
CANADA / JUDGMENT

S. v. S.

2020 BCSC 1796

COURT

Supreme Court of British Columbia

DECIDED

13 November 2020

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2020 BCSC 1796 S. v. S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S. v. S.,

2020 BCSC 1796

Date: 20201113

Docket: E180585

Registry: Vancouver

Between:

O.S.

Claimant

And

T.S.

Respondent

Before: Master Elwood

Oral Reasons for Judgment

In Chambers

Counsel for Claimant:

M. Milau

Counsel for Respondent:

H.M. DeJong

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 27, 2020

November 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 13, 2020

- [1] THE COURT: In this family law case, the father asks the court to order the mother to pay a fine of \$5,000 pursuant to s. 61(g) of the Family Law Act for wrongful denial of his parenting time.
- [2] The parenting times are set out in the final order of Madam Justice Fitzpatrick to which the parties consented when this case came on for a trial on June 24, 2019.
- [3] The mother has taken the two children of the marriage into her care and will not return them to the father for his parenting time under that order.
- [4] The mother has brought an application to vary the parenting arrangements in the final order. That application is set to be heard on December 9, 2020, for three days.
- [5] Relying on s. 61(1)(a) of the Family Law Act, the mother argues that her denial of the father's parenting time is not wrongful because she reasonably believes the children might suffer family violence.
- [6] The mother is concerned if she returns the children to the father, he will further alienate them from her. This concern, she says, is based on a pattern of conduct over the last three years that reached a point of crisis this past summer. The mother argues that the father's conduct amounts to a form of psychological abuse within the definition of family violence in s. 1 of the Family Law Act.
- [7] In the alternative, if this position is not accepted, the mother agrees to pay a fine provided the father pay an equal amount for what the mother asserts is his own non-compliance with the final order.
- [8] In addition to a fine for the current denial of his parenting time, the father seeks an order that the mother post security for future compliance with the final order, and an order that she pay \$1,000 for each subsequent breach of the order.

- [9] At the outset of this application, I denied a request by the mother to adjourn the application to be heard together with the variation application in December. I found there was sufficient urgency in the father's allegation that his parenting time is being wrongfully denied on an ongoing basis to justify proceeding with this application before the court has an opportunity to review the parenting arrangements in the final order.

BACKGROUND

- [10] The parties separated on December 1, 2015. They have two children, V., who is now 13, and R., who is now 15 years old.
- [11] During the marriage, the mother was the primary caregiver and the father was the primary income earner. The father was also involved in the children's lives, and in particular, their extracurricular activities, including hockey. There is every indication that, prior to the separation, both parents had normal, healthy relationships with the two boys.
- [12] Initially following the separation, the parties lived under the same roof in the family home. They are now living in separate accommodations, within 5 kilometres of one another. The boys are able to walk back and forth between the two homes.
- [13] Parenting arrangements have become fraught with conflict, not only between the parents, but also between the mother and the children. The mother attributes these difficulties to the father interfering with her parenting time, communicating with the boys during her time, validating their complaints about her parenting style, and passively enabling their acting out against her.
- [14] In March 2018, the mother brought a without notice application based on allegations the children were exhibiting behaviours consistent with parental alienation. The application was not heard due to a lack of court time; however, by consent, Master Muir ordered that a s. 211 report be prepared.
- [15] At a judicial case conference on May 16, 2018, the parties entered into a consent order that included equal shared parenting time on a five-two/two-five rotation.
- [16] The mother says the problems that gave rise to the March 2018 application continued following the JCC order.
- [17] The parties agreed on Dr. Roland La Torre to prepare a s. 211 report. Dr. La Torre delivered an initial report to the parties in September 2018. In his report, Dr. La Torre expressed the opinion that both parties engaged in alienating behaviour, but only the mother was becoming alienated from the children. This could have been due, in Dr. La Torre's opinion, to estrangement resulting from the mother's new relationship, her use of physical force, and her disparagement of the father.

- [18] Dr. La Torre stopped short of finding either parent engaged in an extreme form of alienation that could lead to a recommendation that the alienating parent have no parenting time until the relationship with the alienated parent was restored. Dr. La Torre recommended that the parents interact as little as possible and that neither attend functions during the parenting time of the other.
- [19] In October 2018, the mother brought an application to vary the parenting arrangements in the JCC order. In reasons for judgment dated October 18, 2018, Mr. Justice Harvey found it was clear the relationship between the mother and her sons had been negatively impacted since the separation. But like Dr. La Torre, Mr. Justice Harvey was unable to conclude there had been alienation by the father that was solely the reason for the difficult circumstances in which the mother found herself with the children.
- [20] Mr. Justice Harvey found that contact between the father and the children at extracurricular activities had proven problematic following the JCC order. He adopted Dr. La Torre's recommendation and directed that the parties not attend activities or functions involving the children during the other's parenting time.
- [21] Dr. La Torre prepared an updated s. 211 report. He delivered the update to the parties shortly before the scheduled trial date. In his updated report, Dr. La Torre found further evidence of alienating behaviour, particularly on behalf of the father in the form of text messaging with the children during the mother's parenting time. However, Dr. La Torre found no evidence of more egregious forms of alienating behaviour by the father. Consequently, Dr. La Torre wrote, he still could not conclude that the behaviour of the children toward their mother was anything but a combination of alienation and estrangement, with both the father and the mother having contributed to the situation.
- [22] Dr. La Torre recommended that the court appoint a parenting coordinator. He also endorsed equal shared parenting time on a week-on/week-off schedule and again recommended the parties have as little interaction as possible.
- [23] The case did not go to trial. In the final order made, as I understand it, on what would have been the first day of the trial, Madam Justice Fitzpatrick ordered by consent, among other terms, that:

Commencing Monday, July 15, 2019, the parties shall share parenting on a week-on/week-off basis. The respondent shall have the children week one, being July 15, 2019, at 9:00 a.m. to July 22nd, 2019, at 9:00 a.m. Neither parent shall involve the police to enforce parenting time.

...

The parties shall appoint Craig Neville or Sandra Jennings for a renewable term of not less than 12 months to assist them in resolving any disputes within the jurisdiction of a parenting coordinator pursuant to the current agreement approved for use by the BC Parenting Coordinators Roster Society.

...

The parenting schedule and parenting responsibility set out in this order shall be subject to review as follows:

- (a) at any time pursuant to recommendation of the parenting coordinator in the event the parenting coordinator is of the view, arrived at either independently or on the basis of information obtained from Reconnecting Families, that the parenting schedule is not in the children's best interest; and
- (b) in any event, not later than January 31, 2020, unless the parties agree that a review is not necessary.

By July 31, 2019, the parties will engage in the Reconnecting Families program with Robert Findlay.

- [24] The parties did not conduct a review of the parenting arrangements in the final order prior to January 31, 2020.
- [25] On June 8, 2020, the mother informed the father that R. was refusing to return to his father's house. She suggested that the parents give R. a few days to see if he could come around on his own.
- [26] Also in June 2020, V. had an altercation with his mother after which he showed up unannounced at his father's house and refused to return to his mother.
- [27] The parties generally blame one another for not doing enough to encourage R. and V., respectively, to return to their father and mother, respectively.
- [28] The father sought out the assistance of the parenting coordinator appointed under the final order. The parties met with the parenting coordinator in July 2020. The parenting coordinator noted that neither was in compliance with the court order and made suggestions to remedy the situation.
- [29] The mother took issue with some statements by the parenting coordinator and purported to dismiss her. The mother subsequently commenced an action against the parenting coordinator.
- [30] On August 3, 2020, the mother wrote to the father informing him that she would not be returning R. to his care. This email marked a transition in the dynamic, from R. not wanting to return to his father's house, to the mother deciding she would not facilitate R.'s return to his father.
- [31] The reasons the mother gave the father for this decision included the father's breach of the final order with respect to V., and the mother's concern that if she returned R. to the father, he would turn R. against her as well.
- [32] On August 24, 2020, V. returned to his mother's home for her normal parenting time.

- [33] In September, the father asked the mother to care for both boys for two weeks while he moved to new accommodations.
- [34] On September 28, the father asked the mother to return the boys for the beginning of his scheduled parenting time. The mother refused. She said she would not agree to return the children to the father because, in her view, it was not in their best interest to see him again until their health stabilized and they became more resilient to the changes following the parents' separation.
- [35] The mother has taken the position she will not return the boys to the father until the parenting arrangements in the final order are reviewed by the court in December.

ANALYSIS

- [36] The mother admits that she has denied the father's parenting time with R. since June 8, 2020, and denied his parenting time with V. since October 1, 2020. The issue on this application is whether that denial of parenting time is wrongful within the meaning of the Family Law Act.
- [37] Section 61(1)(a) states that a denial is not wrongful if a parent reasonably believes the child might suffer family violence. This is an objective test: would a reasonable parent in the mother's circumstances believe the children might suffer family violence if they are returned to the father?
- [38] The issue arises in this case in the context of complex and high-conflict family law proceeding. The conduct of the parties that gave rise to this application long predates the current dispute over the parenting schedule in the final order. The mother's relationship with the children has been fraught with symptoms of both alienation and estrangement since 2018.
- [39] Unfortunately, the issues identified by Dr. La Torre in his s. 211 report continued following the final order, the appointment of a parenting coordinator, and a significant investment by the parties in the Reconnecting Families program.
- [40] The children's occasional hostility towards their mother also continued following the final order. V., in particular, continued to use offensive language and continued to demonstrate rude and abusive behaviour towards his mother. When V. returned to his mother from his father's house on August 24 and 27, he was highly disruptive and emotional and required hours to calm down. The mother's relationship with V. continues to be rocky; however, she deposes, with fewer angry outbursts since she stopped his parenting time with his father. Her relationship with R., the mother deposes, has improved substantially.

- [41] There is evidence the father continues to communicate with the children and involve himself in their activities during the mother's parenting time. There may be merit in the mother's concern the father validates the children's complaints with her parenting style. There may also be merit in her concern the father allows the children to be disrespectful towards her and undermines her relationship with them. But these are not issues I can resolve on disputed affidavit evidence on this interim application.
- [42] I accept the mother's evidence that matters reached a point for her on August 3, 2020, that she concluded she could no longer function in the current parenting dynamic. I accept her evidence that, as a mother, it was incredibly difficult for her to see her children go through what she describes as a rollercoaster of abusive outbursts, fighting and emotional collapse. I have no doubt the mother genuinely believes the current parenting arrangements are not in the best interests of the children.
- [43] But there is no evidence, in my view, on which a reasonable parent in the mother's position would conclude the children might suffer family violence if they are returned to their father's care.
- [44] There is no evidence the father is physically or emotionally abusing the children. While I accept the mother's proposition that parental alienation can amount to a form of psychological abuse, every case is different, and not everything that might be characterized as alienation is psychologically abusive.
- [45] None of the professionals involved in this case found any psychological abuse of the children. Dr. La Torre, who looked at this issue most closely, was unable to reach any clear conclusion on the cause of the children's conduct towards their mother.
- [46] While he found evidence of some alienating behaviour by the father, Dr. La Torre recommended equal shared parenting and did not suggest the father's level of alienating conduct was psychologically abusive. Mr. Justice Harvey stopped short of characterizing the father's conduct as alienation.
- [47] Great mischief would be done in my view if parents struggling to cope with difficult and upsetting circumstances simply refused to comply with court orders until their concerns can be addressed by the court.
- [48] The mother's remedy was to seek a review of the parenting arrangements, as she has done, in accordance with the terms of the final order. If the mother believed irreparable harm would be done to her relationship with the children before a review could be heard by the court, she might have applied for interim relief. But that is not what she did. Instead, she decided on her own initiative she would not return the children to the father. In so doing, the mother wrongfully denied the father of his parenting time.

- [49] Turning to whether there should be a fine for this conduct under the Family Law Act, there are, in my view, a number of mitigating circumstances. First, the mother is not entirely in control of the father's parenting time. While she has not facilitated parenting time for the father since August 3, the mother has no real control over communications between the children and their father. Both boys have gone on their own to their father's home at times.
- [50] Second, the father has not fully complied with the final order himself. The father contrasts his non-compliance with that of the mother, arguing that he encouraged V. to return to his mother, whereas the mother actively withheld R. after August 3. In my view, the father has contributed to the state of dysfunction in the current parenting arrangements. I find the father has also wrongfully denied the mother's parenting time, although to a lesser extent than the mother's deliberate withholding.
- [51] Having regard to all the circumstances, I do not think the maximum fine of \$5,000 allowed under s. 61 is appropriate. I consider an initial fine of \$750 appropriate. I have arrived at this amount by imposing a fine on the mother of \$1,000 and allowing an offset of \$250 as a fine against the father for his non-compliance.
- [52] Hopefully, the mother will now reconsider her position and return to the parenting schedule in the final order until those arrangements are reviewed by the court. In the event the mother continues to deny the father parenting time, the fine will increase.
- [53] I do not think the father's proposal that the mother post security and pay \$1,000 for every subsequent breach is workable. The parties should not be returning to court for every alleged breach of parenting arrangements. Instead, I will defer consideration of further fines against the mother to the judge who hears the variation application.
- [54] I turn to the second order that was sought on this application, counselling for the children. The father seeks an order pursuant to s. 61(2)(b) of the Family Law Act that the parties arrange counselling and encourage the children to participate in counselling by Jordan Penner.
- [55] Mr. Penner was recommended by the team leader of the Reconnecting Family program. The father agrees to pay for counselling for the children, but not sessions for the mother. The mother initially opposed this order, but during oral submissions resiled to taking no position.
- [56] In my view, the children will benefit from counselling to help them develop emotional skills and resilience. It is in their best interest that they begin therapy as soon as possible. An order will be made on the terms sought in para. 5 of the notice of application, except that the father will pay for the cost of counselling in the first instance.
- [57] Other relief sought in the notice of application was adjourned by consent due to the lack of time to deal with those matters on this application.

[58] I turn last to costs. It is regrettable the father was required to bring this application to obtain the mother's compliance with the final order. It is appropriate in my view that the mother pay the father's costs of the application in any event of the cause.

CONCLUSION

[59] The mother must pay a fine to the father of \$750.

[60] The parties will arrange, encourage and support the children's participation in counselling with Jordan Penner. The father will pay for the cost of the counselling, subject to any further order of the court reapportioning those costs.

[61] The mother will pay the father's costs of this application forthwith in any event of the cause.

[62] Counsel, are there any questions on the terms of the order?

[63] MS. DEJONG: I just had one question, Your Honour. This is Hannah DeJong speaking. Will costs also include Mr. S.'s application for short leave?

[64] MS. MILAU: And this is Martina Milau. Can I speak to that?

[65] THE COURT: Yes.

[66] MS. MILAU: I just wanted to say that Ms. DeJong was granted short leave. I wasn't provided notice of that application. I was told after the fact. And when we attended before Master Vos, he agreed that the matter could not be heard in two hours and directed us to attend for a full day, which we then didn't get a judge. But, you know, I think was a toss-up because Master Vos did appreciate that that was going to be about a full-day application and there was no way it was going to be heard on short leave in chambers.

[67] THE COURT: Yes, I agree. Clearly it was not an application that could be heard on short leave in chambers, much less in a hearing of two hours. So, the costs will be of the application itself and not include the short leave application.

"Master Elwood"

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