

CANADA / JUDGMENT

Morales v. Puri

2016 BCCA 216

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCCA 216 Morales v. Puri COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Morales v. Puri, 2016 BCCA 216 Date: 20160520 Docket: CA43134 Between: Madison Pereira Morales Respondent (Claimant) And Yougesh Puri Appellant (Respondent) Before: The Honourable Chief Justice Bauman The Honourable Mr. Justice Frankel The Honourable Mr. Justice Goepel On appeal from: An order of the Supreme Court of British Columbia, dated September 1, 2015 (Morales v. Puri, New Westminster Docket E48767). Counsel for the Appellant: S. Ali Counsel for the Respondent: K.A. Quong Place and Date of Hearing: Vancouver, British Columbia March 17, 2016 Place and Date of Judgment: Vancouver, British Columbia March 17, 2016 Place and Date of Reasons: Vancouver, British Columbia May 20, 2016 Written Reasons of the Court Summary: Appeal from orders made at a judicial case conference. The judge made orders concerning guardianship and access despite knowing that he lacked jurisdiction to do so as he did not have the parties' consent. At the eleventh hour, the respondent conceded the appeal and opposed costs being awarded to the appellant on the basis that both parties were receiving legal aid. Held: Appeal allowed, contested orders set aside, costs awarded to the appellant. Rule 7-1 (Judicial Cases Conferences) of the Supreme Court Family Rules limits the types of orders that can be made at a judicial case conference without consent. The respondent's actions led to much of the time and expense spent prosecuting the appeal. Her financial circumstances were not a reason for not awarding costs against her. Reasons for Judgment of the Court:

Introduction

- [1] This appeal concerns orders that a judge of the Supreme Court of British Columbia made at a family law judicial case conference. The judge made the orders knowing that he lacked the jurisdiction to do so. At the conclusion of the hearing we allowed the appeal with reasons to follow. Relevant Court Rules
- [2] Rule 7-1 (Judicial Case Conferences) of the Supreme Court Family Rules, governs judicial case conferences. Sub-rule 15 sets out what a judge conducting a judicial case conference can do. That sub-rule reads: The court may do one or more of the following at a judicial case conference:

- (a) identify the issues that are in dispute and those that are not in dispute and explore ways in which the issues in dispute may be resolved without recourse to trial;
- (b) make orders to which all the parties consent;
- (c) mediate any of the issues in dispute;
- (d) with the consent of the parties, refer the parties to a family dispute resolution professional, within the meaning of the Family Law Act, other than a family justice counsellor;
- (e) refer the parties to a family justice counsellor, or to a person designated by the Attorney General to provide specialized support assistance, if the court has received written advice from the regional manager that the family justice counsellor or designated person is readily available to the parties;
- (f) direct a party to attend the Parenting after Separation program operated by the Family Justice Services Division (Justice Services Branch), Ministry of Justice;
- (g) make orders respecting amendment of a pleading, petition or response to petition within a fixed time;
- (h) make orders requiring that particulars be provided in relation to any matter raised in a pleading;
- (i) make orders respecting discovery of documents;
- (j) make orders respecting examinations for discovery;
- (k) direct that any or all applications must be made within a specified time;
- (l) reserve a trial date for the family law case or reserve a date for a trial that is restricted to issues defined by the parties;
- (m) set a date for a trial management conference under Rule 14-3;
- (n) make any orders that may be made at a trial management conference under Rule 14-3 (9);
- (o) without hearing witnesses, give a non-binding opinion on the probable outcome of a hearing or trial;
- (p) without limiting any other orders respecting timing that may be made under this subrule, make orders respecting timing of events;
- (q) adjourn the judicial case conference;
- (r) direct the parties to attend a further judicial case conference at a specified date and time;
- (s) make any procedural order or give any direction that the court considers will further the object of these Supreme Court Family Rules. [Emphasis added.] Factual Background

- [3] On May 12, 2015, the respondent, Madison Pereira Morales, filed a notice of family claim against the appellant, Yougesh Puri. The parties have one child, a daughter born in 2007.
- [4] On September 1, 2015, the parties and their respective counsel attended a judicial case conference. Martha Metzner represented Ms. Morales; Shane Ali represented Mr. Puri.
- [5] Near the beginning of the judicial case conference, Ms. Metzner advised the judge that Ms. Morales and her daughter were fearful of Mr. Puri and that there were court orders that prohibited Mr. Puri from having direct or indirect contact with Ms. Morales. After discussing child support and financial matters, the judge stated: Now, let's go to what I think is really the main issue. In view of the restraining order, an additional order that's in place, Ms. Metzner, what does your client want by way of an order other than sole guardianship and sole control over the affairs of her daughter? Ms. Metzner stated that Ms. Morales wanted Mr. Puri's access to their daughter to be at Ms. Morales's sole discretion and on whatever conditions Ms. Morales deemed appropriate.
- [6] During the discussions that followed it was clear that while Mr. Puri wanted physical access to his daughter, Ms. Morales would only agree to non-physical access, such as by telephone or Skype. After Mr. Ali indicated Mr. Puri was not consenting to any order being made with respect to sole guardianship or parenting responsibilities, the following exchange took place: THE COURT: - - I'm going to make the orders even though they're not by consent, and if a party is aggrieved by that, they can appeal to the Court of Appeal. MS. METZNER: My client has agreed with every - - every order up until - - THE COURT: Well, Ms. Metzner, whether she has consented or not, it's clear to me that everything that I have ordered has not been by consent, and therefore I'm making the orders whether they are by consent or not. If either of the parties wishes to take an appeal, they know how to do it. All I'm saying, Ms. Metzner, is you - - by raising the issue, you have made it absolutely clear that everything that I've ordered was not by consent and therefore, you have established a lack of jurisdiction for me to have done what I have done. [Emphasis added.]
- [7] Then the judge made a number of orders for which he did not have both parties' consent. Those orders, which are the subject matter of this appeal, are as follows:
- (a) granting Ms. Morales sole guardianship, sole parental responsibilities, and primary residence of the child on an interim basis;
 - (b) requiring Ms. Morales to give Mr. Puri's parents access to the child on Saturdays;
 - (c) granting Mr. Puri supervised access to the child at his parents' residence;
 - (d) providing that after April 1, 2016, either party can bring an application to review Mr. Puri's supervised access; and
 - (e) requiring Mr. Puri to provide the child with a cellular telephone at his cost to facilitate telephone access with her on Tuesday and Thursday evenings.

- [8] A formal order--entitled "Judicial Case Conference Order"-- was entered on September 10, 2015. That order contains 12 terms, five of which are in issue on this appeal.
- [9] On September 30, 2015, Mr. Puri filed a notice of application for leave to appeal the judge's order with respect to the five terms in issue. The ground of appeal set out in that notice is that the judge did not have jurisdiction to order those terms without consent.
- [10] On October 9, 2015, Ms. Morales filed a notice of appearance. That same day, Mr. Puri filed an application in the Supreme Court for an order permitting him to obtain a transcript of the judicial case conference for the purposes of the appeal. That application was necessitated by Rule 7-1(19) of the Supreme Court Family Rules, which provides that "no part of [the recording of a judicial case conference] may be made available to or used by any person without court order."
- [11] On October 21, 2015, Mr. Puri filed an amended notice of application for leave to appeal to correct a technical error in the original notice.
- [12] On October 23, 2015, Mr. Justice Willcock granted Mr. Puri's application brought under Rule 56 of the Court of Appeal Rules, exempting Mr. Puri from the requirement to pay court fees.
- [13] Both Mr. Puri and Ms. Morales filed motion books on the leave application. By that time, Kevin A. Quong acted for Ms. Morales.
- [14] On December 7, 2015, the leave application came on before Mr. Justice Groberman. Ms. Morales opposed the application. Mr. Justice Groberman granted leave. In his reasons for judgment, Groberman J.A. noted that the appeal would present costs and serious inconvenience for the parties. He suggested that the parties should consider looking at ways of getting the matter back before the trial court in a situation where a judge has jurisdiction to make orders concerning access and guardianship. Mr. Justice Groberman referred the appeal for case management.
- [15] On January 15, 2016, Madam Justice Fenlon held a case-management conference. Mr. Ali indicated that an order with respect to the transcript had been made but he had yet to receive the transcript. Mr. Quong stated that the transcript was necessary for the appeal. Madam Justice Fenlon asked the parties to consider whether an agreement with respect to the disposition of the appeal was possible without proceeding to a full hearing. She indicated that if the appeal was successful, then the court might make a costs order against Ms. Morales. The matter was adjourned to January 18, 2016, for a further case-management conference.
- [16] At the January 18, 2016 case-management conference, Fenlon J.A. gave directions for the filing of material necessary for the hearing of the appeal. She gave the parties leave to use the motion books filed on the leave application as their respective factums and set the appeal to be heard on March 17, 2016.

- [17] On February 5, 2016, Mr. Puri filed an appeal record that contains the transcript of the judicial case conference. On February 10, 2016, he filed additional copies of his motion book and a book of authorities.
- [18] On February 16, 2016, Mr. Quong wrote to Mr. Ali to advise that he had instructions from Ms. Morales to consent to the appeal on the condition that the parties be directed to a further judicial case conference as soon as possible. Mr. Quong said that if Mr. Puri agreed, then the hearing date for the appeal could be vacated.
- [19] On March 14, 2016, Mr. Ali wrote to this Court's deputy registrar to advise that when the appeal came on for hearing on March 17, 2016, the parties would be asking that it be allowed by consent with an order for a further judicial case conference. Mr. Ali further advised that the parties would be speaking to costs.
- [20] When the appeal came on for hearing on March 17, 2016, Ms. Morales agreed that the terms of the order under appeal were made without jurisdiction and should be set aside.
- [21] Mr. Puri sought costs of the appeal. Ms. Morales stated that although she would have sought costs had the appeal been dismissed, she opposed costs being awarded to Mr. Puri. Counsel stated that the Legal Services Society had granted legal aid to both Ms. Morales and Mr. Puri. We were also told that when a costs order is made against a person who has been granted legal aid, that person is personally responsible for those costs.
- [22] At the conclusion of the hearing, we allowed the appeal, set aside the five disputed terms in the order, directed the parties to schedule a judicial case conference as soon as reasonably possible, and awarded Mr. Puri costs of the appeal. Discussion Validity of the Order Made Without Consent
- [23] That a judge conducting a judicial case conference has a limited ability to make non-consensual orders was decided more than nine years ago by this Court in *Harrison v. Harrison*, 2007 BCCA 120, 64 B.C.L.R. (4th) 318. That case dealt with former Rule 60E of the Supreme Court Rules of Court (Family Law Proceeding--Judicial Case Conferences), the predecessor of the present Rule 7-1 of the Supreme Court Family Rules. Sub-rule 12 set out what could be done at a conference held under Rule 60E. That sub-rule read: At a judicial case conference, the judge or master may
- (a) make any of the following orders, whether or not on the application of a party:
 - (i) the pleadings be amended or closed within a fixed time; (ii) a party deliver a list of documents or a statement in Form 89 within a fixed time; (iii) interlocutory applications be brought within a fixed time; (iv) examinations for discovery be conducted within a schedule that the court directs;

(v) setting limitations on discovery procedures; (vi) experts' reports be exchanged within a schedule that the court directs; (vii) the parties attend a mini-trial or settlement conference; (viii) the proceeding be set for trial on a particular date or on a particular trial list, subject to the approval of the Chief Justice, and

(b) make any other order with the consent of the parties. [Emphasis added.]

[24] In Harrison, the judge conducting a judicial case conference made a declaration under s. 57 of the now repealed Family Relations Act, R.S.B.C. 1996, c. 128, that the spouses had no reasonable prospect of reconciliation, a "triggering event" for the purposes of determining and dividing family assets. That declaration was made without Mrs. Harrison's consent, notwithstanding the fact that it was not one of the types of orders listed in sub-rule 12(a). In holding that the judge should not have made the declaration, Chief Justice Finch stated:

[22] I am therefore of the view that there was no mutual consent to a s. 57 declaration being made at the Judicial Case Conference, and that the case conference judge erred when he said that he did "not need consent" to make the order. It is clear that in the absence of consent, the s. 57 declaration was an order not contemplated by Rule 60E(12), and ought not to have been made at the Judicial Case Conference.

[25] From a review of the transcript of the proceedings before the judge it is clear that he was dealing with a difficult, high conflict family dispute. The judge made considerable efforts to encourage the parties to come to an agreement on an interim parenting plan that would appropriately allow Mr. Puri to become part of his daughter's life again. It is apparent that the judge thought that the parties were agreeing with the various terms of an omnibus order he was crafting as the hearing continued. At the very end of the process, however, it became apparent that consent was not forthcoming on certain of the terms and this led the judge to say what we have quoted above.

[26] While the judge in the present case acted out of concern for the well-being of the parties' daughter, his decision to make orders he knew were beyond his authority is troubling. It is axiomatic that judges, like everyone else, are obliged to follow the law. In the present context, this Court's judgment in *Ribeiro v. Vancouver (City)*, 2004 BCCA 482 at para. 3, 41 B.C.L.R. (4th) 64, is particularly apt. In that case, a judge made an order with respect to the conduct of an examination for discovery for which no provision existed in the then Rules of the Supreme Court of British Columbia. In setting that order aside, Madam Justice Southin stated (at para. 3): Matters of practice and procedure in the court below must be governed by its Rules, and those Rules must be duly enacted under the Court Rules of Practice Act. It is certainly open to the Lieutenant Governor in Council to permit what Mr. Potts says is a very good idea but she has not done so. It is not appropriate for a single judge of the court below to engage in matters of practice and procedure in what I call judicial individualism. The course of the court below is the law of the court and the course has never been to engage in such a practice. [Emphasis added.]

- [27] Also pertinent is the following from Halsbury's Laws of Canada, Civil Procedure (2012 Reissue) (Markham, Ont.: LexisNexis Canada, 2012), at HCV-11, "Responsibility for Enforcing Law": it is of fundamental importance to the rule of law -- and to the public's respect not simply for the judicial system, but for the entire machinery of government -- that the powers and jurisdictions of the judge be discharged, not only responsibly and fairly, but in accordance with the customs and conventions of Canada's parliamentary democracy, and only as provided by the rules of law governing their employment. [Emphasis added.]
- [28] We cannot condone what occurred. The judge's decision to disregard the limits on his authority has needlessly increased the costs of this litigation and resulted in the unnecessary expenditure of judicial resources in both this Court and the trial court. No doubt, it has caused the parties additional stress, exactly what the judge sought to avoid. Costs of the Appeal
- [29] By reason of s. 23 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, a successful party is ordinarily entitled to the costs of an appeal. We see no reasons why Mr. Puri, as the successful party, should not have his costs.
- [30] Although Ms. Morales consented to the appeal being allowed she did so only at the eleventh hour, after Mr. Puri had taken the steps necessary to perfect the appeal. Having been at the judicial case conference, Ms. Morales would have been aware that the orders made with respect to guardianship and access were made without jurisdiction. Nevertheless, she instructed her counsel to oppose the application for leave to appeal.
- [31] The fact that Mr. Puri has been granted legal aid does not preclude an award of costs being made in his favour. By virtue of s. 24 of the Legal Services Society Act, S.B.C. 2002, c. 30, costs may be awarded to a person receiving legal aid. Those costs are deemed to be assigned to the society and are recoverable by it.
- [32] That Ms. Morales has also been granted legal aid, and may not presently be in a position to pay costs, is not a reason to not make an order against her: *Brown v. Black Top Cabs Ltd.* (1997), 43 B.C.L.R. (3d) 76 at paras. 16-17 (C.A.).
- [33] As discussed in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 74, 5 B.C.L.R. (5th) 252, costs orders exist for purposes other than indemnifying a successful party. Those other purposes include:
- (a) encouraging conduct that reduces the duration and expense of litigation and discouraging conduct that has the opposite effect;
 - (b) encouraging settlement whenever possible, thus freeing up judicial resources for other cases; and
 - (c) requiring litigants to make careful assessments of the strength or lack thereof of their cases.

[34] Ms. Morales must bear responsibility for waiting until the last minute to concede this appeal. Due to the position she took there have been five appearances in this Court, four in chambers and one before a division. Given that Ms. Morales knew from the outset that the judge made the orders under appeal without jurisdiction, much of the time and expense devoted to prosecuting this appeal could have, and should have, been avoided.

Conclusion

[35] It is for these reasons that we allowed this appeal with costs. "The Honourable Chief Justice Bauman" "The Honourable Mr. Justice Frankel" "The Honourable Mr. Justice Goepel"

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