
CANADA / JUDGMENT

A.J.F. v. N.L.S.

2020 BCSC 26

COURT

Supreme Court of British Columbia

DECIDED

10 January 2020

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

2020 BCSC 26 A.J.F. v. N.L.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.J.F. v. N.L.S.,

2020 BCSC 26

Date: 20200110

Docket: E133331

Registry: Vancouver

Between:

A.J.F.

Claimant

And

N.L.S.

Respondent

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Claimant:

T.R. Bell

Counsel for the Respondent:

L.T. Self

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 8-12, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 10, 2020

Introduction

- [1] This is a family law matter in which the claimant seeks a number of orders to address what he characterizes as the respondent's "repeated, prolonged and unrepentant failures and refusals" to abide by multiple court orders.
- [2] While the respondent did not file a formal cross-application, at the heart of her position is her desire to re-establish a relationship with the two children of the marriage, currently ages 7 and 10, who the respondent has had no direct contact with for over four years.

Preliminary Observations

- [3] The term "high conflict" is often used to describe family law cases in which there are numerous court proceedings and a significant degree of animosity between the parties. While that accurately describes what has transpired to date in this case, it does not fully capture the degree of toxicity that has pervaded the lengthy history of this litigation and that continued through the current application.
- [4] I do not intend to go through the history in great detail except to the extent that it is relevant to the issues now before the Court. Nor do I intend to review all of the voluminous evidence filed on the application, which totalled in excess of 4,000 pages. Many of the affidavits filed by both parties are replete with hearsay, opinion and argument, the principal focus of which appears intended to portray the other party in as negative a light as possible. I will highlight some particular concerns when setting out the respective positions of the parties.
- [5] When I became seized of this matter in October 2018, I advised the parties that, going forward, I expected the evidentiary record would be cleaned up and the extensive irrelevant and inadmissible evidence on the file excised. I also advised the parties that I intended that the focus of the proceeding would be prospective, in the sense of considering how this family would move forward from the lengthy and unfortunate history that preceded my involvement, rather than dwelling on that history.

- [6] Regrettably, neither of those occurred. Much of the evidence and the parties' submissions focussed on excavating their history and re-litigating past grievances. As indicated, I do not intend to dwell on this history except to the extent that it informs my consideration of the current issues. Nor do I intend to resolve factual disputes between the parties about past events. Given the state of much of the evidence, I would be unable to do so in any event.

The Parties

- [7] The claimant is currently 34 years old and the respondent is 35.
- [8] They met in 2006, began dating in February 2007, and moved in together in March 2007. They were married on June 8, 2010. It is apparent that they had a volatile relationship from the start. There were a number of separations and reconciliations during the relationship.
- [9] The parties have two children: A. born August 26, 2009, and K. born September 25, 2012.
- [10] They separated for good in March 2013, and were divorced pursuant to the order of Madam Justice Griffin, as she then was, made June 1, 2015 (the "Final Order").

History of the Litigation

- [11] There were numerous applications brought by the parties and resulting court orders prior to the Final Order. They are of minimal relevance to the issues currently before the Court as the issues between the parties are comprehensively addressed in the Final Order. Suffice it to say that the prior court proceedings reflect the fractious and destructive nature of the parties' relationship.
- [12] The Final Order was entered on June 1, 2015, which was scheduled to be the first day of a 10 day trial. Both parties were represented by counsel. The Final Order contains the following material terms:
- a) Paragraph 1 provides that the parties are divorced;
 - b) Paragraph 2 provides that the parties are joint guardians of the children;
 - c) Paragraph 3 sets out the parties' parenting responsibilities;
 - d) Paragraphs 4 and 5 require the parties to consult on the exercise of parental responsibilities, with the claimant having final decision-making authority in the event of a disagreement;
 - e) Paragraph 6 grants primary residence of the children to the claimant;
 - f) Paragraph 9 provides for the respondent to have supervised parenting time with the children at the office of the children's counsellor;
 - g) Paragraph 10 provides that after the successful completion of counselling, the respondent shall have specified professionally supervised parenting time;
 - h) Paragraph 12 is of particular note. It reads:

The Respondent will sign a Consent Order granting the Claimant a Final Order for sole guardianship, sole parenting responsibilities and primary residence under the Family Law Act [S.B.C. 2011, c. 25 [FLA]], and sole custody under the Divorce Act (Canada) [R.S.C. 1985, c. 3 (2nd Supp.)], which will be held by the Claimant's counsel to be entered if the Children are not returned from one of the scheduled visits or continued drug use by the Respondent, or if the Court on a subsequent application by the Claimant determines that a final order in these terms is appropriate at the time of the subsequent court application.

- i) Paragraph 15 provides for mandatory drug testing of the respondent;
- j) Paragraphs 16 and 17 provide that in the event the respondent fails a drug test, there will be an immediate cessation of her access to the children and she will commence a course of treatment or addiction counselling, including a residential treatment program;
- k) Paragraph 19 provides that the respondent will pay the claimant child support in the amount of \$475.00 per month commencing June 1, 2015, based on a Federal Child Support Guidelines, SOR/97-175, income of \$32,500;
- l) Paragraph 21 provides that the parties will share s. 7 special and extraordinary expenses proportionate to their incomes, which at the time resulted in a 50/50 split; and
- m) Paragraphs 35-42 set out a number of conduct orders pursuant to ss. 225 and 227 of the FLA:
 - i) neither party shall speak negatively regarding the other parent in front of or in hearing of the children;
 - ii) the respondent will not permit her family to speak disparagingly about the claimant or his family;
 - iii) neither party shall permit the children to be subjected to any negative comments or actions of anyone that would negatively impact on the relationship between the children and either party, excepting such actions being carried out by individuals carrying out official duties;
 - iv) the respondent will not speak disparagingly about the children's school, school administrators and/or teachers in front of the children or in hearing of the children, and will not permit her family to do the same;
 - v) the respondent will not subject or expose the children to toys, games, movies, books, or TV programs the content of which is age and/or content inappropriate, including but not limited to content relating to weapons, including guns, evil villains, monsters, or ghosts and will not permit her family to do the same;
 - vi) all communications between the parties shall be in writing via e-mail, shall be courteous, and shall be limited to discussions concerning the children;
 - vii) neither party shall communicate with the family of the other, unless agreed in advance in writing or necessitated by emergency; and

viii) neither party shall attend within 20 metres of the other's known residence.

[13] The nature and extent of these conduct orders gives some indication of the problematic behaviour that preceded the Final Order, particularly on the part of the respondent.

[14] As is all too often the case, the Final Order did not bring any finality to the parties' disputes.

[15] On June 2, 2015, the respondent failed a drug test, although the claimant did not receive the results of the test until June 23, 2015.

[16] The claimant then filed an application and on July 23, 2015, Mr. Justice Bowden granted an order fining the respondent \$500.00 for her non-compliance with the Final Order (the "Bowden Order"). The respondent was served with the notice of application but did not attend. By that time, she had parted ways with her lawyer.

[17] On August 15, 2015, Mr. Justice Josephson granted an order for alternate service on the respondent and an order permitting the claimant to apply for and obtain passports for the children (the "Josephson Order").

[18] On August 26, 2015, the respondent attended at the claimant's home in breach of the Final Order. She attached some balloons to the front gate to mark A.'s birthday.

[19] This in part led the claimant to file an application that came before Mr. Justice Kent on September 15, 2015. While the respondent was served with the notice of application, she again did not appear. As a result of that application, Mr. Justice Kent granted the following orders (the "Kent Order"):

1. Leave is granted to the Claimant to forthwith file the consent Order entered into by the parties on June 1, 2015, and accordingly, from this date forward the Claimant will have sole guardianship, sole parenting responsibilities and primary residence of the Children under the Family Law Act, and sole custody under the Divorce Act (Canada).
2. [T]hat the Respondent not attend within 20 metres of the school of the Children, , without the written consent of the Claimant or further Order of this Court.
3. That in the event the Respondent attends within 20 metres of the Claimant's residence or within 20 metres of the school of the Children, , a member of the Royal Canadian Mounted Police and/or the Abbotsford Police Department will apprehend and remove the Respondent from the Claimant's residence and/or the Children's school
4. The Respondent is declared to be non-compliant and continues to be in contempt of court orders in this proceeding, and accordingly, , the Respondent is hereby fined the sum of \$5,000 payable forthwith. The Family Maintenance Enforcement Program ["FMEP"] may enforce and collect this fine as a s. 7 special and extraordinary expense pursuant to the Federal Child Support Guidelines.

- [20] The claimant was granted leave to serve a copy of the Kent Order on the respondent by way of email, which he did, and he was awarded his special costs, payable forthwith.
- [21] On September 25, 2015, in breach of the Kent Order, the respondent attended the claimant's home and left gifts for the children at the gate. She also attempted to contact the claimant numerous times by Skype. This led the claimant to file a report with the police and to file an application for a protection order pursuant to s. 183 of the FLA.
- [22] That application was heard by Mr. Justice Greyell on December 8, 2015. Again, the respondent did not attend. Justice Greyell made a number of protection orders under s. 183 of the FLA (the "Greyell Order"), including the following:
- a) The respondent is restrained from directly or indirectly communicating with or contacting the claimant or the children;
 - b) The respondent is restrained from attending at, entering or being found within 500 metres of the claimant's residence or any premises where the claimant or the children are residing or occupying; and
 - c) The respondent is restrained from following, calling or messaging, or otherwise contacting the claimant or the children.
- [23] The Greyell Order included a police enforcement clause.
- [24] After the issuance of the Greyell Order, there were further instances of the respondent seeking to contact the claimant. On August 26, 2016, the respondent attended the claimant's home and again tied balloons to the front gate to mark A.'s birthday. The claimant filed a further complaint against the respondent which resulted in criminal charges being laid against her.
- [25] On November 30, 2017, the respondent, who by that time had retained new counsel, filed a notice of application seeking to restore parenting time and to vary child support.
- [26] On February 9, 2018, the claimant filed his current notice of application seeking numerous grounds of relief against the respondent.
- [27] On February 23, 2018, the parties appeared before Madam Justice Iyer who ordered that neither party may bring any application beyond the claimant's application that was then before the court, without leave of the court (the "Iyer Order"). Justice Iyer then set the matter for a four-day hearing commencing on May 28, 2018, and she set certain timelines for the exchange of materials.
- [28] The hearing did not proceed at that time. Ultimately, I seized myself of the matter and it was set for a five-day hearing in March 2019. Those dates were adjourned to July 2019 because the respondent changed counsel at the last minute.

[29] In advance of the hearing in July, on May 30 and 31, 2019, the claimant applied for security for costs based in large part on the respondent's past failure to comply with court orders, including orders for the payment of costs. On June 7, 2019, I rendered reasons for judgment in which I declined to order security for costs, but instead ordered that the respondent pay the \$5,000 fine set out in the Kent Order in advance of the July hearing as an indication of her "willingness to adhere to and respect the Court's processes". The respondent paid the \$5,000.

The s. 211 Report

[30] While, as I have indicated, much of what occurred prior to the Final Order is not directly relevant to the matters now before the Court, it is useful to review the s. 211 report that was prepared by Dr. Larry Krywaniuk, dated May 29, 2015. A s. 211 report was initially ordered by Mr. Justice Harvey on December 30, 2013, then again by Mr. Justice Kent on December 1, 2014.

[31] I reproduce below some of the key passages from Dr. Krywaniuk's report:

P. 4

The relationship between [the claimant] and [the respondent] appears to be very complex and complicated and has varied substantially throughout their relationship. This also has been the case for the relationship between [the claimant] and his parents and also between [the respondent] and [the claimant's] parents both of which appear to have been variable over the years. One of the more recent features has been the internecine conflict within [the claimant's] family to the extent that [the claimant] and his parents appear to be largely estranged from the family at large.

The general issues surrounding guardianship and parenting time generally are defined by context that this complex situation provides and likely are deeply intertwined with it. The relationship between [the claimant] and [the respondent] is now characterized by the many forms of conflict that have been very extensively documented in the numerous affidavits produced in support of each party. These include numerous allegations against one party or the other along with evidence to support them. Most recently the primary parenting outcome has been the significant reduction in [the respondent's] parenting time to the point that it is now limited to a few hours a week under supervision.

P. 14

Overall, alcohol abuse did not seem to be an issue for either party. [The claimant] generally indicated his concern that [the respondent] is abusing drugs and it was pointed out that she was court ordered not to use drugs but tried to circumvent the issue by obtaining a medical marijuana licence. On the other hand, the individuals who called in on [the respondent's] behalf have indicated that they have not seen any indication of a drug problem on [the respondent's] part.

P. 16-18

My impression is that [the respondent] feels she is relatively powerless in her relationship with [the claimant] and has felt the need to use whatever means are at her disposal to gain some advantage. She told me that [the claimant] said that he had a million dollars to devote to this case and that her father was told that he would likely go bankrupt in pressing the case. She told me that she began to believe that [the claimant] was philandering even when they still resided in Calgary and the impression I had from the text messages and emails is that she felt her love for him was unrequited. The impression also was that she was deeply hurt by what she saw as his callous treatment of her while they were still talking about working things out but that he was dating someone else at the same time. Consequently, she saw him as insincere and there were times when she responded with bitterness, anger or self-deception.

The impression I had from [the claimant] was that he saw her as manipulative and seeking revenge but it did not appear to me that he accepted much in the way of responsibility for the breakdown of the relationship or how his actions or attitudes may have affected [the respondent]. In the end, it seems that [the respondent's] machinations were sometimes ill-conceived, ineffectual and probably self-defeating. [The claimant], on the other hand, seems to have a particularly good memory for times and sequences and also is very well organized in presenting his situation and marshalling his resources. It appears that he has been able to out-manoeuvre [the respondent] and take advantage of her self-defeating behaviours to the point where he now essentially has de facto control of the children.

Although [A.] and [K.] are the identified subjects of the dispute and conflict much or perhaps even most of the energy has been focussed on the parent-to-parent issues, even when the issue involved the children. Although there were clearly concerns about parent-child issues these were within the context of the conflict between [the claimant] and [the respondent].

If life had a "reset" button, this would be an opportune time for [the respondent] and [the claimant] to press it and go back to an earlier time when the situation was less onerous. Unfortunately, this is not an option and they are now in the position where they must try to make the best of what appears to be a very difficult situation in the interests of providing [A.] and [K.] the best possible future.

From the information I have been able to gather, including the test results, my impression is that [the respondent] has the potential to be a normal parent. At this point, she tends to be rather defensive and, at least from a psychological perspective, is presenting herself in a positive light. I also think that she is overly optimistic about the emotional adjustment of the children and certainly much more so than [the claimant] is. [The respondent] tends to see them as not having difficulties or concerns but there otherwise tends to be agreement that the children have been having adjustment difficulties in the form of confusion, anxiety and, especially with [K.], some sleep difficulties. Otherwise, [the respondent] presents herself as having adequate parenting knowledge and parenting skills. Personality testing shows a significantly defensive nature, which may tend to obscure other psychological factors. From [the claimant's] perspective, this would

include rule breaking behaviour as well as behaviours of an antisocial nature.

Based on my test results and interviews, my impression is that [the claimant] was significantly less defensive and much more open than [the respondent] about parenting issues. I also understood from him that he has been working with a counsellor and is researching parenting skills and obtaining psychological support for his parenting role. He has taken initiative in organizing schooling at appropriate levels for the children and my understanding is that he is attentive to their medical, dietary and dental needs. He also is aware of community resources, including extracurricular activities. Even so, I would recommend that, as a parent of young children, he continue researching parenting issues.

[Emphasis added.]

[32] Having reviewed the background information in considerable detail, Dr. Krywaniuk makes a number of recommendations. Again, I will reproduce some of his observations:

P. 18

With respect to guardianship, the primary proposals have been the desire for sole guardianship on the part of [the claimant] and an equally shared guardianship arrangement on the part of [the respondent]. [The claimant] presents a well-organized body of information that provides considerable support for his position, as described in the Conclusions and Opinion section of this report. While it appears unlikely to me that the children would be physically abused or exposed to the deleterious effects of a drug or alcohol abuser, there has been an indication of pervasive coaching of the children by [the respondent] against [the claimant] and his parents. [The claimant] also provides evidence that [the respondent] has acted cavalierly with respect to court orders and that he believes she can put the children at risk through her contact with inappropriate individuals, including hard drug users even, if she doesn't use them on her own. He also seems to be concerned that she does not have insight into the effects of her behaviour on the children.

On the other hand, my observations and that of others has been that the children have a strong bond with [the respondent]. I have no doubt she loves them dearly, as does [the claimant], and wants the best for them even if she has acted inappropriately at times. My impression is that her actions may have resulted from a sense of anger and betrayal, a fear that she would lose contact with her children and a strong sense of power imbalance in her relationship with [the claimant]. Enshrining this in a sole guardianship arrangement will likely perpetuate her sense that she has been unfairly treated. I spoke to a relatively large number of individuals, including members of both families [as] well as friends and associates that have uniformly described her as a warm and lovely person who is completely devoted to her children and who has very good parenting skills. Although they did acknowledge that drug habits can remain hidden, they also indicated that they had no indication that [the claimant] was a chronic drug user to the extent that it would interfere with her parenting.

P. 19-20

The major alternative [to sole guardianship] is to establish a shared parenting relationship at some level, including shared guardianship. One effect of this is that it likely would reduce the level of resentment that [the respondent] may have or develop based on her current sense of imbalance. While it has been suggested that she would be able to apply to the court to modify a sole custody provision if she can make the necessary changes, my impression is that this would represent an onerous task for her and her family, who likely have depleted their financial resources to a significant extent. In this sense, this would increase the risk that [the respondent's] involvement with the children at the guardianship level would be marginalized and that she would realistically have little opportunity to change it. I am aware that [the claimant] feels that [the respondent] needs to make some significant changes and that a number of checks, balances and conditions are required to ensure that she does so if she were to have increased involvement with the children.

It appears to me that an appropriate level of control can be established through other means than sole custody, particularly by using the Joyce model, in which [the claimant] would be granted final say around specific issues. Over time and with outside assistance, it would also allow them the opportunity to develop a coparenting relationship, which is likely to be ultimately more beneficial to the children [than] one in which there is a significant imbalance in parenting time.

there is considerable indication that [the respondent] has parented in an inappropriate fashion at times and without consideration for the effect that her behaviour would have on the children and their psychological adjustment. I would recommend that she address these issues through parenting courses, personal research, consultation with parenting coaches and through personal counselling.

Assuming that [the respondent] will address the identified issues and demonstrates the ability to work in the interests of the children, when and if the need for supervised access is no longer present, [the respondent's] parenting time could increase in conjunction with the progress she is making.

P. 22

With respect to specific numbers, my recommendation under this approach is that [the claimant] and [the respondent] begin with the status [quo] with regard to parenting time and that a parenting coordinator be appointed as soon as is feasible. I would envision that, over time, they would work towards a reasonably equal parenting arrangement which could range between 60/40 to 50/50. The exact balance may change with the ages and schedules of the children. Many parents prefer that the children reside primarily in one home during the school week and that the other parent may have somewhat more time during the summer or other breaks from school to make up the difference.

- [33] Dr. Krywaniuk's report provides useful insight into the state of the parties' relationship in 2015 and before. Unfortunately, given that it is over four years old, it is of limited assistance in considering present circumstances and determining a path forward.

The Claimant's Evidence and Position

- [34] At the outset, I noted problems with the evidence of both parties. To be fair to the claimant, efforts were made to "clean up" and cull the record from how it had developed throughout the proceeding. Some thirty or more previous affidavits sworn by the claimant were replaced by what was described as an "omnibus affidavit" that summarizes what the claimant considers to be the important evidence from the previous affidavits and sets out his evidence in support of his current application. He also filed three additional affidavits on the application.
- [35] While the omnibus affidavit represents a significant improvement in the quality of the evidence from what was in the record before, it is, as I indicated, still replete with opinion, argument and inadmissible hearsay. It is largely focussed on highlighting the past misdeeds of the respondent, or at least the claimant's perception thereof.
- [36] There are also problems with the supporting evidence filed by the claimant, in particular the five affidavits sworn by his mother. She goes into considerable detail about the history of the parties' relationship, again for the apparent purpose of emphasizing all of the respondent's alleged misdeeds. She purports to give evidence about statements made in court that are not reflected in reasons for judgment or court orders. She goes so far as to include research she did about both the respondent's former counsel and one of the judges previously involved in the case. Throughout her affidavits, she regularly opines about the motives and actions of the respondent and provides her interpretation and opinions about the evidence adduced by the respondent. Her evidence is suggestive of someone so immersed in the claimant's case that she lacks any sense of objectivity and her evidence is therefore of minimal assistance to the Court.
- [37] I turn now to the key elements of the claimant's position on his application. The notice of application, which was drafted by the claimant's previous counsel, sets out 15 items of relief sought, including extensive fines for breaching court orders, imprisonment and special costs.
- [38] The central thrust of the claimant's position is that the respondent's "repeated, prolonged and unrepentant" failures to comply with court orders must attract consequences. Further, he submits that the respondent's conduct casts significant doubt over whether renewed contact between her and the children would be in the children's best interests. In order for the respondent to even set foot on the road towards re-establishing contact, the claimant submits that she must prove that she has learned from the past and taken meaningful steps to rectify her behaviour.

- [39] Many of the breaches alleged by the claimant pre-date the Kent Order. I do not intend to consider those alleged breaches as, in my view, they are subsumed in the Kent Order. It is clear from the face of that order, and from the transcript of proceedings before Justice Kent, that the preceding history informed his decision to permit the claimant to file the consent order terminating the respondent's parental rights. Further, the Kent Order expressly states that a fine of \$5,000 is being imposed due to the respondent's non-compliance with and contempt of court orders.
- [40] In terms of breaches that post-date the Kent Order, some of which include ongoing or repeated breaches of earlier orders, they fall into several different categories:
- a) No contact/communication orders - the Final Order and the Kent Order both include terms governing communication between the parties and restraining the respondent from attending the claimant's residence and other locations such as the children's school. The Greyell Order was in the form of a protection order under s. 183 of the FLA and also included terms restraining the respondent from attending the claimant's home and the children's school as well as restraining her from contacting the claimant or the children. The claimant has provided evidence of the respondent breaching these terms, for example by attending his home as set out in paras. 18 and 24 above. I would add that because the Greyell Order is a protection order, breach of that order raises specific issues relating to enforcement that I will address below;
 - b) Child support and s. 7 expense orders - under para. 19 of the Final Order, the respondent was to pay child support in the amount of \$475.00 per month commencing June 1, 2015. Under para. 21, the parties were to share responsibility for s. 7 expenses proportionate to their incomes, which at the time of the Final Order was set at 50/50. The respondent has made minimal voluntary payments of child support and virtually none towards s. 7 expenses. Since August 2015, FMEP has been garnishing employment and government benefit amounts payable to the respondent. According to an FMEP statement dated June 14, 2019, the claimant had received a total of \$8,684.60 and the outstanding balance owing was \$32,201.48. The claimant alleges that the respondent has actively tried to frustrate collection of child support, for example she states that she does not maintain a bank account. The claimant also alleges that the respondent's disclosure of financial information and records has been deficient. The claimant points to the fact that in her financial statement sworn May 6, 2019, the respondent lists a total of \$247,000 in personal loans earmarked for "court and living expenses", yet there is no supporting documentation and, despite allegedly receiving these amounts, the respondent paid none of it towards her child support obligations; and
 - c) Costs and fines - each of the Bowden, Josephson and Kent Orders included an award of costs in favour of the claimant. Certificates of costs were filed in respect of these orders totalling \$10,529.08. In addition, pursuant to para. 34 of the Final Order, the parties were to share the cost of the s. 211 report equally and the respondent was to reimburse the claimant for her share. She has not paid any of these amounts. Pursuant to the Bowden Order, the respondent was fined \$500.00 for non-compliance with the Final Order. She did not pay that fine. Under

the Kent Order, the respondent was fined \$5,000.00, which I again consider to have subsumed the fine in the Bowden Order. The respondent initially did not pay that amount, however she did upon my subsequent order as a condition of participating in the present application.

- [41] As I indicated, the Greyell Order was a protection order, which involves certain unique issues relating to enforcement. Sections 228 and 230 of the FLA deal with enforcement of orders made under the FLA. Section 228 deals with enforcement of orders respecting conduct and s. 230 deals with enforcement of orders generally. However, pursuant to s. 188, a protection order may not be enforced "by means of any order that may be made under" the FLA. In other words, the enforcement mechanisms and powers available under ss. 228 and 230 do not apply where the order alleged to have been breached is a protection order issued pursuant to s. 183.
- [42] Protection orders result in a distinct form of order, and breaching a protection order is a criminal offence under s. 127 of the Criminal Code: *B.H.C. v. F.G.J.P.*, 2017 BCPC 378 at para. 70; *M.S. v. K.S.*, 2019 BCSC 1458 at para. 69; *A.G.M. v. R.S.M.*, 2018 BCSC 1670 at para. 45. In this case, the claimant contacted the police to complain about the respondent's breach of the Greyell Order. Crown counsel became involved. Criminal charges were laid against the respondent but those charges were ultimately stayed, apparently because of the Crown's view that the issues between the parties were being addressed in the family litigation.
- [43] The claimant has expressed considerable frustration about the fact that there seems to be little or no recourse for breaching a protection order given that s. 188 of the FLA makes it clear that enforcement cannot be by way of an order under the FLA and yet the Crown has declined to proceed with criminal charges. I will return to this issue below.
- [44] Before leaving the point however, I want to address the fact that during his dealings with Crown counsel, the claimant surreptitiously recorded a conversation with Crown counsel without their knowledge or consent. He then sought to introduce the transcript of that conversation into evidence at the hearing, which I rejected.
- [45] The record contains transcripts of other recordings made by the claimant, generally of conversations between him and the respondent, all made without the knowledge of the respondent. The claimant justifies this behaviour on the basis of the respondent's history of making false claims about him to the police and to the Ministry of Child and Family Development ("MCFD"). While the claimant may have had some legitimate concerns in this regard, I agree with the observation of Madam Justice Sharma in *Lin v. Wang*, 2019 BCSC 1169 at para. 34, that the practice of recording personal conversations for use in family litigation is insidious and should be discouraged.

- [46] Further, whatever reasons the claimant may have had for recording conversations with the respondent, they cannot explain or justify recording a conversation with Crown counsel. To do so and then to propose using the recording in this proceeding shows remarkably poor judgment.
- [47] With respect to the various breaches of court orders referred to above, the claimant seeks an order on this application that the respondent pay a significant amount of the child support and the costs and fines owing before the court will consider granting her leave to bring an application to re-establish contact with the children.
- [48] In addition to the financial issues and the issues concerning the respondent's breaches, the claimant also submits that the respondent must prove that she has taken steps to address her past conduct and to establish that it is in the best interests of the children to re-establish contact with her.
- [49] In support of this latter point, the claimant gives evidence about past events that he says caused the children considerable stress and upset. These include confrontations at exchanges, unjustified reports to MCFD, coaching of the children to have them say adverse things about the claimant and his family, and repeated telephone calls to the claimant's house despite no contact orders. On one occasion, in April 2014, the respondent was discovered attempting to abscond with the children, having shaved their heads.
- [50] The respondent's conduct was sufficiently concerning that prior to the termination of her parenting rights by way of the Kent Order, her parenting time was required to be supervised (order of Master Caldwell dated November 6, 2014; order of Mr. Justice Steeves dated April 29, 2015; order of Master Tokarek dated May 4, 2015; Final Order).
- [51] The claimant deposes that over the four years since the children have had any contact with the respondent, their lives have stabilized and they have thrived. They are both doing well at school and are involved in numerous extra-curricular activities. Their stress and anxiety has lessened considerably.
- [52] The claimant relies on the affidavit of I.P. sworn February 7, 2018. I.P. is a counsellor who has worked with both children, although more so with the older child A. than the younger child K. She also swore a previous affidavit dated April 15, 2015. As at that date, she had seen A. six times commencing in October 2014.
- [53] In her more recent affidavit, I.P. deposes that sessions with A. re-commenced in March 2017. She describes A. as having "insecure attachment and abandonment issues". She notes that the claimant has told her that he has been advised by A.'s school that A. seems more needy and at times presents with clinging behaviours.
- [54] I.P. concludes her affidavit by stating:

Access would not be advisable at this time. The children's mother has not seen her two sons for a period of two years. She has experienced ongoing conflicts with the law and substance abuse issues. Perhaps the children could decide for themselves once they become of age, rather than confuse them any further and add to their insecurities.

I believe that forcing either [A.] or [K.] to see their mother at this time could cause irreparable emotional and psychological harm to the children.

Given the nature of trauma and the children continuing to have issues as a result of what they tell me their mother did with them and told them, I do not believe it advisable that either [A.] or [K.] see their mother until they are old enough to make a decision for themselves. Generally, I believe it is important for children to have relationships with both of their parents, however, in this instance, I cannot recommend that these two children [spend] any time with their mother.

[55] While I.P.'s views must be considered given her counselling relationship to the children, there are significant flaws in her evidence that impact the weight that I can attach to it. Specifically:

- a) She relies on hearsay statements in support of her ultimate recommendations. While it is generally accepted that hearsay statements of children may be relied on, she appears to take at face value what the claimant says he was told by A.'s school;
- b) In a similar vein, she suggests that the respondent has experienced "ongoing conflicts with the law and substance abuse issues". She provides no basis for this bald statement, although it is fair to assume it comes from the claimant, and she does not profess to have any knowledge of the respondent's current circumstances, or her circumstances post 2015;
- c) She makes her recommendation without ever interviewing the respondent. Again, it is apparent that she relies heavily on what she is told by the claimant; and
- d) Her opinion fails to account for the fact that the children have not had any meaningful contact with the respondent since June of 2015, when A. was five years old, almost six, and K. was two, almost three. She does not explain how, given that length of time, the respondent is contributing to any problems A. is continuing to have. With respect to K., it is likely that he has no meaningful memory of the respondent yet she opines that any contact with her would be damaging to him.

[56] For these reasons, I do not accept her recommendation that there be no contact with the respondent until the children come of age and can decide for themselves. That said, there is no doubt that if there is to be a move towards re-establishing contact, it must be managed with great care.

[57] As noted, the claimant seeks to hold the respondent accountable for her past conduct and for the breaches of the various orders. In his written submission, the claimant sets out the terms of the orders sought as follows:

- a) The respondent pay a sufficient portion of the support owed before the court will consider granting her leave to apply to permit her to re-establish contact with the children;
 - b) The respondent pay a sufficient portion of the costs and fines she has been ordered to pay before leave will be considered;
 - c) The respondent satisfy her obligation to pay 50% of the cost of Dr. Krywaniuk's fees for the s. 211 report;
 - d) The respondent produce ongoing drug tests for a prescribed period of time that will be according to a prescribed schedule and on demand;
 - e) The respondent attends and complete a residential treatment program;
 - f) The respondent fulfills certain recommendations made by Dr. Krywaniuk;
 - g) If mediation is ordered, the respondent post security in advance for the cost;
 - h) If further expert evidence is sought or ordered, the respondent post security in advance for the costs, to be borne solely by the respondent;
 - i) Fines for the respondent's breach of the various orders, totalling at least \$30,000;
 - j) FMEP be permitted to collect costs; and
 - k) Special costs, or alternatively costs, to be collected by FMEP.
- [58] The claimant submits that his position is not about punishing the respondent, but rather "[i]t is about rehabilitation demonstrated through a protracted period of stability and the earning of trust". He submits further that the court cannot gamble with the lives of the children and that the measures he proposes are necessary in order to ensure the children are not put at risk.

The Respondent's Evidence and Position

- [59] In her amended response to the claimant's application, the respondent acknowledges that she has not complied with a number of court orders, including:
- a) Paragraphs 11 and 13 of the Final Order requiring the parties to engage in mediation and/or arbitration to resolve disputes;
 - b) Paragraph 14 of the Final Order requiring that neither party is to consume marijuana or other illegal drugs. The respondent acknowledges using marijuana and failing a drug test requested on June 1, 2015;
 - c) Paragraph 15 of the Final Order requiring the respondent to undergo drug testing;
 - d) Paragraph 17 of the Final Order requiring the respondent, if she fails a drug test, to undergo drug counselling including a residential treatment program;

- e) Paragraph 19 of the Final Order requiring the respondent to pay child support in the amount of \$475 per month;
 - f) Paragraph 21 of the Final Order requiring the respondent to pay 50% of special and extraordinary expenses;
 - g) Paragraph 1 of the Bowden Order requiring her to pay a fine of \$500;
 - h) Paragraph 8 of the Bowden Order requiring her to pay arrears of child support and provide post-dated cheques for ongoing support;
 - i) Paragraph 10 of the Bowden Order requiring the respondent to pay costs;
 - j) Paragraph 3 of the Josephson Order requiring the respondent to pay costs;
 - k) Paragraph 3 of the Kent Order requiring the respondent to stay at least 20 metres away from the claimant's residence and the children's school;
 - l) Paragraph 4 of the Kent Order requiring the respondent to pay a \$5,000 fine (that has now been paid);
 - m) Paragraph 6 of the Kent Order requiring the respondent to pay costs; and
 - n) The Greyell Order prohibiting the respondent from attending the claimant's residence or the children's school and from contacting the claimant and the children.
- [60] Turning to the respondent's evidence, similar to that of the claimant, the evidence of the respondent is flawed in that it too contains hearsay, opinion and argument. While I agree with counsel for the respondent that, particularly in family litigation, it is preferable that affidavits should be in the parties' own words, rather than carefully crafted by counsel, they are still subject to the rules of evidence governing what is permissible in an affidavit.
- [61] For example, near the beginning of her affidavit #19 sworn May 9, 2019, the respondent states "I did not believe that the Final Order was in the best interests of the Children, especially the provisions that deal with parenting arrangements for the Children." While that no doubt reflects the respondent's opinion, the statement is neither admissible nor helpful.
- [62] Also like the claimant, much of the respondent's evidence is directed at the history of their relationship and the physical, emotional and financial abuse that she alleges she was subjected to. She also alleges that the claimant has been abusive to the children and to various other women. She includes in the record an affidavit of one other former girlfriend of the claimant who speaks to this alleged abuse as well as correspondence from another former girlfriend who makes similar allegations.
- [63] The focus of the respondent's evidence, like that of the claimant, appears to be to portray the other in as negative a manner as possible. However, she also provides some evidence about her recent and current circumstances:

- a) Between January and April 2016, she completed an Early Childhood Education Assistant Program;
 - b) Since September 2016, she has been studying social work and counselling at a Lower Mainland university. A transcript from the university indicates that the respondent has been enrolled in three classes per semester since the fall of 2016;
 - c) The respondent deposes that since about March 2016, she has attended counselling with N.G., a registered clinical counsellor. She says that counselling is now on an "as needed" basis. The respondent has included two documents prepared by N.G. in April 2017. They are very general in nature and are more in the form of references for her admission to university than actual records of counselling; and
 - d) In her financial statement sworn May 6, 2019, she claims income of \$13,727. In 2017, she claimed income of \$17,189 and in 2016, she claimed \$8,058.39. Attached to her financial statement is a letter dated April 10, 2019, from her employer who describes her as a part-time independent contractor for a wealth management company who earns \$1,000 - 1,200 per month.
- [64] As pointed out by the claimant, the respondent at best provides vague explanations of why she breached the various court orders. For example, she says:
- a) "At the time of the Final Order, I was mentally exhausted and was suffering a significant financial burden as a result of the cost of ongoing litigation" (affidavit #19, para. 6); and
 - b) "In the months following the Final Order the claimant made many applications that I did not respond to. I was emotionally in a very dark place and when I stopped working with my previous lawyer, , shortly after the Final Order, I felt powerless to respond to the court documents that were being provided to me by the Claimant. I typically responded to these applications by throwing them away and not looking at the contents of the envelopes that were sent to me. I could not afford to hire a lawyer again as I had exhausted my finances. I felt dead inside and the only things I cared about were taken from me. I felt completely hopeless and helpless" (affidavit #19, para. 11).
- [65] The respondent speaks at some length in her affidavits about the anguish that the loss of her children has caused her and the depth of her desire to re-establish a relationship with them. I am not going to go into that evidence in any detail but I accept that the removal of her parenting rights and the effective termination of her relationship with the children has been devastating. I further accept that she is sincere in her wish to resume her role as the children's mother.

[66] In response to the claimant's application, the respondent submits that she was unable to comply fully with the various financial orders given her personal circumstances. She notes that the Final Order contemplates that child support and the parties' proportionate share of s. 7 expenses is to be adjusted annually, effective September 1 of each year. That has never occurred (nor has the annual exchange of income tax information).

[67] As set out at the beginning of these reasons, the central element of the respondent's position is her desire to re-establish contact with the children. She seeks leave of the court to bring an application to establish the terms for beginning that process.

Legal Framework

[68] The following provisions of the FLA are relevant:

Misuse of court process

221 (1) A court may make an order prohibiting a party from making further applications or continuing a proceeding without leave of the court if satisfied that the party

- (a) has made an application that is trivial,
 - (b) is conducting a proceeding in a manner that is a misuse of the court process, or
 - (c) is otherwise acting in a manner that frustrates or misuses the court process.
- (2) If an order is made under subsection (1), the court may do one or more of the following:
- (a) make the order apply
 - (i) for a specified period of time, or
 - (ii) until the party has complied with an order made under this Act;
 - (b) impose any terms and conditions respecting the granting of leave to make further applications or to continue a proceeding;
 - (c) require the party to pay
 - (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the party's actions, including fees and expenses related to family dispute resolution,
 - (ii) an amount not exceeding \$5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the party's actions, or
 - (iii) a fine not exceeding \$5 000.

Enforcing orders respecting conduct

228 (1) If a party fails to comply with an order made under this Division, the court may do one or more of the following:

- (a) make a further order under this Division;
- (b) draw an inference that is adverse to the party, and make an order based on the inference;
- (c) make an order requiring the party to pay
 - (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the non-compliance, including fees and expenses related to family dispute resolution,
 - (ii) an amount not exceeding \$5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the non-compliance, or
 - (iii) a fine not exceeding \$5 000;
- (d) make any other order the court considers necessary to secure compliance.

Enforcing orders generally

230 (1) Subject to section 188 [enforcing orders respecting protection], an order under this section may be made only if no other provision of this Act applies for the purposes of enforcing an order made under this Act.

- (2) For the purposes of enforcing an order made under this Act, the court on application by a party may make an order to do one or more of the following:
 - (a) require a party to give security in any form the court directs;
 - (b) require a party to pay
 - (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the party's actions, including fees and expenses related to family dispute resolution,
 - (ii) an amount not exceeding \$5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the party's actions, or
 - (iii) a fine not exceeding \$5 000.

[69] The other provision of the FLA that is of central importance is s. 37, which deals with the best interests of the child:

Best interests of child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
 - (a) the child's health and emotional well-being;

- (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

Discussion

[70] I will begin with some general observations.

[71] As is apparent from the above summary of the parties' evidence and positions, each blames the other for what has gone on in the past and for the current state of affairs and neither acknowledges any fault on their own part. However, as I stated in my oral reasons on the claimant's security for costs application: "it is not necessary nor is it possible to parse the extensive record and to assign blame for the past and current state of affairs. That said, from what I have seen of the record, neither party is free of blame". That observation continues to hold true.

- [72] The claimant again says that he is not trying to punish the respondent but rather seeking to ensure that she has learned from the past and taken steps to address and assume responsibility for her troublesome conduct. While there may be a measure of truth in this, it is clear that the sanctions sought by the claimant, particularly the financial ones, are indeed punitive and, if ordered, would effectively preclude the respondent from even starting along the path towards some form of re-integration with the children for the foreseeable future.
- [73] By way of example, the claimant characterizes each missed child support payment as a separate breach of a court order and, as a consequence, alleges literally hundreds of breaches. Such an approach is both hyperbolic and unhelpful.
- [74] That said, I agree with the claimant that the respondent has not adequately explained her conduct nor has she demonstrated insight into the impact her behaviour has had on the children.
- [75] In this regard, there can be no debate about the importance of complying with court orders. Compliance is not a matter of discretion or choice on the part of litigants. Rather, compliance is fundamental to the proper administration of justice and maintenance of the rule of law: *Grewal v. Nijjer*, 2011 BCSC 332 at para. 20, *aff'd* 2011 BCCA 505; *R.A. v. W.A.*, 2018 BCSC 1910 at para. 131; *Larkin v. Glase*, 2009 BCCA 321 at para. 7; *The Law Society of British Columbia v. Goodwin*, 2015 BCSC 2472 at para. 15.
- [76] As set out in para. 57 above, the claimant seeks numerous orders addressing the respondent's conduct.
- [77] First, the claimant, relying on s. 221 of the FLA, seeks to compel the respondent to comply with various terms of orders previously made. That section, titled "Misuse of court process", authorizes the court to make an order prohibiting a party from bringing further applications without leave of the court where the court is satisfied that the party has, as the title suggests, misused the court's process. The claimant submits that the respondent must demonstrate a sufficient degree of compliance with the court orders before she should be granted leave to apply for a resumption of any contact with the children.
- [78] Section 221 was discussed by Mr. Justice Punnett in *Williams v. Williams*, 2015 BCSC 928 at para. 150:

I am of the opinion, as was noted in *Dawson*, that the test under s. 221 is "less stringent" than that for a vexatious litigant under s. 18 of the Supreme Court Act. The language used broadens the factors considered under s. 18 as it recognizes that family litigation has unique characteristics and that litigation may have wider and more significant effects that should be considered if the goal of resolution of family conflict is to be achieved. In the context of family litigation s. 221 recognizes the need for the courts to have access to the less stringent remedy provided for given the negative financial and social costs that family litigation may cause. That impact affects the parties and their children both financially and emotionally and where the behaviour of one or both parties meets the threshold in s. 221 such orders may be made.

[79] In *Williams*, Justice Punnnett ordered that neither party shall make an application to the court for a period of five years without first obtaining leave to do so. The context in which the order was made was described by Justice Punnnett at para. 147:

In the case at bar, the court record shows a course of conduct that far exceeds what would be considered reasonable or normal, even in high-conflict family litigation. The applications have been unrelenting and are remarkable in number and frequency; so much so, that two judges of this Court have restricted the parties' access to the Court for set periods of time. In particular the conduct of the defendant as evidenced by his applications up to 2003 and from 2010 to the present has, in my view, amounted to attempts to control and harass the plaintiff. It has been a misuse and waste of court time in certain respects, such as filing an application to dispute the indigent status order obtained by the plaintiff.

[80] The respondent in the present case has not abused the court's process to the same degree as in *Williams*. The record in fact indicates that, at least up to the time of the Kent Order, both parties regularly availed themselves of the court's process.

[81] However, the concern with the respondent's conduct is less about her bringing numerous, frivolous court applications but rather about her failure to comply with court orders. I agree with the claimant that some demonstrated commitment to compliance is required by the respondent in order for the court to have confidence in her ability or willingness to comply going forward, for example with terms governing her contact with the children should matters progress to that stage.

[82] The claimant also seeks orders imposing further fines on the respondent pursuant to ss. 228 and 230 of the FLA.

[83] As noted by Master Bouck in *C.A.L. v. D.E.L.*, 2018 BCSC 772 at para. 43, s. 228 has been considered a limited number of times, but shares much of the same language as s. 213, which was discussed in *J.D.G. v. J.J.V.*, 2013 BCSC 1274. Relying on *J.D.G.*, Master Bouck said, "a robust application of the FLA's enforcement provisions is necessary so that the parties can focus on resolving the true merits of their dispute and not be bogged down in repetitive and costly pre-trial applications." Like s. 213, s. 228 should be applied creatively in a manner sensitive to the particular issues before the court. The court should focus on what measure will be most effective in the circumstances: *J.D.G.* at para. 25.

[84] In addressing s. 228, a court must also be mindful of the purposes of conduct orders as stated in s. 222 of the FLA: *C.A.L.* at para. 43. Section 230 is linked to s. 228 in this case because its application is only triggered if no other provision of the FLA applies: s. 230(1); *I.J.G.P.G. v. K.M.*, 2018 BCSC 2468 at para. 20; *Partridge v. Partridge*, 2018 BCSC 1687 at para. 79.

- [85] The measures set out in ss. 228 and 230 should be resorted to when, and only to the extent, necessary and appropriate to enforce and secure compliance with orders made under the FLA: *Kanta v. Kanta*, 2017 BCSC 2321 at para. 19; *Kanta v. Kanta*, 2017 BCSC 1428 at para. 72. Orders under ss. 228 and 230 may be necessary to impart on one or both parties that they are bound by the FLA and must comply with court orders: *B.G.M.S. v. J.E.B.*, 2018 BCSC 1628 at para. 177.
- [86] Although compliance with the FLA and related court orders is critical, the FLA mandates a more holistic approach to resolving family disputes that minimizes delay, formality and conflict between the parties: s. 199(1). The remedies available under ss. 228 and 230 empower the court to provide progressively more serious responses as a particular case may dictate. More importantly, a court's objective should be to fashion a remedy that ensures compliance while addressing the specific situation before the court: *J.R.B. v. J.H.F.*, 2015 BCPC 70 at para. 26.
- [87] Given the nature of the current conflict between the parties and its relation to the children, the Court must encourage the parties to focus on the best interest of the children: FLA, s. 199(2). See also *H.F.E. v. J.C.E.*, 2016 BCPC 107 at para. 89.
- [88] With these principles in mind, I will address each of the specific terms sought by the claimant.

The respondent pay at least a portion of the child support owing

- [89] According to the FMEP statement dated June 14, 2019, as at that date, FMEP had collected \$8,684.60 and the outstanding balance owing was \$32,201.48, based on the child support amount of \$475 established by the Final Order. It is useful to note however that, according to the FMEP statement, in the year preceding the date of the statement, the following amounts were paid in child support by virtue of FMEP's garnishment of the respondent:
- i) June 2018 \$535.75
 - ii) July 2018 \$175.00
 - iii) August 2018 \$630.00
 - iv) September 2018 \$352.00
 - v) October 2018 \$420.00
 - vi) November 2018 \$598.50
 - vii) December 2018 \$352.00
 - viii) January 2019 \$463.75
 - ix) February 2019 \$525.00
 - x) March 2019 \$562.00

xi) April 2019 \$420.00

xii) May 2019 \$630.00

- [90] As can be seen, for much of 2018 and 2019, the respondent has been paying at or close to the amount set by the Final Order. It should also be noted, that the respondent's reported income for 2017 and 2018 was \$16,873 and \$13,727 respectively, which would result in child support payments of \$137.34 and \$245.46. While the Final Order setting child support at \$475.00 per month was a consent order and there is no application before the court to vary that order, the \$475.00 figure does not reflect the respondent's actual income. In the circumstances, I decline to order that the respondent make any further payments towards child support beyond what FMEP is currently making through its garnishment process.
- [91] The claimant makes much of the fact that the respondent lists in her financial statement personal loans totalling \$247,000 from 2015 forward for "court and living expenses" as well as a \$30,000 student loan. He submits that she has clearly had access to funds which she has not used to satisfy her obligations, including child support, and which she has not accounted for.
- [92] I agree with the claimant that the respondent's disclosure of financial and other information has been lacking, however there is no basis for the claimant's allegation that the respondent simply chose other priorities. She has had minimal income over the past few years and I accept that she required loans from family and friends to live. This is not a case like *C.D.G. v. D.J.P.*, 2010 BCSC 1216, where the respondent wilfully chose to prefer other creditors over her support obligations (at paras. 121-123).

The respondent pay a sufficient portion of the costs and fines owing, including her 50% share of the cost of Dr. Krywaniuk's s. 211 report

- [93] On the issue of fines, it is my view that any fines pre-dating the Kent Order were subsumed in that order and by virtue of the fact that the respondent paid the \$5,000 fine imposed by the Kent Order, no further fines are outstanding.
- [94] In terms of the costs, as noted in para. 40(c) above, certificates of costs have been obtained totalling \$10,529.08, independent of the respondent's share of Dr. Krywaniuk's fees. Non payment of court costs is not normally a factor that would impede a parent's right to see her children, particularly in circumstances like the respondent's in which she lacks financial resources. However, to the extent that the failure to pay costs reflects a broader pattern of conduct on the part of the respondent in failing to comply with court orders, some payment of outstanding costs is appropriate. Accordingly, I order that the respondent pay \$7,000 towards the outstanding costs and that, as part of any leave application she may bring (see below), she will be required to put forward a clear payment plan for the balance of the costs owing, including Dr. Krywaniuk's fees.

The respondent produce drug tests and complete a residential treatment program

[95] Drug use by the respondent has been an issue in this proceeding in the past, hence the term of the Final Order requiring drug testing and, in the event she failed a drug test, treatment, including a residential treatment program. The respondent acknowledges using marijuana, although in recent times she says that it is pursuant to a medical marijuana prescription. Dr. Krywaniuk addressed the issue at p. 13 of his s. 211 report:

The issue has been raised that [the respondent] uses illicit drugs extensively in there for [sic] would [not] be an appropriate role model and potentially place the children at risk. It was noted that [the respondent] admitted to marijuana usage and that she now has a medical marijuana card. I understand that drug testing through hair analysis of both parties was ordered and that [the respondent] has complied, with the result that marijuana usage but no other illicit drugs showed up.

[96] The evidence does not support a finding that the respondent has abused drugs in recent times and there is no basis to require her to attend a residential treatment program. However, the respondent does need to better explain her marijuana usage, including producing any prescription or licence and any medical report supporting her use. In addition, in light of past events, the respondent shall commence a program of monthly drug tests at her own expense.

The respondent fulfill the recommendations set out in Dr. Krywaniuk's report

[97] At p. 20 of his report (see para. 32 above), Dr. Krywaniuk states that "there is considerable indication that [the respondent] has parented in an inappropriate fashion at times and without consideration for the effect that her behaviour would have on the children and their psychological adjustment." He then goes on to recommend that she address these issues through "parenting courses, personal research, consultation with parenting coaches and through personal counselling."

[98] The claimant submits that the respondent should be required to fulfill these recommendations before she is granted leave to apply to re-establish contact with the children.

[99] The difficulty with this position is that the recommendations are so vague and general as to be almost meaningless. Frankly, it is difficult to see how the respondent could comply with them in a manner that would satisfy the claimant.

[100] However, the concerns addressed by Dr. Krywaniuk about the respondent's parenting and interaction with the children has been a theme running through many of the previous court proceedings and decisions and it is not unreasonable for the claimant to expect the respondent to take some meaningful steps to address those concerns.

- [101] In her 14th affidavit, the respondent again refers to counselling she has had with N.G. However, her description of the counselling and the letters she has produced from N.G. provide little insight into the nature and focus of the counselling. Certainly, there is nothing to suggest that it has dealt with the parenting concerns identified by Dr. Krywaniuk. Further, her affidavit evidence does not suggest that she has developed much in the way of personal insight into those concerns.
- [102] Accordingly, I order that the respondent engage in a course of clinical counselling focussed on identifying and addressing her past conduct that ultimately resulted in the Kent Order, developing better parenting skills and strategies, and preparing her for the possible re-establishment of contact with the children.
- [103] I appreciate that, not unlike Dr. Krywaniuk's recommendations, this order is somewhat vague, however the onus must be on the respondent to demonstrate that she has heard and understood what has been said by Dr. Krywaniuk and by various judges and masters throughout the court process and that she is taking meaningful action.

The respondent post security for the costs of any mediation or further expert evidence

- [104] The claimant next seeks an order that the respondent post security for any mediation ordered. Given the respective positions of the parties, mediation is not a viable option at this time. The respondent also seeks an order requiring the respondent to post security for the cost of any expert evidence that may be required, for example an updated s. 211 report. However, it is also premature to be considering an expert report.

The respondent pay additional fines for breaches of the Final Order, the Bowden Order, the Josephson Order, the Kent Order and the Greyell Order

- [105] As I have previously indicated, I consider any breaches of court orders and any fines imposed prior to the Kent Order to be subsumed in that order. With respect to the respondent's failure to pay child support in the amount set out in the Final Order and her failure to pay court ordered costs, I have addressed those issues above and there is nothing to be gained by imposing further financial penalties in the form of additional fines.
- [106] The question then becomes what if any penalty should the respondent pay for breaching the "no contact" terms of the Kent Order and the terms of the Greyell Order. Again, those breaches occurred when the respondent repeatedly tried to contact the claimant at his home, attended the children's school and attached balloons to the respondent's gate to mark the birthday of one of the children.
- [107] In considering whether the respondent should be subject to further penalties, for example additional fines, it is worth noting that the respondent has been subject to arguably the most severe penalty available under the FLA, that being the removal of her parental rights and the complete loss of contact with her children for over four years.

- [108] In my view, there is nothing to be gained by piling on additional fines which would only serve to increase the financial burden on the respondent and further reduce the likelihood of her ever regaining any sort of relationship with her children.
- [109] Further, if the claimant is sincere in his position that this is not about punishing the respondent but about her demonstrating personal development and insight and regaining trust, that is not accomplished through crippling financial penalties but rather through counselling and personal reflection. Going forward, her ability to reconnect with her children will depend more on those factors than on her ability to overcome some artificial financial barrier.
- [110] I therefore decline to impose any further fines on the respondent.
- [111] I do want to address the claimant's concern about the fact that the Crown stayed criminal charges against the respondent for alleged breaches of the Greyell Order. As noted, he questions what recourse a family litigant has in the face of such breaches given that s. 188 of the FLA makes it clear that protection orders are not enforceable under the FLA.
- [112] The decision whether to prosecute a matter or to stay criminal charges is within the discretion of the Crown and it is not for the court to comment on the exercise of that discretion in this proceeding. I can say that the conduct of the respondent in breaching the Greyell Order is part of a pattern of behaviour on the part of the respondent that informs my consideration of the various issues raised on this application.
- [113] However, I would also note that, without in any way intending to diminish the significance and force of protection orders, the claimant's decision to involve the police over the posting of balloons on one of the children's birthdays provides a stark illustration of the dysfunction that has plagued the parties' relationship for many years.

Section 7 expenses

- [114] The claimant seeks an order that the respondent pay outstanding special expenses and that FMEP be permitted to collect those expenses.
- [115] The issue of s. 7 expenses is larger than the claimant simply claiming an outstanding amount. Given the lack of any contact by the respondent with the children and the absence of any input into their activities, the respondent questions why she should simply be billed for expenses unilaterally incurred by the claimant.
- [116] Both parties acknowledged that this aspect of the claimant's application should be adjourned generally, and I so order.

The Respondent's Request for Leave to Bring an Application

- [117] The respondent seeks leave to bring an application for orders paving the way to a resumption of contact with the children and potentially to a reinstatement of guardianship and parenting time and rights. The requirement that the respondent seek leave is again found in the Iyer Order.
- [118] The claimant opposes the granting of leave to the respondent. As set out above, he seeks numerous orders and penalties that he submits must be fulfilled before the claimant should be permitted to bring a further application.
- [119] He submits that given the past chaos in the lives of the children and their current stability, the Court should be very careful about allowing the respondent back into their lives unless and until it can be established that to do so would be in their best interests.
- [120] The claimant cites s. 51 of the FLA which deals with the granting and termination of guardianship:
- 51 (1) On application, a court may
- (a) appoint a person as a child's guardian, or
 - (b) except in the case of a director who is a child's guardian under the Adoption Act or the Child, Family and Community Service Act, terminate a person's guardianship of a child.
- (2) An applicant under subsection (1) (a) of this section must provide evidence to the court, in accordance with the Supreme Court Family Rules or the Provincial Court (Family) Rules, respecting the best interests of the child as described in section 37 [best interests of child] of this Act.
- [121] As can be seen, a person applying to be appointed as a child's guardian, which would include someone whose guardianship had previously been terminated, must provide evidence addressing the best interests of the children, including the various factors set out in s. 37. The claimant cites a number of cases in support of his position that a person seeking to be appointed a guardian has a high burden to meet: *L.A.M.G. v. C.S.*, 2014 BCPC 172 at para. 30; *G.W.M. v. W.C.M.*, 2015 BCSC 1624 at para. 153; *J.W.K. v. E.K.*, 2014 BCSC 1635 at para. 36; *D.B. v. B.B.*, 2017 BCPC 359 at para. 23.
- [122] It is premature at this stage to engage in a detailed analysis of the children's best interests or the factors that weigh for and against a reinstatement of guardianship for the respondent. It is also not for the Court to provide a specific framework or timeframe for the respondent to take the necessary measures that will support her application.
- [123] However, at a minimum, in order for the respondent to bring an application, she must demonstrate compliance with the orders that I have made above. For ease of reference, I will summarize those orders here:

- a) The respondent will pay \$7,000 towards outstanding costs, including her share of Dr. Krywaniuk's fees, and will put forward a payment plan for paying the balance;
- b) The respondent will commence a program of monthly drug testing and will produce evidence relating to her use of medical marijuana, including any prescriptions or licences; and
- c) The respondent will engage in a course of clinical counselling focussed on identifying and addressing her past conduct that ultimately resulted in the Kent Order, developing better parenting skills and strategies, and preparing her for the possible re-establishment of contact with the children.

[124] I would add to these points a requirement that the respondent prepare a clear and detailed plan for how initial contact and ultimate re-integration with the children is to be approached. Given what has gone on in the past, it is clear that professional assistance will be required. Again, rather than the Court directing certain measures in this regard, it will be for the respondent to source appropriate professional resources and to present a comprehensive plan for moving forward, including how the plan will be financed. That plan must, of necessity, have as its central focus the best interests of the children, particularly their "physical, psychological and emotional safety, security and well-being" (FLA s. 37(3)).

[125] On the basis of these terms, I grant the respondent leave to bring an application for an order or orders addressing guardianship and her parental rights.

[126] Again, I do not intend to impose a time frame in which such an application may be brought however, at a minimum, I would expect that prior to such an application, the respondent will have paid the \$7,000 towards the outstanding costs, will have undergone at least three monthly drug tests and will have produced the supporting information, will be firmly engaged in the counselling program and will have developed the proposed re-integration plan.

[127] I noted earlier that the issue of s. 7 expenses was adjourned generally. Those expenses need to be considered alongside other financial issues, specifically child support. On that issue, I grant the respondent leave to apply to vary her current child support obligation, including s. 7 expenses, established pursuant to the Final Order.

[128] In order for that to occur however, there must be proper financial disclosure on her part, something that has been lacking to date. Accordingly, before bringing an application to vary, the respondent will produce to the claimant all relevant employment, banking, income tax and other financial records for the years 2016 forward. I have chosen that date because the Final Order contemplates that the parties will exchange tax information beginning as of June 30, 2016, and child support will be adjusted September 1 of that year and each subsequent year.

[129] I expect that counsel should be able to come to an agreement about what specific records need to be produced. It follows that the claimant will also produce his annual income tax returns beginning with the year 2016 in accordance with para. 20 of the Final Order.

Conclusion

[130] In summary, I make the following orders:

- a) The respondent will pay \$7,000 towards outstanding costs, including her share of Dr. Krywaniuk's fees, and will put forward a payment plan for paying the balance;
- b) The respondent will commence a program of monthly drug testing and will produce evidence relating to her use of medical marijuana, including any prescriptions or licences;
- c) The respondent will engage in a course of clinical counselling focussed on identifying and addressing her past conduct that ultimately resulted in the Kent Order, developing better parenting skills and strategies, and preparing her for the possible re-establishment of contact with the children;
- d) The respondent will prepare a clear and detailed plan for how initial contact and ultimate re-integration with the children is to be approached, focussing on the best interests of the children, particularly their "physical, psychological and emotional safety, security and well-being";
- e) The respondent is granted leave to bring an application to address guardianship and her parental rights in accordance with paras. 125-126 above;
- f) Issues concerning s. 7 expenses are adjourned generally, to be addressed alongside the issue of child support;
- g) The respondent is granted leave to bring an application to vary her current child support obligation established pursuant to the Final Order;
- h) The respondent will produce to the claimant all relevant employment, banking, income tax and other financial records for the years 2016 forward; and
- i) The claimant will also produce his annual income tax returns beginning with the year 2016 in accordance with para. 20 of the Final Order.

[131] The claimant seeks an order for special costs based on the well known test established in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17 (C.A.). See also *D'Atri v. Gonzalez*, 2017 BCSC 1244 at paras. 48-53.

[132] I decline to award costs to either party. Success was largely divided and, furthermore, this case is similar to *Creber v. Franklin*, [1993] B.C.J. No. 890 (S.C.), where Mr. Justice Spencer ordered that neither party to a family matter receive their costs or disbursements given the extent of the "irrelevant or otherwise inadmissible" material in the record (at paras. 5, 22). As I have noted throughout these reasons, the same problem has plagued this case.

[133] The parties will therefore bear their own costs.

"Skolrood 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/20/00/2020BCSC0026.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/a-j-f-v-n-l-s-2020>

Prepared on 26 October 2026 · Esheria