

CANADA / JUDGMENT

A.N.H. v. L.D.G.

2018 BCSC 2002

COURT

Supreme Court of British Columbia

DECIDED

27 September 2018

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2018 BCSC 2002 A.N.H. v. L.D.G. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: A.N.H. v. L.D.G., 2018 BCSC 2002 Date: 20180927 Docket: E45924 Registry: Vernon Between: A.N.H. Claimant And L.D.G. Respondent Before: The Honourable Mr. Justice Abrioux Oral Ruling Re Attendance of L.D.G. at Variation Hearing The Claimant, appearing in person: A.N.H. Counsel for Respondent: C. Chisholm Place and Date of Hearing: Vernon, B.C. September 25, 2018 Place and Date of Judgment: Vernon, B.C. September 27, 2018

- [1] This is my ruling with respect to L.D.G. attending the hearing in Vernon in order to be cross-examined on her Affidavit #62, sworn August 14, 2018, and her Affidavits #63 and #64, sworn August 14, 2018, and August 31, 2018 being her most recent F8 Financial Statements.
- [2] L.D.G. filed her Application Response on August 16, 2018 together with her Affidavits #62 and #63. Affidavit #64 essentially replaces Affidavit #63.
- [3] In her Affidavit #62, L.D.G. states at paras. 39-46:
39. From the materials that [A] has filed, it appears that A has ignored what the court tells him and that he will continue on his own agenda to perpetuate the litigation.
40. I cannot continue to defend against A's onslaught of thousands of pages of materials and volumes of video and audio recordings. 41.
- a. I am unable to and am not prepared to attend at the hearing scheduled for September 25, 2018.
- b. There is no one able to look after the Children while I attend at the hearing.
- c. I cannot afford to pay for a lawyer, and Mr. Kahn is unable to appear on my behalf on a pro bono basis.
42. I currently owe Mr. Kahn's firm approximately \$125,000.
43. Accordingly, I will not be appearing at the hearing. My submissions would be contained in my Response filed to A.'s Application.

44. I will leave it to the Court to make whatever decision it sees fit in the circumstances regarding Andrew's obligations to pay support.
45. I am financially, mentally and emotionally exhausted as a result of A.'s vexatious and litigious conduct.
46. For my own welfare and for the welfare of my Children, I cannot continue to be entangled in this litigation.
- [4] Exhibit A to the affidavit is a brief note from her family physician, Dr. Bakare, dated March 2, 2018 recommending that L.D.G. be excused from attending any further court appearances on medical grounds.
- [5] At a judicial management conference ("JMC") on August 27, 2018, at which L.D.G.'s counsel was in attendance by telephone, I directed L.D.G. through her counsel to make inquiries as to her ability to be cross-examined from the courthouse in Swift Current, Saskatchewan. Counsel and A.N.H. were also directed to attempt to agree on L.D.G.'s cross-examination by video prior to September 25, 2018, failing which L.D.G. should be available to testify in person on October 1, 2018. L.D.G.'s counsel also agreed to appear by telephone on the first day of this hearing, being September 25, 2018, in part to advise the court on L.D.G.'s willingness to be cross-examined.
- [6] These directions were made in the context of a time limited, one hour JMC where all the parties and the court appeared by telephone. It was hoped that an arrangement could be reached but, in fairness to L.D.G., given the time restraints, there was no opportunity for proper submissions to be made as to the potential consequences that may flow in the event she maintained her unwillingness to be cross-examined.
- [7] On the first day of the hearing (the "Variation Application"), being September 25, 2018, L.D.G.'s counsel and L.D.G. appeared by telephone. Counsel advised the court that L.D.G. was not prepared to attend to be cross-examined, essentially for the reasons outlined in her Affidavit #62 to which I have referred, in part, above. Counsel indicated that L.D.G. was well aware of the potential ramifications of her not appearing to be cross-examined, including: · that her affidavits would not be admitted into evidence at this hearing; or · if they are admitted, the weight attached to their contents may be affected by the fact L.D.G. was not prepared to be cross-examined.
- [8] L.D.G. confirmed what I had just been advised by counsel.
- [9] Counsel also advised the court that she intended to file written submissions by September 30, 2018, which would both supplement the legal argument contained in L.D.G.'s response and address the admissibility and weight which should be attached to L.D.G.'s affidavits if they were accepted as part of the evidentiary record.

- [10] I asked counsel to review the matter with L.D.G. overnight and communicate to her that any cross-examination would be conducted in the controlled setting of the courtroom and, whether she appeared by video or not, I would be there to deal with the relevance of A.N.H.'s questions and the manner in which he was conducting his cross-examination.
- [11] A.N.H.'s position is that L.D.G.'s credibility is very much at issue and that he has prepared extensively for the cross-examination. He anticipates that his cross-examination will expose L.D.G. as a liar and someone who acted deliberately to cause him and the children harm over the years. Accordingly, he argues that L.D.G. should be ordered to attend the hearing, failing which her evidence should not be admitted.
- [12] He identified a practical difficulty in L.D.G. appearing by video conference, which I agree with, being that there were numerous documents and recordings that he wished to put to her during cross-examination that she may not have access to if she were to testify by video link. For that reason, he submits she should be ordered to attend in person.
- [13] It was also A.N.H.'s position that Dr. Bakare should be ordered to come from Saskatchewan to attend court on a day next week to be cross-examined.
- [14] Counsel appeared by telephone this morning and advised that L.D.G.'s position remained unchanged. She would not participate in the proceeding any further and was well aware of the ramifications of this decision. She renewed her request that she be permitted to file a written argument dealing with the issues she identified yesterday.
- [15] A.N.H. repeated his strong objections to L.D.G.'s non-attendance and indicated that he was now of the view that two days would be required for her cross-examination. He sought a ruling that the affidavit evidence not be admitted.
- [16] Rule 10-3(4) of the Supreme Court Family Rules, which governs chambers proceedings, provides in part:
- (4) On a chambers proceeding, evidence must be given by affidavit, but the court may
 - (a) order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,
 - (b) order the examination of a party or witness, either before the court or before another person as the court directs,
 - (c) give directions required for the discovery, inspection or production of a document or copy of that document,

- [17] It is more often the rule than the exception that in family law proceedings like the current case, there are material differences between the contents of affidavits presented by the parties. This is a situation where the cross-examination of L.D.G. on her affidavits may well have been the proper order for the court to make. In fact, at the JMC on August 27, 2018, I directed that L.D.G. attend this hearing on October 1, 2018, unless other arrangements were agreed to between the parties.
- [18] Rule 10-3 provides considerable discretion to the court in chambers proceedings. L.D.G. is well aware of the potential ramifications which may flow from her non-attendance. She says that she means no disrespect to the court in not appearing to testify next week, but the conundrum she faces is that failing to follow a court order is not only disrespectful, but can also amount to contempt should I now order her to attend.
- [19] I have concluded based on the unique circumstances of this case, which I will not repeat in this ruling but include A.N.H. being declared a vexatious litigant, and having adopted what I have already accepted in prior reasons for judgment as a "scorched earth" approach to this proceeding, that:
- (a) my order made at the JMC on August 27, 2018 that L.D.G. attend to testify in person on October 1, 2018 is vacated;
 - (b) L.D.G. is not ordered to attend to testify in person during the week of October 1, 2018; and
 - (c) L.D.G. through her counsel, may file a written argument by September 28, 2018 which may both supplement the Application Response filed August 16, 2018 and address the issue as to whether the court should admit into evidence her Affidavits #62 and #64 and if so, what weight should be attached to them.
- [20] I wish to emphasize that I have reached no conclusions whatsoever as to whether those affidavits will be admitted into evidence and, if so, what weight I should attach to them.
- [21] A.N.H. will have the opportunity next week to make submissions regarding the admissibility/weight pertaining to these affidavits. In fact, he will be in a better position to do so than he is today since he will have had several days to review counsel's written argument and respond to it. "Abrioux J."

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