

CANADA / JUDGMENT

Routkovskaia v. Gibson

2020 BCCA 84

COURT

British Columbia Court of Appeal

DECIDED

9 March 2020

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2020 BCCA 84 Routkovskaia v. Gibson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Routkovskaia v. Gibson,

2020 BCCA 84

Date: 20200309

Docket: CA46228

Between:

Olga Routkovskaia

Appellant

(Respondent)

And

Michael Gibson

Respondent

(Applicant)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Butler

On an application to vary: An order of the Court of Appeal for British Columbia,

dated January 24, 2020 (Routkovskaia v. Gibson, 2020 BCCA 29, Vancouver Docket CA46228).

Oral Reasons for Judgment

The Appellant, appearing in person:

O. Routkovskaia

No one appearing on behalf of the Respondent:

Place and Date of Hearing:

Vancouver, British Columbia

March 9, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 9, 2020

Summary: The appellant seeks to review the decision of a chambers judge dismissing her application for the unedited transcript of oral reasons for judgment. Held: Application dismissed. There is no prohibition against trial judges editing their reasons for judgment. A litigant is not entitled as of right to a transcript of a judge's unedited oral reasons. While a party can apply to court for a transcript of the unedited reasons, the onus lies on the applicant to establish that it is in the interests of justice that the unedited transcript be released. On the facts of this case, the applicant failed to discharge the onus.

- [1] GOEPEL J.A.: The appellant seeks to review the order of Justice Garson dismissing her application for the unedited transcript of Justice Ball's reasons dismissing her appeal of Judge Steinberg's decision in a custody matter.
- [2] Justice Garson, in her reasons, which are indexed at 2020 BCCA 29, set out the background facts:
- [6] The underlying issue in this appeal is an access and custody dispute. The parties have a child, born in 2008.
- [7] On November 8, 2010, Judge Steinberg of the British Columbia Provincial Court ordered that Mr. Gibson have weekly access visits with the child.
- [8] On September 14, 2012, Judge Buller Bennet of the Provincial Court made an order by consent that contained an access schedule for Mr. Gibson and provided that the parties have joint guardianship.

- [9] On August 3, 2016, Mr. Gibson applied for an order in the British Columbia Provincial Court for full custody of their child. Specifically, the application asked that the November 2010 access order be replaced. In his written application, Mr. Gibson wrote: "Access - Full Custody - I believe my son is living in unacceptable conditions and is not being taken care of."
- [10] On October 7, 2016, Ms. Routkovskaia counterclaimed for child support, retroactive support, and a protection order. Ms. Routkovskaia asked for a protection order due to Mr. Gibson's "anger issues".
- [11] From November 2017 to September 2018, a trial concerning the child took place over 14 days in Provincial Court.
- [3] On September 7, 2018, at the conclusion of the provincial court trial, Judge Steinberg made the following order (the "Order"):
1. The Applicant, Michael E. Gibson ("Mr. Gibson") and the Respondent, Olga Routkovskaia ("Ms. Routkovskaia") shall have joint guardianship of the child ("the Child");
 2. Primary residence of the Child shall be with Ms. Routkovskaia;
 3. Mr. Gibson shall have parenting time with the Child every second weekend from Thursday to Monday morning, the Child will be picked up from school or after school program on Thursday and returned to school Monday morning;
 4. If there is a Professional Development day or statu[t]ory holiday following the weekend of Mr. Gibson's parenting time with the Child, Mr. Gibson will have the Child from Friday to Tuesday. The Child will be picked up from school or after school program on Friday and returned to school on Tuesday morning;
 5. Mr. Gibson shall have telephone access with the Child 1 time a week. Each call is not to exceed 15 minutes and the Child is to be permitted to call his father, Mr. Gibson anytime the Child wishes;
 6. Mr. Gibson's calls will be on the Thursday before the weekend the Child is not with Mr. Gibson and on the Tuesday of the following week;
 7. Each parent is to treat the other with courtesy and respect and will limit communication to factual information necessary for the other parent's care of the Child;
 8. Each parent will advise the other of any medical, dental or similar appointments;
 9. Each parent is to notify the other at the earliest possible opportunity of their plans to travel outside the country and if written permission is required for that travel the other parent is to immediately supply that written permission unless there is a good reason not to;
 10. Subject to further Court Order, for the Child's school winter break and spring break, each parent is to have alternating weeks, the week is to be scheduled so that it does not interfere with the overall cycle of the exchanges;

11. Mr. Gibson's parenting time during the summer will [be 2] weeks in July and 2 weeks in August;
 12. The Child will be with Ms. Routkovskaia during the day of Mother's Day and with Mr. Gibson on Father's Day. Pick-up and drop-off will be by Mr. Gibson from 10:00 am to 7:00 pm;
 13. Any changes that need to be made shall be reviewed during April of 2019;
 14. Mr. Gibson, Ms. Routkovskaia and the Child shall each attend counselling, for the parents counselling is to be focussed on improving communication and for the child counselling is to be focussed on how to cope with differing parenting styles;
 15. Each parent is to prepare a list of three things that have improved between them for the period from this date until the appearance in April 2019 and present that list to the Court at that appearance.
- [4] Of particular import is para. 13 of the Order which states that "any changes that need to be made shall be reviewed during April of 2019."
- [5] On October 16, 2018, the appellant, pursuant to s. 233(1) of the Family Law Act, S.B.C. 2011, c. 25, appealed the Order to the Supreme Court of British Columbia. In her notice of appeal, she alleged that the provincial court judge had made errors of law by improperly considering the best interests of the child and by incorrectly assessing family violence.
- [6] The appeal was heard by Justice Ball. Justice Ball dismissed the appeal on the grounds that it was an interim order. In his brief oral reasons, which are indexed at 2019 BCSC 2186, Justice Ball said:
- [1] The fundamental issue on this appeal is whether or not the conclusion of proceedings on September 7, 2018, amounted to a final or an interim order. If it is an interim order, then there is no appeal.
- [2] I have reviewed this transcript with some care, particularly the final portion of the transcript. Upon that review and reflecting on the comments from Ms. Routkovskaia, and the rather more brief comments from Mr. Gibson, I am satisfied, based on that review, that this was not a final order and was never intended to be a final order.
- [3] The recorder had difficulty recording reasons because there were often two persons speaking. What is clear from the transcript is that there was a conversation between Ms. Routkovskaia and Judge Steinberg. Judge Steinberg is a very experienced member of the court, he would not have tolerated the kind of consistent interruptions which took place here while he was giving reasons. It is difficult enough to give reasons without being repeatedly interrupted with references to bits of evidence and statements to the effect that "I disagree with this, and I disagree with that". This is simply a conversation intending to lead to a further hearing which occurred and not a final order.

- [4] The parties subsequently appeared again in front of His Honour in the following April to continue the proceeding. The proceeding in April was not before this court on appeal. That second hearing however is inconsistent with there having been a final order on September 7, 2018.
- [5] There is no basis for an appeal of an interim order here, and because this is an interim order and not a final order, I am dismissing this appeal now.
- [6] Each party will bear their own costs.
- [7] The appellant appealed the order of Justice Ball to this Court. In her factum, she alleges that Justice Ball erred in law in finding that the Order was an interim order. She further alleges that there was a reasonable apprehension of bias based in part on what she says was an unfairly negative portrayal of the appellant in Justice Ball's reasons.
- [8] To support her submissions on reasonable apprehension of bias, the appellant applied in this Court for the unedited transcript of Justice Ball's oral reasons. In her affidavit supporting her application, she deposed that she had listened to the audio-recording and that there were differences in what the judge said in the courtroom and the signed reasons.
- [9] When the application came before Justice Garson, she had before her the Supreme Court's "Court Record Access Policy" that details the process by which a party can access the recording and transcript of a proceeding. Justice Garson's reading of that policy lead her to conclude that the appellant was entitled on request as of right to a transcript of the audio-recording of the oral reasons for judgment. She concluded that the appellant should in the first instance follow the procedures set out in the policy for access to the recording and on that basis, dismissed her application.
- [10] Armed with Justice Garson's reasons, the appellant attempted to obtain a transcript of the unedited reasons. In her affidavit filed in support of the review application, she has attached email correspondence between herself and registry staff. Registry staff has indicated to her that the only transcript which the registry is prepared to make available, absent a specific court order, is a copy of the judge-approved transcript. That, as the appellant points out in her communication with the registry staff, is of no assistance to her as what she is seeking is the unedited transcript of what the judge actually said in court.
- [11] I should note for completeness that Mr. Gibson takes no position on this application.
- [12] There is no prohibition against trial judges editing their reasons for judgment to a degree. In *R. v. Pham* (September 6, 2011), Vancouver Docket 038676 (C.A. Chambers) at para. 18, Justice Bennett described the principles as follows:
- [18] Trial judges are entitled to edit their reasons. It is preferable if they advise the parties at the commencement of their reasons that they reserve the right to edit them, but this is not necessary. Trial judges cannot edit or change their reasons "in an attempt to defeat an appeal", but where words are misspoken or some clarification is necessary, the trial judge, in

my respectful view, is entitled to make edits and changes to her reasons for judgment. See, for example, *Alers-Hankey v Solomon et al*, 2000 BCCA 196 and *Wilde v Archean Energy Ltd.*, 2007 ABCA 385 at para. 24, leave to appeal ref'd [2008] SCCA No. 53.

- [13] The signed reasons are the judge's reasons. A litigant is not entitled as of right to a transcript of the unedited oral reasons. There may be situations where edits in reasons can lead to a ground of appeal: *R. v. Veeken*, 2020 BCCA 54. In such a case a party can apply to court for a transcript of the unedited reasons. On the application, the onus lies on the applicant to establish that it is in the interests of justice that the unedited transcript be released.
- [14] In my opinion, in this case the onus is not met. The appellant suggests the edits provide a foundation for her allegations of bias. That ground of appeal in the circumstances of this appeal is not relevant. The only issue decided by Justice Ball was whether the decision of Judge Steinberg's order was interim or final. That issue raises an issue of law that the division will determine afresh. Justice Ball's reasons on that issue are not entitled to deference.
- [15] Accordingly, I would dismiss the review.
- [16] NEWBURY J.A.: I agree.
- [17] BUTLER J.A.: I agree.
- [18] NEWBURY J.A.: The application is dismissed.

"The Honourable Mr. Justice Goepel"

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