

CANADA / JUDGMENT

## Wong v. Tersigni

2024 BCCA 36

COURT

British Columbia Court of Appeal

DECIDED

19 January 2024

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2024 BCCA 36 Wong v. Tersigni

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Wong v. Tersigni,

2024 BCCA 36

Date: 20240119

Docket: CA49231

Between:

Raymond Richard Wong

Appellant/

Respondent on Cross Appeal

(Respondent)

And

Natalie Tersigni

Respondent/

Appellant on Cross Appeal

(Claimant)

Before:

The Honourable Justice Dickson

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated  
July 13, 2023 (N.T. v. R.R.W., Vancouver Docket E171249).

Oral Reasons for Judgment

Counsel for the Appellant/Respondent on Cross Appeal:

K.A. Quong

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C. Alvarez Gomez

Place and Date of Hearing:

Vancouver, British Columbia

January 19, 2024

Place and Date of Judgment:

Vancouver, British Columbia

January 19, 2024

Summary:

The appellant appeals a parenting time order, arguing that the judge erred in failing to provide him with more weekend time with the child. The respondent's primary position on appeal is that judge committed no reversible error. In the alternative, the respondent has filed a cross-appeal seeking to implement the parenting schedule she sought in the court below. Held: Appeal and cross-appeal dismissed. The judge made no error of law, fact or principle that would justify appellate intervention.

- [1] HORSMAN J.A.: The appellant, who I will refer to in these reasons as "the Father", appeals an order setting parenting time for the parties' eight-year old child. The respondent, "the Mother", has filed a cross-appeal.
- [2] The order under appeal varied the provisions of a 2018 consent order as it relates to parenting time. Each party proposed a variation to the regular parenting schedule set out in the order. The judge found that their proposed variations were unrealistic and not in the child's best interests. She therefore ordered a schedule that was different than either party had proposed.
- [3] On appeal, the Father says the judge erred in making a parenting time order that provides him with insufficient weekend time with the child, and does not account for child care difficulties he experiences due to his work schedule.

- [4] The Mother's primary position on appeal is that the judge did not commit a reversible error, and that her order should be upheld. In the alternative, the Mother says, in her cross-appeal, that the judge ought to have ordered the parenting schedule that she proposed.
- [5] At the hearing of this appeal, the Mother advised the Court that she was abandoning her preliminary objection that the Father required leave to appeal. I agree that the Father does not require leave to bring this appeal. The Mother also abandons her challenge to the judge's order on costs, as set out in her factum on the cross-appeal.
- [6] For the reasons that follow, I would dismiss the appeal and the cross-appeal. The judge's discretionary decision regarding parenting time is entitled to a high level of deference on appeal. In my view, it has not been demonstrated that the judge made a reversible error in this case.

### The chambers judgment

- [7] The parties met in August 2010, and commenced living together in a marriage-like relationship in 2011. They have one child, who was born in February 2015.
- [8] In March 2018, the parties made a parenting agreement, which was incorporated into a consent order (the "Consent Order"). The Consent Order includes, in Schedule B, a "parenting plan" that provides a four-week "Regular Parenting Schedule". While the Schedule provided for shared parenting, it did not provide the Mother with any overnight time with the child on the weekends. Rather, the Father had parenting time with the child overnight every Friday and Saturday night.
- [9] The Consent Order includes a provision that the parties will review the Regular Parenting Schedule each year in February, or at the request of either party if there is a significant change to their work schedules.
- [10] In 2023, the parties filed competing applications to vary the terms of the Consent Order. By this time, the co-parenting relationship between the parties had, as described by the judge, "been marred by conflict and tension", and was not working for the parties or the child: at paras. 8-9. The judge explained:
- [9] The materials filed in support of these applications establish that the respondent [the Father] is rigid, controlling and unlikely to agree to any variations that do not suit his needs or wants. The claimant [the Mother] is not entirely blameless either. Both parties appear to be incapable of being flexible with the other side in so far as last-minute family events or emergencies are concerned.
- [11] The judge elaborated on these observations by reference to examples from the "litany of complaints and accusations" that both parties advanced on the applications: at para. 10. For the purposes of this appeal, it is unnecessary to review these examples in detail. They are fully explored in the reasons of the chambers judge at paras. 11-17.

- [12] At the time of the hearing of the applications, the parties had reached agreement to vary a number of terms in the Consent Order by consent. Other issues could not be resolved, including the issues of the Regular Parenting Schedule, holiday parenting schedules, travel, FaceTime calls with the off-duty parent, and extracurricular activities.
- [13] The only order challenged on appeal is the judge's order varying the Regular Parenting Schedule. As such, it is only necessary to review the judge's reasons to the extent that they relate to the issue of the Regular Parenting Schedule.
- [14] The Mother's concern with the existing Regular Parenting Schedule was that it did not give her any overnight weekend time with the child. She proposed that the existing regime be replaced with a 2-2-5-5 schedule. This variation would allow the Mother to have one full weekend with the child every other weekend. The judge agreed that it was in the child's best interests to have consistent quality time with his Mother in the form of overnight time on the weekends.
- [15] The Father opposed the Mother's proposed variation. The Father maintained that, because he worked long hours during the week, the only "actual" parenting time he could spend with the child was on the weekend. His evidence was that he relied on his mother to provide childcare during the week, and a 2-2-5-5 schedule was unmanageable in light of her employment commitments. The Father's initial position was that the existing schedule should not change at all. However, following a continuation of the hearing, he modified his position by suggesting a variation that would provide the Mother with four extra hours of parenting time per week, but still no weekend overnight time.
- [16] The judge did not find either of the parties' proposals to be tenable. In light of the arguments advanced on appeal, it is helpful to set out her full analysis on this issue:
- [29] Respectfully, I find that both proposals are completely unrealistic. The claimant's proposal of 2/2/5/5 fails to acknowledge the difficulty it presents in terms of the respondent's work schedule. The respondent works as a digital imaging technician in the film industry. When he is employed on a film shoot project, the respondent's hours can be very intensive and lengthy, sometimes with crew calls at 7:00 a.m. or 8:00 a.m., and often involving ten to 12-hour days. Other than his 72-year-old mother, the respondent has no one else to assist him with drop-offs and pickups. The claimant's proposal fails to account for the respondent's work schedule.
- [30] Correlatively the respondent's proposal completely fails to acknowledge and accommodate the need for their son and the claimant to spend some greater quality weekend time together. As it stands currently, the claimant either has their son from Sunday at 9:00 a.m. or 3:30 p.m. until the following Wednesday or Thursday morning. Accordingly, the claimant seemingly has time with their son at the end of the weekend but never for an overnight during the weekend. This too, is unacceptable and not in their son's best interests. Both parties need to have a more realistic approach to parenting time with their son.

[31] The respondent needs to understand that the parenting time schedule cannot be dictated by his work schedule alone. The claimant as well needs to understand that the 2/2/5/5 proposal--at this point--is unworkable from the perspective of the respondent's work schedule. Something has to give on the part of both parties. Neither have provided realistic proposals at this juncture, and so the Court will do its best to provide a schedule that will attempt to address the respondent's seemingly inflexible work schedule and his seeming unwillingness to allow their son to have any sort of overnight weekend time with his mother.

[17] Accordingly, the judge ordered that the Regular Parenting Schedule in the Consent Order be replaced by the following schedule:

A. Week 1: The Mother will have parenting time from Saturday at 10:00 a.m. to Wednesday at 9:00 a.m. The Father will have parenting time from Wednesday at 9:00 a.m. to Sunday at noon.

B. Week 2: The Mother will have parenting time from Sunday at noon to Wednesday at 9:00 a.m. The Father will have parenting time from Wednesday at 9:00 a.m. to Saturday at 10:00 a.m.

C. The schedule reverts to Week 1.

[18] The result of this variation is that the Mother has overnight time with the child on Saturdays twice per month, while the Father has two Saturday nights per month and every Friday night.

On appeal

[19] The Father alleges that the judge erred in two respects in ordering a variation of the Regular Parenting Schedule:

1. She made an error of mixed fact and law by implementing a parenting time schedule that sees the Mother exercise the "vast majority" of weekend parenting time moving forward; and
2. She misapprehended the evidence.

[20] The Mother's primary position on appeal is that the judge did not err in the parenting time order that she made, and the appeal should be dismissed.

[21] On her cross-appeal, the Mother argues that if the judge did make any of the errors alleged by the Father, then she also erred in her reasons for rejecting the Mother's proposal of a 2-2-5-5 parenting schedule. At the hearing of the appeal, the Mother confirmed that her cross-appeal is only advanced as an alternative argument. Thus, it is not necessary for the Court to address the cross-appeal if the Father's appeal is dismissed.

## Standard of review

[22] The judge's decision to vary the parenting time arrangements involved an exercise of discretion. The standard of review on appeal is highly deferential. To justify appellate intervention, it must be demonstrated that there was a material error of law or fact, a

serious misapprehension of the evidence, or a decision that is "clearly wrong": *White v. Schultz*, 2023 BCCA 266 at para. 16; *Van de Perre v. Edwards*, 2001 SCC 60 at paras. 13-15. An appeal is not a party's opportunity for a "second kick at the can", particularly in parenting cases where finality is of paramount importance: *Van de Perre* at para. 13; *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 104.

## Analysis

### The appeal

- [23] The Father approaches this appeal as if it is his opportunity to re-argue the applications. He presents a "Proposed Regular Parenting Time Schedule" for the first time on appeal, and argues that this proposed schedule would more effectively balance the interests the judge had to weigh in the first instance. The Father's proposed adjustments, among other things, would give the Mother parenting time with the child overnight every other Saturday starting at 8:00 p.m. rather than 10:00 a.m., which in turn would increase the Father's weekend time with the child. The remedy sought on appeal by the Father is an order setting aside the judge's variation of the Regular Parenting Schedule, and implementing his Proposed Regular Parenting Time Schedule.
- [24] It is not apparent to me that the Father's Proposed Regular Parenting Time Schedule strikes a better balance, as he alleges. In any event, this appeal is not an opportunity for the Father to reargue the applications, or have this Court reweigh the factors that were for the judge to weigh in ordering parenting time. In the absence of a demonstrated error of law, principle, or fact by the judge, there is no basis for appellate interference with her discretionary order. The fact that the judge could have made a different parenting time order--one that, I note, was never suggested to her--is not a reversible error.
- [25] The Father argues that the judge's parenting time order reflects errors of mixed fact and law, and a misapprehension of evidence. However, a review of the record does not bear this out.
- [26] First, the Father says that the judge failed to give "due consideration" to his work schedule, and the fact that his only opportunity for "actual" parenting time is on the weekend. However, the judge did not ignore this factor. Indeed, the Father's position that his work schedule mandated that he exercise a majority of the parenting time on the weekend provided the context for the dispute between the parties over the Regular Parenting Schedule. The judge rejected the Mother's proposal for a 2-2-5-5 schedule because it did not account for the Father's work schedule. However, the judge also found that the Father needed to accept that the parenting time schedule "cannot be dictated by his work schedule alone": at para. 31. The weighing of this factor was a matter for the judge.
- [27] Second, the Father says that the judge did not consider his reliance on his mother to provide childcare, or his mother's stated inability to increase her amount of child care during the week because of her own work demands. This is also inaccurate. The judge specifically

acknowledged that the Father relied on his mother for child care: at para. 29. However, to the extent that the Father argues that the restrictions on his schedule, whether by virtue of his work demands or his mother's, ought to be determinative of the division of weekend parenting time, that proposition was expressly rejected by the judge.

- [28] Third, the Father argues that the judge failed to consider that other variations she made to the Consent Order increased the Mother's "quality" time with the child during the holidays, thus lessening the importance of providing weekend overnight time. This argument, in my view, overlooks the judge's finding that it is in the child's best interests to have consistent time with the Mother overnight on weekends. The Father has not demonstrated that the judge erred in her assessment of the child's best interests. This assessment drove her analysis of the appropriate variation to the Regular Parenting Schedule.
- [29] Fourth, and finally, the Father says that the judge misapprehended the evidence in stating that he often worked "ten to 12-hour days", when, in fact, his evidence was that he typically worked 12 to 15-hour days. The Father does not explain how this misapprehension is material to the judge's analysis. I cannot see how it could be said to be material. It is, at most, a minor mischaracterization of the evidence that had no substantive impact on the judge's analysis or her order.
- [30] For these reasons, I would dismiss the Father's appeal. The Father has not demonstrated any material error of law or fact, serious misapprehension of the evidence, or that the decision is "clearly wrong". The Father's belief that his Proposed Regular Parenting Time Schedule would better balance the various conflicting interests that the judge had to balance is not a ground for appellate intervention.

#### The cross-appeal

- [31] The Mother has advised that if the appeal is dismissed, she does not pursue her cross-appeal.

#### Disposition

- [32] Accordingly, I would dismiss the appeal and the cross-appeal.
- [33] DICKSON J.A.: I agree.
- [34] DEWITT-VAN OOSTEN J.A.: I agree.
- [35] DICKSON J.A.: The appeal and the cross-appeal are dismissed.

"The Honourable Madam Justice Horsman"

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