, the needs or circumstances of the child may change since the making of an order. As such, section 47 of the FLA permits this court to vary an order respecting parenting arrangements if satisfied that since the making of the order there has been a change in the needs or circumstances of the child.
- [31] The order sought to be varied was entered into in May 2019. The global outbreak of novel coronavirus (COVID-19) was recognized as a pandemic in March 2020. Flowing from that, the British Columbia government and Canadian government made various orders in relation to international travel.
- [32] Specifically, the government of Canada placed a 30-day restriction on all non-essential (discretionary) travel at the Canada-US border. Despite this, the respondent continued to travel with the children across a closed international border for travel that is not essential.
- [33] The respondent argues that the claimant has not adduced evidence to show that the children are safer in this province than they are in Virginia, or that airline travel is dangerous for the children.
- [34] It is not necessary for the applicant to provide specific proof of harm, in order for this court to determine that it would not be in the best interests of the children to permit the respondent to have unfettered permission to travel with the children. As held by the Court in *Leveque v. Leveque* (1983), 54 B.C.L.R. 164 (C.A.) [also known as *L. (B.J.) v. L. (E.J.)*] at para. 13:

When the welfare of children is concerned, the question is not so much whether specific allegations of misconduct have been proven, but whether on the whole of the evidence there arises a real risk to the children if access is given without protection against that risk.

- [35] There is ample evidence that the respondent's actions by travelling across international barriers during this pandemic have put the children at real risk of harm. The government prohibition against non-essential international travel, the closing of the Canada-US border, and the requirement of a mandatory quarantine period of two weeks when one returns from travel to the United States, are clear indication that the governmental and health authorities consider the coronavirus to be so dangerous that protection of the public requires these extreme measures be put into place.
- [36] As noted by the Court in *Morgan* at para. 8, "it falls within the accepted bounds of judicial notice for us to take into account the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission."
- [37] To the extent that it is necessary, I also take judicial notice of the fact that a variety of agencies and institutions, including the BC Supreme Court, have released well-publicized guidelines to address the risks posed by the ongoing COVID-19 pandemic. The global travel advisory issued by the Government of Canada advising against all non-essential travel

outside of Canada, the fact that the RCMP and local police have been given powers to enforce the quarantine imposed by the federal government for people returning from international travel, and the extremely stiff penalties for breaking self isolation orders are all indicative of the seriousness of the potential risk of contracting or transmitting coronavirus.

- [38] I note also that several recent decisions have commented on the risks involved in long-distance travel during the current pandemic, even where that travel is within Canada. In *Amirzada v. Alemy*, 2020 ONSC 1979, the Court refused the mother's application to allow her to travel from Ontario to Vancouver, noting at para. 31(d) that such travel is against the advice of public health experts. The Court determined that this interprovincial travel both posed a threat to the children's health and created public health concerns.
- [39] In *Onuoha v. Onuoha*, 2020 ONSC 1815, the Court noted at para. 10 that it would be "foolhardy" to expose children to international travel given the evolving nature of international travel restrictions.
- [40] In *S.B. v. M.P.*, 2020 BCPC 68, the Court concluded at para. 36 that lengthy international travel involving stopovers in American cities would unnecessarily risk the children's health and would not be in their best interests.
- [41] I am not swayed by the respondent's argument that he has taken reasonable precautions to ensure the health and safety of the children. Travelling internationally or even on domestic flights, creates risks for children in airplanes, airports and dining facilities, even if precautions are taken.
- [42] In my view, the real risk of harm to the children is not ameliorated even if the respondent takes the precautions he has outlined. Notably, the restriction against non-essential travel does not indicate that non-essential travel is acceptable if the necessary precautions are taken. Rather, precautions are necessary even in the case of essential travel. Here there is no evidence that the children's trips to Virginia to spend time with family and friends, constitute essential travel.
- [43] The respondent's argument that if the coronavirus truly posed a risk of harm to the children, the government authorities would not have permitted him to travel internationally with the children, is also untenable. It ignores the responsibility that the respondent has towards protecting and promoting the best interests of the children. Deflecting his responsibility to health authorities flies in the face of the duty he has as a parent and guardian of the children to act in accordance with their best interests.
- [44] I now turn to the respondent's argument that the claimant's demand that the children be returned immediately to Canada indicates that the children are not at risk of harm, since returning to Canada would require them to travel across international boundaries. I find this argument to be wholly without merit. Being in the safety of their own home, where they can be cared for by both parents, and complete their academic year, is clearly in their best

interests. The fact that the children will have to be exposed to further danger by crossing international boundaries and travelling through airports is an undesirable situation of the respondent's making. Nevertheless, in the circumstances, it is far preferable to leaving them in Virginia.

- [45] It is not disputed that the children have a strong connection to Virginia. The parties were married in Virginia, and the two older children were born there. The respondent's family continues to reside in Virginia. The children spend most of their summer parenting time with their father in Virginia, as well as part of their winter break, including celebrating Ramadan and Eid there with family. They also have friends in Virginia.
- [46] However, Virginia is not their home. Their home is in BC. Maintaining the children's health and safety supersedes their need to maintain their connection to friends and family in Virginia. In this case, the children will have access to the love, guidance, and support of both parents without subjecting them to the risk of international travel. While I appreciate that the children have a strong connection to Virginia, the current pandemic requires that parties put their routines and activities on hold: see *Ribeiro v. Wright*, 2020 ONSC 1829 at para. 8.
- [47] I also reject the respondent's suggestion that the current application is simply a tactic to interfere in his parenting time, as discussed in *J.R.K.P. v. L.A.S.*, 2020 BCPC 73 at para. 6. To the contrary, it is clear that the mother's application has been made with the best interests of the children in mind, and that it is the father who has "resorted to harmful gamesmanship" in his approach (*Brazeau v. Lejambe*, 2020 ONSC 3117 at para. 30).
- [48] The rather cavalier attitude exhibited by the respondent in the events leading up to this application, as well as the unreasonable position taken by him during the application, are concerning. It was evident that the respondent had not considered, or did not care about, the fact that the mother would not be able to exercise her parenting time with the children when they were returned to her at 4:00 pm on May 26, because the children will be required to self-isolate for 14 days on their return. As the parties are currently on a two week-on, two week-off schedule, this would be the entirety of the claimant's two-week parenting time with the children. This total disregard of the impact of his actions on the claimant's parenting time is indefensible.

- [49] As noted in *Ribeiro* at para. 14:

in some cases a parent's lifestyle or behaviour in the face of COVID-19 (for example, failing to comply with social distancing; or failing to take reasonable health-precautions) may raise sufficient concerns about parental judgment that direct parent-child contact will have to be reconsidered. There will be zero tolerance for any parent who recklessly exposes a child (or members of the child's household) to any COVID-19 risk. (Emphasis added)

(see also *Amirzada* at paras. 27-30)

- [50] While the actions of the respondent up to this point do not raise sufficient concern to justify a change in parental contact, I view any non-essential international travel during the current pandemic to be against the children's best interests. Continuing to expose the children to unnecessary risks created by international travel, or even domestic travel which requires traveling through airports and on airplanes, is reckless.
- [51] The evidence in this case is sufficient to establish that the respondent has exposed the children to unnecessary health risks by travelling across international barriers during this pandemic, and that there is a real risk that he will continue to do so, unless safeguards are put into place to protect against that risk.

VI. Conclusion

- [52] The evidence in this case supports a finding that the children's needs or circumstances have changed such that variation of the consent order entered into in May 2019 is necessary in order to protect and promote their health and well-being.
- [53] Arriving at an order that adequately protects the children from real risk of harm, while respecting the autonomy of a parent to freely travel with their child, is a delicate balancing act. The goal is not to eliminate all risk, but to bring the risk to an acceptable level, recognizing that the best interests of the child require consideration of not only the physical health, but also the emotional well-being of children. In my view, restricting all travel outside the lower mainland is unnecessary. While travelling to smaller communities within BC for non-essential purposes is discouraged by the provincial health officers, it does not expose the children to the same risks posed by international travel, or domestic travel by airplane.
- [54] I find that the safety concerns of the children can best be addressed by placing restrictions on international travel, and any domestic travel requiring the children to travel through airports and on airplanes. I conclude that it is appropriate to order that neither party be permitted to embark on this travel with the children without the written consent of the other, or a court order.
- [55] I turn now to the concern that the order is far-reaching because it is of unlimited duration. In light of the constantly evolving situation with respect to COVID-19, it is difficult to anticipate when the risk posed by international travel, or travel by airplane, will be reduced to an acceptable level, such that the best interests of the children warrant the removal of these travel restrictions. As such, pronouncing an order of limited duration is not in keeping with the best interests of the children. Subject to clauses 26 and 40 of the May 10, 2019 consent order, should the threat of COVID-19 dissipate such that it is in the best interests of the children to remove the restrictions on travel, it is always open to the parties to apply to the court to seek a variation under s. 215 of the FLA.
- [56] I therefore make the following orders:

- a) The relief sought under Clause 1 of the notice of application, is moot and therefore dismissed.
- b) The May 10, 2019 Order is varied such that without the express written consent of the other party or court order:
 - i. Each party is prohibited from international travel with the children; and
 - ii. Each party is prohibited from domestic travel with the children by airplane.
- c) The respondent is to immediately surrender the children's US and Canadian passports and NEXUS cards to the claimant.

VII. Costs

- [57] I turn now to the question of costs. The claimant seeks special costs of this proceeding, fixed at \$5,000 and payable forthwith. She argues that the respondent's conduct was reprehensible and worthy of rebuke, given that he unnecessarily exposed the children to the health risks of international travel during the global pandemic, crossed international borders closed to non-essential travel, and dismissed the concerns of the claimant.
- [58] The respondent resists the making of such an order, simply arguing that he has at all times upheld if not surpassed the standard expected of parents with respect to the care of their children. Indeed, the respondent seeks his own costs fixed at \$1200 payable forthwith on the grounds that this application was unnecessary and without merit.
- [59] Costs are generally awarded to the successful party. In family law proceedings, where there is mixed success, costs are generally awarded to the party that has achieved substantial success. In this case, the claimant has achieved substantial success, and is therefore entitled to her costs.
- [60] Special costs are awarded to a litigant where the other party has engaged in reprehensible conduct: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17. They are punitive in nature and encompass an element of deterrence: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 8.
- [61] Reprehensible conduct encompasses many types of conduct. It can include conduct which is scandalous or outrageous, or simply misconduct deserving of reproof or rebuke: *Garcia* at para. 17.
- [62] I note the observations of Justice Ballance in *D.R. v. E.P.R.*, 2016 BCSC 550 at para. 75, where she discussed special costs in the context of family proceedings. In noting that family law lends itself to highly charged emotions in an environment of anger and distrust, she concluded that a reasonable dose of forgiveness should be afforded to family law litigants in evaluating their alleged misbehaviour in the litigation.

[63] While the conduct of the respondent is concerning, I conclude that the circumstances of this case do not warrant an award of special costs. The claimant is awarded her costs fixed at \$1,000, payable forthwith.

"Shergill J."

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