
CANADA / JUDGMENT

Wilson v. Bokenfohr

2020 BCSC 1902

COURT

Supreme Court of British Columbia

DECIDED

3 December 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1902 Wilson v. Bokenfohr

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wilson v. Bokenfohr,

2020 BCSC 1902

Date: 20201203

Docket: E202321

Registry: Vancouver

Between:

Anita Ann Wilson

Claimant

And

Luke Ellis Bokenfohr

Respondent

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Claimant:

G.K. Thomas

Counsel for the Respondent:

T.L. Jackson

Place and Dates of Hearing:

Vancouver, B.C.

November 18-19, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 3, 2020

Table of Contents

I. Introduction.. 3

II. The Background Facts.. 3

III. Discussion.. 7

A. Was there an agreement?. 7

B. What is the appropriate order?. 10

IV. Conclusion.. 12

I. Introduction

- [1] The parties in this matrimonial action have brought competing applications seeking, by way of a summary trial, to clarify the terms governing how they should be co-parenting their two sons, aged 9 and 7.
- [2] The claimant, Ms. Wilson, seeks to enforce the terms of an agreement that she contends the parties entered into after a mediation that took place on February 21 and 23, 2018, as reflected in draft "Minutes of Settlement" that they subsequently negotiated but never executed.
- [3] The respondent, Mr. Bokenfohr disputes that the parties reached a final agreement on that or any other occasion. Regardless of whether there was an agreement or not, however, he seeks an order to implement a different set of terms that he contends will better serve the interests of the children.
- [4] The parties' applications therefore raise the following questions to be determined by the Court:
- a) did the parties reach agreement on the terms reflected in the third draft of the Minutes of Settlement; and
 - b) whether they did or not, would the children's interests be best served by those terms, those proposed by Mr. Bokenfohr or other terms.

- [5] For the reasons that follow, I have concluded that it is Mr. Bokenfohr's proposed terms, with some modifications, that should be implemented.

II. The Background Facts

- [6] Ms. Wilson owns a physiotherapy and massage therapy business. Mr. Bokenfohr works as a police officer with the Vancouver Police Department. He works on a four-days-on, four-days-off schedule.
- [7] The parties lived together in a marriage-like relationship between 2011 and 2015 or 2016 (the actual separation date is disputed but is not relevant to the question before me). It is not disputed that they entered into a separation agreement dated June 13, 2014 (the "Separation Agreement") that called for them to share parenting time with their two sons equally.
- [8] Ms. Wilson commenced this action on October 3, 2016. On November 21, 2016, Mr. Bokenfohr obtained an interlocutory order from Master Dick that:
- a) allocated him equal parenting time, four days on, four days off, as contemplated by the Separation Agreement; and
 - b) ordered that neither party should attend activities taking place during the other party's parenting time.
- [9] A 10-day trial was scheduled for March 2018.
- [10] In preparation for the trial, the parties commissioned a s. 211 report from Dr. Rebecca St. Clere England, a registered psychologist. Her report, dated January 14, 2018, recommended, among other things, that the parties change to a new parenting schedule of 2-2-5-5 rather than the 4-4 schedule they had been following, which would have meant that Mr. Bokenfohr had to change jobs. She also commented that she thought it was harmful for the children that Ms. Wilson often seeks to remain in contact with them in various ways during Mr. Bokenfohr's parenting time.
- [11] In an effort to settle the dispute in advance of trial, they entered into a mediation with Arlene Henry, Q.C. The mediation took place over two days, February 21 and February 23, 2018. The second day turned into a marathon, with the session finally concluding at 3 am on February 24 with an apparent agreement. The parties and their respective legal counsel demonstrated their apparent agreement by placing their signatures or initials on each of the pages of the reference documents they had been using for the mediation. They later adjourned the trial generally, apparently assuming the case had been settled.
- [12] On March 12, 2018, Ms. Henry wrote to the two lawyers attaching the first draft of the proposed Minutes of Settlement to reflect the agreement that she believed the parties had reached at the end of the mediation. She told them that the enclosed draft was intended to remove internal ambiguities, define certain concepts more clearly, fill in some gaps and use consistent phrasing and style. She asked that counsel:

not distribute the DRAFT to your clients until you have read through fully and confirmed that I have in fact captured all of the settled terms correctly. I do not want to provide either party with any opportunity to feel that they can re-negotiate the settled terms.

- [13] Ms. Wilson's counsel at the time, Ms. Smyth, understood that request to mean that she should read the enclosed draft and satisfy herself that it correctly captured all of the settled terms, and, having done so, that she was free to send it to Ms. Wilson, which is what she did soon after receiving it. Unfortunately, Mr. Bokenfohr's counsel at the time, Ms. Choudhry, misunderstood the email and believed that it precluded her from sharing the attached draft with Mr. Bokenfohr until further notice. As a result, Mr. Bokenfohr did not see it until late April, over a month later.
- [14] In the meantime, the parties had an exchange in which Mr. Bokenfohr asked for the additional parenting time that he thought the agreement allowed him to take over the Easter holiday. Ms. Wilson refused his request, citing his failure to comply with the notice period set out in the first draft of the minutes of settlement, a copy of which she had but he did not.
- [15] On April 18, Ms. Choudhry responded with a list of comments that Mr. Bokenfohr wished to see incorporated in the draft. Ms. Henry responded by email on April 27 with a second draft incorporating some but not all of her suggestions (in particular, she refused to incorporate "[t]hose which are not consistent with my notes").
- [16] Ms. Choudhry responded with another email on May 1, 2018, in which she asserted that, having checked her notes and now discussed the draft with Mr. Bokenfohr, there appeared to be a misunderstanding about one of the key terms of the settlement. Ms. Wilson had agreed to maintain the four-on-four-off schedule in exchange for a new provision that would ensure that she had at least one full weekend each month with the children. Mr. Bokenfohr believed that he had agreed to that clause on the basis that it would be reciprocal. Ms. Wilson contends that the clause could not be reciprocal because Mr. Bokenfohr's work schedule did not allow him to make use of it in every case. Instead, she says, Mr. Bokenfohr agreed to another clause that compensated him in other ways for the guaranteed weekend given to Ms. Wilson.
- [17] On May 10, 2018, Ms. Smyth wrote to Ms. Henry and Ms. Choudhry setting out her proposed changes to the draft and responding to Ms. Choudhry's comments.
- [18] On May 18, 2018, Ms. Henry asked Ms. Choudhry for a response to Ms. Smyth's letter, particularly "with respect to the more substantive comments", before turning her third draft.
- [19] On June 20, 2018, with no response from Ms. Choudhry having been forthcoming, Ms. Smyth wrote to Ms. Henry asking that she "complete the task based on your assessment of the writer's comments and forward a final document "

[20] On June 28, 2018, Ms. Choudhry responded, advising them that "[t]he final draft of the letter with [Mr. Bokenfohr's] comments is with [Mr. Bokenfohr] for his approval." She promised to send it when his review was complete.

[21] While that review was pending, Mr. Bokenfohr sent an email to Ms. Wilson on July 1, 2018, in which he stated as follows:

The terms of settlement as mediated this February will stand. I intend to honour all the terms of the settlement and I expect you to do the same.

[22] The email concluded as follows:

Now leave me alone please. If you contact me nightly after this point I will be reporting you once again to the police. I did not spend tens of thousands of dollars on lawyers to have you disregard the entire mediation agreement based on one phone call and your nose being out of joint.

[23] On July 6, 2018, Ms. Choudhry sent her response to the latest draft of the minutes of settlement. It proposed several substantive revisions to the last draft, including a provision that would have made the guaranteed monthly weekend clause reciprocal.

[24] By letter dated July 30, 2018, Ms. Smyth responded by asserting that Ms. Choudhry's comments were late and inconsistent with the terms that had previously been agreed upon. She followed up with another letter on August 1, 2018 attaching a memorandum setting out a detailed comparison of the previous drafts and letters, showing where, in her view, the remaining areas of dispute were and what had previously been agreed.

[25] Ms. Henry finalised the third draft of the Minutes of Settlement on the basis of that memorandum and forwarded that draft to the parties' counsel with an email dated August 25, 2018. It was never signed.

[26] Since then, the parties have generally sought to abide by the terms set out in the draft Minutes of Settlement but at times they have disputed what those terms are or alternatively invoked previous court orders. The lack of a definitive set of rules to govern their shared parenting regime has created a considerable amount of conflict between them, to the detriment of the children.

III. Discussion

A. Was there an agreement?

[27] The principles to be applied in determining whether former spouses have made a binding settlement agreement have been discussed in a number of recent authorities.

[28] In *Reid v. Reid*, 2011 BCSC 231, for example, Bernard J. conveniently summarized the law in this area as follows at paras. 25-28:

- [25] It is well-established that settlement agreements must meet the requirements of contractual formation: offer, acceptance, consideration and an intention to create legal obligations: *S. (O.H.) v. S. (M.J.)*, 2004 BCSC 600, at para. 22; *Jorgensen v. Jorgensen*, [1996] B.C.J. No. 1153 (QL) (S.C.) aff'd (1998), 56 B.C.L.R. (3d) 124 (C.A.).
- [26] Settlement agreements made upon marriage breakdown, and for the purpose of resolving issues such as property division and spousal support, are generally referred to as "separation agreements". While these agreements are subject to the requirements of contract formation, such are not applied with the same rigour in a matrimonial context. In this regard, our courts have recognized the need to achieve fairness as between the parties: *Mitchell v. Mitchell*, 2000 BCSC 1367, at para. 35.
- [27] In addition to the foregoing, for a settlement agreement to be enforceable there must be a "meeting of the minds" of the parties on the essential elements of the agreement: *Fridman G.H.L., The Law of Contract in Canada*, 5th ed. (Toronto: Carswell, 2006) at p. 14. The burden of proving consensus between the parties falls to the party seeking to prove the existence of the agreement, and the standard to be met is proof on a balance of probabilities: *Bell v. Bell* (1998), 80 A.C.W.S. (3d) 705 (B.C.S.C.).
- [28] In determining whether the parties were *ad idem* at the time of contract formation, the manifested intentions of the parties are considered. Generally, the courts apply an objective, rather than a subjective, test and consider whether a reasonable person in the situation of the party would have believed and understood that the other party was consenting to identical terms: *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607, adopted by the S.C.C. in *St. John's Tugboat Co. Ltd. v. Irving Refining Ltd.*, [1964] S.C.R. 614. The starting point for determining whether the parties were *ad idem* is the contract, itself; however, where it is unclear whether or not the parties have agreed, the court may resort to the evidence beyond the contractual language, including the circumstances in existence at the relevant time, the genesis and aim of the transaction, and the conduct of the parties during, and subsequent to, the purported making of the contract: *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365, at 18, and *Aerovac Systems Ltd. v. Darwin Construction (Western) Ltd.*, 2010 BCSC 654, at 26.
- [29] More recently, *Dickson J.A.*, writing for the Court in *Kuo v. Kuo*, 2017 BCCA 245, had occasion to consider those principles in the context of a dispute over whether the parties had reached agreement on the terms of a purported settlement:
- [37] There is a strong public interest in favour of resolving lawsuits by agreement. As *Abella J.* observed in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 11, "[s]ettlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation". As a result, the policy of the courts is to promote settlement and to enforce settlement agreements: *Catanzaro v. Kellogg's Canada Inc.*, 2015 ONCA 779. This judicial policy contributes to the effective administration of justice: *Kelvin Energy Ltd. v. Lee*, [1992] 3

S.C.R. 235, at 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.).

- [38] When a dispute arises, the first question is whether the parties have agreed on all essential terms of the purported settlement: *Fieguth* [*Fieguth v. Acklands Ltd.* (1989), 37 B.C.L.R. (2d) 62 (C.A.)] at 70. The usual principles of contract formation apply. The court must analyse the evidence to determine whether, in all the circumstances, it is clear to the objective, reasonable bystander that the parties intended to contract, and whether the essential terms of that contract can be determined with a reasonable degree of certainty: *Lacroix v. Loewen*, 2010 BCCA 224 at paras. 35-36
- [30] Ms. Wilson seeks to give effect to the agreement that she says the parties reached during the mediation, as reflected in the third draft of Minutes of Settlement that was delivered to the parties on August 25, 2018.
- [31] Mr. Bokenfohr denies that there was an agreement, as reflected in that document or otherwise. He argues that the parties did not intend the settlement to be binding until there was a formal court order entered to memorialise the terms of the settlement, which never occurred.
- [32] I am satisfied that the parties subjectively believed that they had reached agreement and moreover, that they intended that agreement to be binding immediately after the conclusion of the mediation. That is apparent from the contents of their contemporaneous emails.
- [33] Nevertheless, I am unable to find that they actually had reached an agreement, when the matter is viewed objectively as the law requires. It is clear that there remained significant substantive issues still to be resolved following the conclusion of the mediation and that a final agreement was never formed. The emails among Ms. Henry, Ms. Smyth and Ms. Choudhry make it apparent that there was never consensus ad idem on the terms reflected in the third draft of the Minutes of Settlement, as Ms. Wilson contends.
- [34] Ms. Wilson argues that Mr. Bokenfohr's agreement to the contents of the third draft of the Minutes of Settlement can be inferred from the fact that he sought to resile from terms drawn from his own pre-mediation settlement offer. But I agree with Mr. Bokenfohr that those terms were part of a package that was never accepted as a whole. Ms. Wilson was not in a position to accept part of the offer and incorporate the terms she accepted into a concluded agreement. The most that can be said is that the parties tried to reach agreement by building on, among other things, some of the terms in Mr. Bokenfohr's pre-mediation offer and came very close to doing so, but never quite got to the finish line.
- [35] In summary, I have concluded that the parties did not reach an agreement.

B. What is the appropriate order?

- [36] Regardless of whether an agreement was reached or not, it is clear that the parties urgently require clear and simple rules to govern their co-parenting regime given the high level of conflict that they and the children have had to endure since the separation.

- [37] Mr. Bokenfohr argues that the terms set out in the third draft of the Minutes of Settlement are not in the best interests of the children for the following reasons, among others:
- a) they are too long, too complicated and too difficult to follow to be workable (and indeed they have not been followed for that reason);
 - b) they call for too many activities for the children and too much communication between the parties to arrange them;
 - c) they allow for the parties to have too much contact with the children during the other party's parenting time, which has been disruptive to the children; and
 - d) a set schedule without exceptions will be more likely to encourage the parties to compromise.
- [38] I agree with Mr. Bokenfohr that the current regime has proved to be unworkable and that a change is required. That is due in part to the fact that the third draft Minutes of Settlement were never signed, leaving the rules uncertain. Even accounting for that factor, however, I agree with Mr. Bokenfohr that many of the problems that he has identified with that document appear to have contributed to the present state of affairs.
- [39] One of the main sources of ongoing disagreement between the parties appears to arise from Mr. Bokenfohr's stated preference that Ms. Wilson leave the children alone during his parenting time. Because he believes that it is disruptive for the children when either parent contacts them during the other parent's parenting time, he has chosen not to telephone them during Ms. Wilson's parenting time, even though the third draft of the Minutes of Settlement allows for such contact. Some of the observations in Dr. England's report appear to support Mr. Bokenfohr's perspective in that regard.
- [40] For that and the other reasons that Mr. Bokenfohr has advanced, I have concluded that the draft form of order attached to his application is generally preferable to the regime created by the third draft of the Minutes of Settlement and that it will indeed better serve the interests of the children.
- [41] My order will incorporate those terms subject to the following exceptions:
- a) Dispute Resolution (paras. 39-41): I prefer the terms set out in the third draft of the Minutes of Settlement at paras. 63-68 because the parties appear to require the ongoing assistance of a parenting coordinator. Neither party should have final decision making authority in the event of an impasse, given the history of conflict and both parties' demonstrated capacity to take unreasonable positions. Mr. Bokenfohr's concern that Ms. Wilson will run up costs by involving the parenting coordinator more often than is necessary is addressed by the provision stating that the parenting coordinator can allocate costs as he or she sees fit after the initial retainer;

- b) Right of First Refusal (para. 37): the parties agreed during the hearing that such a right can be included in the order, provided the exchange is for at least 24 hours; and
- c) Parenting Advisory Committee (para. 9): there is no reason to require that Ms. Wilson withdraw from the PAC; the provision should be amended to read as follows:

The Claimant shall be permitted to attend at the Children's school only during her parenting time with the Children.

IV. Conclusion

[42] Ms. Wilson's application to enforce the terms of the third draft of the Minutes of Settlement is refused.

[43] Mr. Bokenfohr's application is allowed in part, subject to the changes listed above.

[44] Because the parties both contributed to the need for the two applications, they shall each bear their own costs.

"Milman J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/19/2020BCSC1902.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/wilson-v-bokenfohr-2020>

Prepared on 26 October 2026 · Esheria