

CANADA / JUDGMENT

Sapir v. Sapir

2020 BCSC 931

COURT

Supreme Court of British Columbia

DECIDED

22 June 2020

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2020 BCSC 931 Sapir v. Sapir

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sapir v. Sapir,

2020 BCSC 931

Date: 20200622

Docket: E50045

Registry: New Westminster

Between:

Amit Sapir

Claimant

And

Bronwen Maureen Sapir, also known as Bronwen Maureen Blunt

Respondent

Corrected Judgment: The text of the judgment was corrected on the front page on July 28, 2020

Before: The Honourable Madam Justice Shergill

Reasons for Judgment - Application by Written Submissions

Counsel for the Claimant:

J.F. Brown

Counsel for the Respondent:

L. Rudovica

Application by Written Submissions:

New Westminster, B.C.

June 10, 2020

Place and Date of Judgment:

New Westminster, B.C.

June 22, 2020

Overview

- [1] This application is brought pursuant to the Supreme Court of British Columbia COVID-19 Notice #14 dated April 27, 2020 ("Notice #14"), permitting Applications by Written Submission ("AWS").
- [2] The claimant seeks to vary the interim order of Justice Warren made July 30, 2019, regarding parenting time with the parties' two children, aged 6 and 8. Justice Warren's Order varied the Final Order, and three other interim orders, as follows:
- a) On an interim basis, Primary Residence of the Children shall be with Ms. Blunt in Nanaimo until further order of the court;
 - b) Mr. Sapir's parenting time shall be at the discretion of the Director of MCFD [Ministry of Children and Family Development] until further order of the court.
 - c) Mr. Sapir must give the Director of MCFD notice of any application that he makes for parenting time under the Family Law Act.
 - d) Ms. Blunt is to make herself available for examination for discovery in August 2019 upon reasonable notice.
 - e) Mr. Sapir may apply to vary this order following the discovery of Ms. Blunt, but not before.
- [3] The claimant wishes to have parenting time every Sunday to Friday or every other week from Sunday to Sunday, without prejudice to his ability to bring an application for termination or variance of a previous order of Justice Warren once the court resumes regular operations.

Issues

- [4] The issues raised in this application are as follows:
- a) Is this matter suitable for determination by way of written submissions?
 - b) Does the application material conform with the procedural requirements of Notice #14?

- c) Should the order of Justice Warren be varied?
- [5] For reasons that follow, I conclude that this matter is not suitable for determination by way of written submissions.

Positions of the parties

- [6] The respondent objects to this matter proceeding by way of written submissions. She submits that this matter is complex, involves multiple disputed issues, and cannot be adequately addressed in a single 10-page affidavit.
- [7] The claimant objects to my relying on the affidavit material of the respondent on two grounds. First, that the written submissions of the respondent were late, and second, that the respondent's material exceeds the page limits and affidavit limits stipulated in Notice #14.
- [8] Rule 1-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009, stipulates that the object of the Rules is to help the parties resolve family law cases fairly, and in a way that will take into account the impact that the conduct of the family law case may have on a child and minimize conflict and promote cooperation between the parties. Rule 1-3 also seeks to secure the just, speedy and inexpensive determination of every family law case on its merits. In my view, these objectives are best met if I consider the respondent's material despite procedural irregularities.

Notice #14

- [9] As a result of the COVID-19 pandemic, a well-publicized provincial state of emergency was declared in British Columbia on March 18, 2020. On March 19, 2020 Chief Justice Hinkson suspended all regular operations of this Court to protect the health and safety of court users and to help contain the spread of COVID-19. All civil and family matters scheduled between March 19, 2020 and May 29, 2020 were automatically adjourned.
- [10] Through a series of Notices, some of the court's operations were resumed under new procedures. These temporary measures have been put into place to address the unique challenges facing litigants during the COVID-19 pandemic.
- [11] As a substitute to the in-person hearings that were the hallmark of chambers practice prior to the pandemic, family and civil hearings can be conducted in one of three manners: as an essential or urgent matter scheduled pursuant to a Request for Urgent Hearing ("RUH"); at a Telephone Conference Hearing ("TCH"); and as an AWS.

[12] On April 17, 2020, the Court established a process for TCHs for matters that are not considered essential or urgent, and were scheduled for hearing prior to May 29, 2020. Parties at a TCH are limited to addressing one disputed issue, which must be suitable for determination by telephone and estimated to take less than one hour. Parties may rely on one affidavit of no longer than 10 pages.

[13] The AWS process does not require the parties to attend hearings in person or by telephone. AWSs are designed to deal efficiently with a single issue between the parties: *Engelbert v. Holuboch*, 2020 BCSC 890 at para. 3.

[14] Part I of Notice #14 explains which applications can be made by written submissions. It provides as follows:

A party may bring an application by way of written submissions in lieu of a hearing if:

- The matter is limited to one disputed issue; and
- The issue can be addressed on the basis of one affidavit filed per party, no more than 10 pages in length, inclusive of exhibits.

If the matter involves more than one disputed issue, a party may bring an application by way of written submissions in lieu of a hearing if:

- The parties have reached consent on all but one issue, or the party bringing the application has identified all of the disputed issues and chosen one issue to proceed by written submissions; and
- The issue can be addressed on the basis of one affidavit filed per party, no more than 10 pages in length, inclusive of exhibits.

If the application relates to a family law issue that requires filing a financial statement in Form 8 pursuant to Rule 5-1 of the Supreme Court Family Rules, each party may also rely on either a previously filed financial statement (if it contains current, accurate and complete information) or a new financial statement filed as part of the application, but not both.

The Court retains its discretion to decide if the issue is appropriate for determination on the basis of written submissions.

[15] Part II of Notice #14 sets out the procedures the parties must follow for an application by written submissions. The relevant portions of Part A are as follows:

- The Applicant must file a notice of application in Form 32 for a civil matter or in Form F31 for a family matter, not exceeding 10 pages, with the modifications below:
 - o In Part 1 (Order(s) Sought), using numbered paragraphs, the Applicant must list any other issue(s) still in dispute, and indicate if any issue will be proceeding by consent; and

- o In Part 4 (Material to be Relied on), using numbered paragraphs, the Applicant must list the single affidavit served with the notice of application, the financial statement if applicable for a family law matter, and any other pleadings already in the court file on which the Applicant will rely. Parties may not rely on previously filed affidavits (except, if applicable, in a family law matter where the party wants to rely on a previously filed financial statement).
 - The Applicant must file one sworn affidavit, not exceeding 10 pages, inclusive of exhibits, setting out the key facts of the issue.
 - The Applicant must serve copies of the filed notice of application, this Notice filed affidavit, filed financial statement (if any) and written submissions not exceeding 20 pages on the Respondent.
- [16] The balance of Part A stipulates the requirements for the respondent to file their material. It places the same limitations on affidavit material and submissions. While Part A affords the applicant an opportunity to file reply submissions not exceeding five pages, the applicant may not file any responding affidavits.
- [17] Part B of Notice #14 sets out the requirements for the Written Submissions Brief.
- [18] The relevant portion of Part C is as follows:
- A judge or master will review the Written Submissions Brief and make a decision on the merits of the issue. If the issue is not appropriate for determination on the basis of written submissions or if the materials in the Written Submissions Brief are insufficient, the judge or master may provide further direction to the parties (e.g., with respect to filing additional materials or setting a date for the parties to speak to the matter by telephone).

Suitability for determination by written submissions

- [19] On April 30, 2020, Justice Young reviewed a RUH made by Mr. Sapir for interim parenting time. She determined that the matter was not urgent. Justice Young also noted that the claimant could apply to vary Justice Warren's order by filing an application under Notice #14.
- [20] Not all AWS will be determined on their merits. Notice #14 provides this Court with the discretion to determine whether a matter is suitable for hearing on the basis of written submissions. That discretion was not lost by virtue of Justice Young's comments, which were made before the parties prepared their current submissions.
- [21] As held by Justice Kent, the judge reviewing an AWS will make a decision on the merits of a case only if it is appropriate to do so based on the filed material: *Raniga v. Poirier*, 2020 BCSC 780 at para. 4.

- [22] Having regard to all of the evidence in this case, I find that this matter is not suitable for determination by written submissions. The matter is complex, there remain multiple issues in dispute between the parties which are related to or overlap with the order sought in this application, and the order sought herein cannot be determined on the basis of a single, 10-page affidavit filed by each party.
- [23] Notice #14 requires the applicant to identify all of the disputed issues that remain outstanding between the parties. This enables the court to decide whether the matter is suitable for determination on the basis of written submissions alone, having regard to various factors such as: the complexity of the matter; whether there is overlap between the issue raised and the remaining issues in dispute; whether it is appropriate for the matter to proceed on this issue alone; and whether the case is being litigated in slices.
- [24] Part 1 of the Notice of Application does not identify the existence of any other issues outstanding in this litigation. However, the Application Response outlines six issues which the respondent says are in dispute. These include issues related to a Provincial Court protection order which is still in effect prohibiting the claimant from any contact with the children and the respondent; child support; disclosure of the claimant's medical records; and compliance with recommendations that the claimant complete counselling. Many of the issues identified by the respondent overlap or relate directly to the order sought in the within application.
- [25] In support of his application, the claimant relies on a single 10-page affidavit (his own) which does not attach any exhibits. However, in Part 4 of the Notice of Application, the claimant seeks to rely on a Provincial Court Order, in addition to the claimant's affidavit and the pleadings in the court file. The four-page Provincial Court Order is not part of the Supreme Court file, and the only way to put it before this court is to attach it to an affidavit. That was not done, evidently because by doing so, the claimant's affidavit would exceed the 10-page limit.
- [26] The responding material also exceeds the limits for a single 10-page affidavit. The respondent relies on two affidavits - her own, numbering 17 pages, and the affidavit of a legal assistant working in her counsel's office, numbering 10 pages. The bulk of both of these two affidavits are comprised of exhibits. The respondent explains this lack of compliance by asserting that the issues raised in this application cannot be fairly addressed within the limitations of Notice #14. I agree.
- [27] Based on the material before me, it is clear that this matter cannot be determined on the basis of a single 10-page affidavit from each party. There were 12 affidavits before Justice Warren when she made her order. These included a section 211 report and a number of court orders and transcripts. At least some, if not most, of this material would potentially be relevant in the present application.

- [28] Further, this matter is of significant complexity. There are allegations of family violence, parental alienation, extensive MCFD involvement, mental health concerns, involvement of the police, and outstanding criminal charges against the claimant. A determination of the best interests of the children in this scenario requires that the Court have as much relevant information available to it as possible.
- [29] Finally, I have grave concerns about the general suitability of this matter for resolution on affidavit evidence alone, even after the court resumes its regular operations. The affidavit material raises serious allegations which will require findings of credibility. There is a significant possibility that the trier of fact who ultimately hears this application will conclude the matter is unsuitable for determination on the basis of affidavit material, and require the viva voce testimony of the parties.

Orders

- [30] I conclude that the claimant's application for interim parenting time is not suitable for determination by Application by Written Submission pursuant to the Supreme Court of British Columbia COVID-19 Notice #14 dated April 27, 2020.
- [31] Once the court resumes its regular operations, the claimant is at liberty to schedule a hearing to obtain the relief sought in this Notice of Application.
- [32] The respondent is entitled to her ordinary costs of this application at Scale B, subject to any ruling made by the presiding justice or master in the event this matter is heard on its merits.

"Shergill J."

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