

CANADA / JUDGMENT

A.N. v. A.M.N.

2024 BCSC 587

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 587 A.N. v. A.M.N.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.N. v. A.M.N.,

2024 BCSC 587

Date: 20240410

Docket: E200078

Registry: Vancouver

Between:

A.N.

Claimant

And

A.M.N.

Respondent

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Claimant:

T.L. Jackson

L. Besada

Counsel for the Respondent:

C.J. Carta

Place and Dates of Hearing:

Vancouver, B.C.

March 6-7, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 10, 2024

INTRODUCTION

- [1] Ms. N seeks fines for Mr. N's breaches of court orders pursuant to ss. 228, 230 and 61(2)(g) of the Family Law Act, R.S.B.C. 2011, c. 25 (FLA). In addition, she seeks reimbursement of the legal costs she incurred for dispute resolution under s. 230(2)(b)(i) of the FLA and special costs.
- [2] This is a high-conflict family matter. In my November 17, 2021 judgment indexed 2021 BCSC 2228, which also involved breaches by Mr. N, I set out a brief background as follows:
- [3] Briefly put the parties began cohabiting in February 2001, married in July, 2002 and separated at the end of March 2019. Upon separation the parties lived separate and apart in the matrimonial home until January 2020 when Mr. N agreed to move out and let Ms. N have exclusive occupancy of the family residence where she remains.
- [4] The parties have two children- a daughter A.N., [now 18] and a son, B.N., [now 16]. A.N. has been diagnosed with Asperger's syndrome, an autism spectrum disorder. In addition she suffers from anxiety.
- [5] Mr. N is and has always been the bread winner of the family. He is a CPA and is the Vice president of his family's business. Mr. N has earned a good living. The parties own a house valued in excess of \$3M, belong to a private country club and send B.N. to private school. Ms. N earns a small income from part-time work as a fitness instructor and Italian translator and teacher. Ms. N is virtually completely financially reliant on Mr. N, a fact which is not lost on him.
- [6] There have been a number of interim orders made since the parties' separation. Of significance to the present applications are the following;
- 1) On January 17, 2020, Master Cameron, by consent, made conduct orders applicable to both parties:
 - (a) Neither party shall discuss these proceedings with the children;
 - (b) Neither party shall speak negatively about the other party in the presence of the children;

- (c) Neither party shall speak negatively or aggressively toward the other, demean the other, harass, molest or speak in a raised voice against the other whether in the presence of the children or not; and
 - (d) During exchanges of the children, the parties shall limit their interactions to pleasantries only and shall not engage in argument or discussion of disputed issues including financial.
- 2) On March 6, 2020, Master Cameron ordered that Mr. N was to have parenting time Saturday at 5 to Monday drop-off at school and Wednesday evenings;
- 3) On May 4, 2020 Master Dick made interim orders:
- (a) changing parenting time to 50/50, week on/ week off;
 - (b) Restraining Mr. N from being within 100 meters of Ms. N's residence;
 - (c) Restricting the noncustodial party from contacting the children during the other party's parenting time.
- [3] In addition to the orders outlined above, since June 2021 I have made four orders (as set out in the Claimant's written argument):
- 1) On June 28, 2021 (First Murray Order):
- a. By consent, the Parties shall share parenting time on an equal basis.
 - b. Commencing on September 3, 2021, the Parties shall share parenting time with the Children on a week on/week off basis.
 - c. The Parties' pets shall go back and forth with the Children.
 - d. The non-custodial Party must make their best efforts not to interfere with the Children during the other Party's parenting time.
 - e. The non-custodial Party shall not permit the Children to stay at their residence during the other Party's parenting time except in emergencies.
 - f. The Parties shall not involve the Children in their legal dispute.
 - g. Neither Party shall speak negatively about the other Party to the Children or in the presence of the Children.
 - h. Neither Party shall speak negatively or aggressively towards the other, demean the other, harass, molest or speak with a raised voice against the other whether in the presence of the Children or not.
 - i. During exchanges of the Children, the Parties shall limit their interactions and shall not engage in argument or discussion of the issues in dispute between them.
 - j. On a without prejudice basis, the Respondent shall deposit \$2,000 into the Parties' joint TD Chequing account for the use of the Claimant at the end of each month.

- k. The Respondent shall continue paying the expenses for the Family Residence, which include but are not limited to the property insurance, property taxes and utilities.
 - l. The Respondent shall pay the Children's expenses, the Claimant's car insurance, and the Claimant's gas expenses.
 - m. The Parties and the Children shall attend counselling to support the interim 50/50 parenting arrangement and to assist the Parties with respectful parenting.
 - n. The Respondent shall pay for the costs of the counselling sessions in the first instance, on a without prejudice basis.
- 2) On October 22, 2021 (Second Murray Order):
- a. By consent, the Respondent shall reimburse the Claimant for all payments that she made to the Children's credit card, within 24 hours of her sending a list of payments to him.
 - b. The Respondent shall reimburse the Claimant for all the Children's expenses that she paid at his request, namely half of A.N.'s voice lessons, a White Caps Game ticket, and A.N.'s choir enrollment fees.
 - c. The Respondent shall reimburse the Claimant for all the expenses that she had paid at his request, within 24 hours of her sending her list of expenses.
- 3) On November 17, 2021 (Third Murray Order):
- a. By consent, the Respondent shall pay the Claimant's monthly credit card bill on time and in full.
 - b. The Respondent shall reimburse the Claimant for all payments she made to her credit card since the First Madam Justice Murray Order within 24 hours of her providing statements of all payments to him. The Respondent shall deposit the amount owing into the Claimant's bank account.
 - c. The Respondent shall reimburse the Claimant for all payments she made to the Children's credit card since the First Madam Justice Murray Order within 24 hours of her providing statements of all payments to him.
 - d. The Respondent shall pay \$5,000 to the Claimant within 5 days for wrongful denial of parenting time pursuant to s. 61(2)(g) of the Family Law Act.
 - e. The Respondent shall pay \$5,000 to the Claimant for the Respondent's breaches of conduct order pursuant to s. 228(1)(c)(ii).
- 4) On June 29, 2022 (Fourth Murray Order):
- a. B.N. shall be in the Claimant's care from July 1 to July 29, 2022.
 - b. B.N. shall be in the Respondent's care from July 29 to August 31, 2022.

- c. A.N. shall be in the Respondent's care from July 10 to August 31, 2022.
 - d. The family pets shall be in the Respondent's care from July 10 to August 31, 2022.
 - e. The Respondent shall pay \$1,650 to the Claimant by 4:00 pm on June 30, 2022, into the TD Chequing account for the arrears he owed to her.
 - f. The Respondent shall leave the Claimant's car insurance documents in the box in his carport by 8:00 pm on June 29, 2022.
- [4] The following comments from my November 17, 2021 Reasons for Judgment are pertinent to the current application:
- a. It is also clear that Mr. N has little regard for the court process or court orders and is willing to use the children to frustrate the same. (at para. 23);
 - b. It was Mr. N's responsibility to ensure that the order was followed. If he truly believed that he could not do so or that it was not in the Children's best interest, it was his responsibility to make application to court to vary the order. (at para.25);
 - c. The conduct orders in issue were designed to protect the Children from their parents' acrimony and shield them from their dispute. The impacts on the physical and mental health of children that are put in the middle of warring parents are well known. They are significant and long-lasting. As such, breaches of conduct orders must be viewed as most egregious and will not be condoned by the court. (at para. 38);
 - d. In my view, the appropriate penalty is an order that Mr. N make payment to Ms. N. The amount must be significant enough to deter Mr. N from future breaches. (at para. 28).
- [5] On November 17, 2021, I ordered Mr. N to pay a total of \$10,000- \$5000 for denying Ms. N parenting time and \$5000 for breaching conduct orders. In ordering those fines I warned Mr. N of the consequences of future breaches:
- [42] This is the first time Mr. N has been found to be in breach and penalized. I am hopeful that the penalties imposed above will send the message to Mr. N that court orders must be abided by. If the penalties imposed are insufficient to secure Mr. N's future compliance with the court orders, Mr. N can expect increased penalties in the future.
- [Emphasis added.]
- [6] The Claimant says that the modest fines did not have any impact on Mr. N as he has continued to continually breach virtually every order. It is not until he is brought to court that Mr. N complies with orders.

- [7] I accept Ms. N's evidence regarding the breaches and Mr. N's behaviour. In the course of this hearing, Mr. N said that he has come to realize that his actions have caused the children harm, although on my questioning it is unclear what actions he is taking ownership of. He seems to be blaming the court orders for causing him stress and anxiety. Respecting conduct orders Mr. N stated in court during the application that he now sees that his "resentment" of Ms. N is "coming out" in the group emails between the parties and the children.
- [8] I do not intend to outline every breach. I accept that they are continuous and designed to harm (or "destroy" as he threatened) Ms. N. Unfortunately, but not surprisingly, the children have been greatly impacted by Mr. N's actions. A.N. is now 18. She is attending university. B.N. is 16 and a half. They are past the age that courts are generally involved in parenting time issues. In a separate application, Mr. N sought and was granted a s. 211 report. I am uncertain what use that report will be of given the ages of A.N. and B.N.
- [9] I will outline the most egregious of Mr. N's breaches starting with breaches of the order that the parties share parenting 50/50.
- [10] In 2022, A.N. spent only five nights of overnight parenting time with Ms. N. While Mr. N claims that he can not control the children, on February 23, 2024, notably two weeks before this application, Mr. N emailed Ms. N and A.N. encouraging A.N. to stay with her mother. That was the first time he had encouraged A.N. to stay with her mother. A.N. stayed with Ms. N for about a week.
- [11] Beginning in 2021, Ms. N began a routine where she would have lunch with A.N. at her school on Tuesdays. Ms. N would bring A.N. her favourite sushi and they would spend the 50-minute lunch break together. It was Ms. N's only time with A.N. When Mr. N found out about it he began showing up at A.N.'s school at lunchtime. Once he brought A.N. sushi. Other times he brought the family dog. Once when he could not physically be there, he called A.N. and kept her on the phone for the entire lunchbreak. In his affidavit sworn for this application, Mr. N defended his actions saying that the lunch time was his parenting time. Of note, during the hearing of this application, Mr. N admitted to interfering with Ms. N's lunchtime visits with A.N.
- [12] The June 29, 2022 order regarding B.N. being with Ms. N for July was to allow Ms. N to take B.N. and his friend to Italy to spend time with her family. That did not happen. Mr. N frustrated Ms. N's efforts to get B.N.'s passport. As a result, B.N. was unable to travel with her.
- [13] In the days leading up to Ms. N's departure, Mr. N incessantly emailed Ms. N hostile messages, sometimes including B.N. into the emails. He accused Ms. N of abandoning B.N. and berated her for not getting B.N.'s passport in time. On the day Ms. N left for her trip Mr. N emailed her criticizing her for "disobeying" the court order:

The same way you are always telling me I cannot adjust the court order, neither can you. And if it means you need to adjust your trip by a few days to get him a passport, so be it. If you do not, I will make sure that my counsel brings it to court and requests fines for you intentionally disobeying it. This is not a minor variation.

[14] Ms. N could not afford to change either her airline ticket or B.N.'s. When Ms. N left for Italy, Mr. N would not allow B.N. to stay with him. Despite the fact that Mr. N had already breached the Court order by having B.N. with him for the first week of July (and was in continuous breach regarding A.N.) and Ms. N consenting to B.N. staying with him (including through her counsel in writing), Mr. N would not allow it insisting that that was contrary to the court order and that his mother had to go to court to vary it before B.N. could stay with him. As a result, B.N. had to stay with friends of the parties. When the family friend told Mr. N how stressful the situation was for B.N., Mr. N justified his actions by blaming the court order. Mr. N's views on the court order clearly changed, as on July 21, 2022, after B.N. had been with the friends for two weeks, Mr. N appeared unexpectedly to take B.N. to his house. During the pickup, when B.N. was not present, words were exchanged by one of the friends and Mr. N during which the friend told Mr. N that she thought he was an abusive parent. Mr. N followed up by sending the friends an email setting out his side of the conflict and copying B.N. and Ms. N. He wrote that he was copying B.N. "because he would literally testify to everything I am saying here as being 100% accurate".

[15] The affidavits sworn by the friends regarding their observations of Mr. N's actions during that time and the impact on B.N. are troubling. Both attest to the anger and resentment that B.N. has for his mother. Both attest those feelings are caused by Mr. N. They also attest to the extent and power of Mr. N's manipulation of B.N. I reproduce some of the passages:

- a) During the two-week stay with us, B.N. expressed feeling anger towards [Ms. N] and blamed her entirely for placing him in this predicament. B.N. expressed frustration at his inability to stay with his father, who resided a mere 10 minutes away from our residence. Nevertheless, he blamed [Ms. N] and not [Mr. N] for the situation. Unfortunately B.N. could not come to understand or accept that he was actually allowed to stay at [Mr. N's] residence and that [Mr. N] was refusing to agree. As a result of B.N.'s feelings, he resisted speaking to [Ms. N] while she was in Italy.
- b) Throughout the years, I have valued my friendship with [Mr. N]. However, after my observations during the summer of 2022, I am concerned regarding [Mr. N's] judgment when he chooses to involve B.N. in adult matters.

I am concerned that [Mr. N] may not be aware or is not mindful of the psychological damage that he may be causing his children by involving them in his dispute with [Ms. N].

- c) Based on my observations of [Mr. N's] behaviour towards B.N. this summer, I strongly believe that it is not in B.N.'s best interest to have unsupervised parenting time with [Mr. N]. B.N. requires de-programming. I witnessed first-hand how Mr. N created difficult situations for [Ms. N] with the intent of destroying her relationship with B.N. I believe [Mr. N] is

malicious and is more concerned about his hostility toward [Ms. N] than the children's emotional well-being which would include a healthy, happy and productive relationship with [Ms. N], their primary caregiver for the majority of their lives. I was and remain very concerned about B.N.'s mental health. From my observations, B.N. is under a huge amount of pressure as [Mr. N] relies on him directly and overtly to be his support system against [Ms. N].

[16] During the time B.N. was staying with them, one of the friends emailed Ms. N outlining how things were going. Among other things she wrote the following:

Unfortunately, it is with great sadness that I report that after a week for caring for B.N., the young man I knew is but a sad shadow of himself. His sense of humour still lurks underneath the façade, but there is a profound sadness and anxiety that emanates from B.N. when he lets his guard down

[17] I accept the observations of the friends. They have known B.N. since birth. I take it as significant that they chose to swear affidavits as to their observations of Mr. N's parenting/ actions given that they were long-time friends of his. In my view, it shows how concerned they were.

[18] Mr. N's actions not only hurt B.N., they further harmed B.N.'s relationship with Ms. N. B.N. virtually refused to communicate with his mother for five weeks. When he did it was rude and disrespectful. He blamed her for abandoning him.

[19] Mr. N has either excluded, attempted to exclude or allowed the children to exclude Ms. N from important occasions in the children's lives.

[20] When B.N. returned from his first international rugby tournament in July 2023, Mr. N advised Ms. N not to be at the airport to greet him as it was his parenting time. In the group family email, A.N. told Ms. N not to attend A.N.'s graduation ceremony in June 2023. Mr. N did not respond to A.N.'s email to encourage her to allow Ms. N to attend.

[21] On May 2, 2022, and May 7, 2022, Ms. N sent an email on the group family email inquiring whether the children would spend Mother's Day with her. When the children did not respond, Mr. N wrote an email to the Claimant and copied the children stating:

The reason they have not replied is not because they have not seen your email Seeing that you're not picking up on their hint, I will pass on their message. Neither one of them is interested in spending any time with you tomorrow.

[22] In order to avoid another lonely Christmas without her children, Ms. N made plans to be in Italy with her family for Christmas 2023. She emailed the respondent asking if the children could have Christmas dinner with her on December 22, 2023. Mr. N did not respond. An hour before dinner was to begin B.N. advised Ms. N that he had dinner plans with his father and his friends and could only stay for a short time.

- [23] Mr. N creates issues between the children and Ms. N by telling them to ask Ms. N to pay for some of their expenses (contrary to the court orders). When she says that she is unable to do so the children are rude and denigrating. They treat her the same way their father does. For example, B.N. texted Ms. N the following when she could not afford to buy him what he demanded: "you are cheap. are you fucking serious? you are unbelievable" and "you can't afford to pay ANYTHING for me?" And on another occasion when he was upset because she did not buy him a new iPhone, B.N. texted this to his mother: "I don't feel like talking to you. I picked up the phone, its bullshit! It's not even an 8 I can't believe you are so cheap."
- [24] The First Murray Order included a term that the family attend counselling with Alyson Jones and Associates to support the 50/50 parenting regime. I am satisfied from the evidence that Mr. N frustrated the process. First, he did not sign the required paperwork for months until Ms. N brought a court application. Then he attended only one session with the children. He then revoked his credit card authorization and refused to pay for treatment. He did not respond to any communications from the treatment team at Alyson Jones' office thereafter. Mr. N explains his refusal to attend counselling and respond with the treatment team was because he was busy at work and they did not answer his questions about the budget to his satisfaction. He recently claims that he suffers "paralysis", concerned that whatever he says or does will be misrepresented in court. I will return to this.
- [25] Regarding financial orders, Mr. N has consistently failed to deposit the court-ordered \$2000 per month into the parties' joint bank account for the use of Ms. N. Rather he, on his own initiative, decided that that amount should be just \$1500. He sent an email to Ms. N stating that that was the amount he would be paying. On November 24, 2023, days before the parties were scheduled to appear before me, Mr. N deposited into the joint bank account the shortfall. That is consistent with the pattern I spoke of earlier: Mr. N breaches court orders until he has a court appearance. After the court appearance, he continued paying \$1500 per month in contravention of the First Murray Order.
- [26] Also in contravention of the First Murray Order, Mr. N failed or refused to pay \$2985.99 in Children's expenses. Ms. N had to pay them out of her limited income. Again consistent with his pattern, Mr. N finally reimbursed her for just over \$1000 of that amount days before the November 24, 2023 court appearance.
- [27] Without going into details, Mr. N has also failed to pay Ms. N's credit card, car insurance, gas, and repairs to the family residence. With regard to the latter, as per his pattern of behaviour, on November 24, 2023 days before a scheduled court appearance, Mr. N finally reimbursed Ms. N for house repairs.
- [28] In November 2023, Mr. N for the first time in this litigation, deposed that he is suffering from mental health issues- depression, anxiety and paralysis. Counsel advises that the information does not excuse Mr. N's behaviour but it provides context to his breaches.

[29] In fact, Mr. N is not denying that he breached court orders. Mr. N says that he now recognizes in retrospect that he has caused the children harm and distress. He submits that \$75,000 is the appropriate fine for all of his breaches under ss. 61 and 228 to date. He says that this number is tempered by his mental health difficulties and the fact that he is seeing a psychiatrist to get help.

ISSUES

[30] Given Mr. N's admissions, the issues are as follows:

- 1) What is the appropriate fine for Mr. N's repeated breaches under s. 228 of the FLA;
- 2) What is the appropriate fine for Mr. N's repeated breaches under s. 61(2)(g) of the FLA for his continuous wrongful denial of Ms. N's parenting time since January 2022;
- 3) Can legal fees be ordered pursuant to s. 230(2)(b)(i); and
- 4) Are special costs appropriate?

ISSUE 1: WHAT IS THE APPROPRIATE FINE FOR MR. N'S REPEATED BREACHES UNDER S. 228 OF THE FLA

[31] The following sections of the FLA pertain to conduct orders:

Purposes for which orders respecting conduct may be made

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

- (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
- (c) to prevent misuse of the court process;
- (d) to facilitate arrangements pending final determination of a family law dispute.

225 Unless it would be more appropriate to make an order under Part 9 [Protection from Family Violence], a court may make an order setting restrictions or conditions respecting communications between parties, including respecting when or how communications may be made.

Other orders respecting conduct

227 A court may make an order requiring a party to do one or more of the following:

- (a) give security in any form the court directs;

- (b) report to the court, or to a person named by the court, at the time and in the manner specified by the court;
- (c) do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222 [purposes for which orders respecting conduct may be made].

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 \$5000 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 \$5000;
 - (d) make any other order the court considers necessary to secure compliance.
- (2) If a party fails to comply with an order made under section 225 [orders restricting communications], the court must consider whether it would be appropriate to make an order under Part 9 [Protection from Family Violence].

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[32] The remedies under s. 228 (and 231) of the FLA are not intended to punish, but rather to secure compliance with conduct orders. Deterrence and to a lesser extent, rehabilitation are important considerations. Unlike criminal contempt, concern for the administration of justice is less of a priority: *Larkin v. Glase*, 2009 BCCA 321, at paras. 49 and 50.

[33] In order to find that s. 228 of the FLA applies, the court must find that a party has breached a conduct order. Whether a breach has occurred is to be determined objectively, considering the impugned conduct along with the surrounding circumstances at the time: *C.A.L. v. D.E.L.*, 2018 BCSC 772 at para. 44.

[34] On the evidence before me I am satisfied that Mr. N has continually breached the conduct orders by:

- a) Creating conflict between Ms. N and the children;
- b) Speaking rudely, negatively, disrespectfully and in a demeaning manner to Ms. N in the presence of the children (including via email) and about her to the children;

- c) Involving the children in the litigation; and
- d) Interfering with Ms. N's parenting time.

[35] The impact of these continued breaches is obvious. The children treat their mother exactly how Mr. N has taught them to: like she is worthless. They swear at her, call her names and demean her. They blame her for all their woes.

[36] As noted above, Mr. N says that he now realizes that his resentment toward Ms. N is evident in the way he communicates/deals with her, including in family emails. He has acknowledged that he has harmed his children.

[37] That he has harmed his children is clear. As I stated in the November 2021 judgment, the impact on children who are put in the middle of warring parents is well recognized. It is proven to impact child brain development. It impacts every facet of a child's life. The affidavits of the former friends of Mr. N speak volumes. Through his conduct, Mr. N is extinguishing the joy from his children's lives. And he has destroyed their relationship with one of the most important people in their lives- their mother- to the point that they have little respect or time for her.

[38] These are serious breaches. While the fact that Mr. N suffers from depression and anxiety provides some insight into his behaviour, it does not excuse it. He is an intelligent man. He knows exactly what he is doing. The harm he is causing his children is grave and possibly permanent.

[39] In November 2021 I gave Mr. N a clear warning. It did not deter him whatsoever. This time I must send a stronger message: this destructive behaviour will not be condoned.

[40] I order that within 10 days of the date of this judgment, Mr. N must pay to Ms. N \$100,000 for his continuous breaches of the conduct orders.

ISSUE 2: WHAT IS THE APPROPRIATE FINE FOR MR. N'S REPEATED BREACHES UNDER S. 61 OF THE FLA

[41] In my November 17, 2021 judgment, I wrote the following regarding Mr. N's denial of parenting time:

[17] The starting point of this analysis is that court orders must be abided by. Once a denial of parenting time has been established the onus shifts to the offending parent to show that the denial was not wrongful. Only reasonable denials of parenting time will excuse a denial. This was made clear by Betton, J. in K.R. v. J.W., 2016 BCSC 225:

57 Parenting time that has been included in an agreement or that has been ordered must be respected. If not appealed or varied, compliance cannot be viewed as optional. The time constraint in s. 61(1)(b) ensures some contemporaneity between the alleged denial and the remedy, thus serving as well to focus on the best interests of the children. Section 62 ensures reasonable denials are permitted, again consistent with the best interests of the children being the only consideration.

58 In my view, the objective of the provisions is to give the court a broad discretion that can be adapted to each unique situation. It would be inconsistent with the broad objectives to limit the remedies to only discrete events of an express denial.

59 A pattern of wrongful conduct that frustrates an agreement or order such that parenting time is not fully available is a wrongful denial. A parent need not say the word "no" to scheduled parenting time for them to communicate a denial nor must they physically prevent the parenting time from occurring for it to be a wrongful denial. The cumulative effect of less definitive words and actions may suffice.

[Emphasis added.]

[18] Having regard to all of the evidence I am satisfied that Mr. N denied Ms. N parenting time.

[19] The parenting regime ordered by Master Cameron on March 6, 2020 is clear and unambiguous. There is no doubt that Mr. N was aware of it and understood it. Mr. N says that the children, primarily A.N. refused to go to their mother's house and that, despite his efforts, he could not force them. With respect to B.N., Mr. N says that his son was going back and forth but in the spring of 2021 B.N. told him that he preferred to stay with Mr. N more frequently. Mr. N claims that B.N. told him that he (B.N.) had advised his mother that he would be at his father's.

[20] I do not accept Mr. N's explanation but even if I did I am not satisfied that it justifies the denial.

[21] In *F.(K.E.) v. P.(T.W.)*, 2016 BCSC 1706, the court found the father in contempt of parenting orders because he deliberately failed to use his parental authority to override the children's wishes to spend less time with their mother. The court imposed a fine of \$5000.

[22] It is clear from the evidence that Mr. N is capable of making the children go to their mother's. The fact that parenting time has gone more smoothly since the June 28 Order is proof of that.

[23] It is also clear that Mr. N has little regard for the court process or court orders and is willing to use the children to frustrate same. Proof of this occurred on the morning of June 28, 2021, the second day of the hearing of the four applications before me, when we were focussing on parenting time issues. The plan, agreed to by the parties was that Mr. N would bring the children to the courthouse at 9 a.m. I would meet with the children, then the parties' applications would continue when we were finished. Mr. N failed to deliver the children as

promised. Instead he sent his counsel to say that A.N. had school. There were two problems with this explanation: school had finished for the year and all events were cancelled that day as we were in the middle of a dangerous heat wave. Mr. N eventually delivered the children to court after we stood court down to await that happening.

- [24] At best Mr. N is condoning the children's wishes to be at his home rather than their mother's. At worse he is counselling such behaviour. At this stage of proceedings, it matters not. What matters is that Ms. N has been wrongfully denied significant periods of parenting time and that she has spent considerable time and effort (and legal fees) in trying to have the court order followed.
- [25] It was Mr. N's responsibility to ensure that the order was followed. If he truly believed that he could not do so or that it was not in the children's best interests, it was his responsibility to make application to court to vary the order.
- [42] What I said in November 2021 is equally true now. There is no question that the children, particularly A.N. have not had equal parenting time with their mother. As stated above, A.N. spent only five nights with her mother in 2022. The week or so A.N. spent with her mother just before the hearing of this application was the first lengthy period of time she has stayed with Ms. N in years.
- [43] As he did in October 2021, Mr. N continues to say that he can not force the children to go to their mother's house. I still do not accept that. It is clear from the evidence that Mr. N can and does influence the children. Examples are the fact that he was able to persuade A.N. to stay with her mother for a week before the court appearance. A further example is that he made B.N. stay at the friends' house while Ms. N was in Italy.
- [44] It remains evident that Mr. N has little to no regard for court orders and is willing to use the children to frustrate same. And to cause Ms. N pain.
- [45] I am satisfied that Mr. N has continually breached the parenting time order. The children are almost adults. The concept of parenting time is all but academic at this stage. Mr. N has stolen from Ms. N precious time with her children. Likewise, he has stolen from his children precious time with their mother. Time none of them will ever get back.
- [46] As with the breaches of conduct orders, in November 2021 I gave Mr. N a chance. The \$5000 fine did not have any deterrent effect. There is a small window of parenting time left. The penalty I impose must send Mr. N a clear message: breaching parenting orders will not be condoned. Ms. N is entitled to the children 50% of the time. It is his responsibility to ensure that the children spend that time with her.
- [47] Having considered all of the evidence I order that within 10 days of the date of this judgment, Mr. N must pay to Ms. N \$100,000 for his continuous breaches of the parenting orders.

ISSUE 3: CAN LEGAL FEES BE ORDERED PURSUANT TO S. 230(2)(B)(I)?

- [48] Ms. N is seeking to recover the legal expenses she incurred as a result of Mr. N's breaches. Mr. N argues that that is not available under s. 230. I agree.
- [49] In the recent case of *Sperring v. Shutiak*, 2023 BCCA 54 our Court of Appeal held that a party could not recover legal fees incurred under s. 213 of the FLA as that would effectively supplant the entire cost regime.
- [50] The wording of s. 230 is similar to that of s. 213. I do not accept that the present case is distinguishable from *Sperring* because Ms. N is claiming only the legal fees spent trying to remedy Mr. N's breaches, and not her total legal expenses. It is still supplanting the cost regime.
- [51] Ms. N's application to recover her legal fees under s. 230 is dismissed.

ISSUE 4: ARE SPECIAL COSTS APPROPRIATE?

- [52] Ms. N seeks an order for special costs against Mr. N.
- [53] The purpose of special costs is to punish and deter litigation misconduct, not to compensate the other party: *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69, leave to appeal ref'd 39145 (1 October 2020).
- [54] The circumstances in which this Court has in the past awarded special costs in matrimonial litigation were summarised by Warren J. in *Hu v. Dickson*, 2015 BCSC 218, at paras. 46-49, as follows:
- [46] Special costs are awarded where a party's litigation conduct can be characterized as "reprehensible". In this context the word reprehensible encompasses both scandalous and outrageous conduct and also milder forms of misconduct deserving of reproof or rebuke. This does not mean that all forms of misconduct justify a special costs order - rather, the misconduct must be such as to be deserving of reproof or rebuke.
- [47] The purpose for this high level of costs is punitive and intended to express the court's disapproval of the party's conduct. It is not necessary that all aspects of a party's conduct in the litigation be reprehensible in order to make an award of special costs that applies to the entire action. However, pursuant to Rule 16-1(14) of the Supreme Court Family Rules, the court has the discretion to award costs that relate to only certain aspects of a proceeding and may do so where it would be disproportionate to award special costs of the entire proceeding.
- [48] The court must exercise restraint in awarding special costs and as such the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order.
- [49] In *Kim v. Hong* Justice Griffin quoted extensively from the judgment of Justice Williams in *Schwabe v. Dr. Lisinski* where he summarized a number of cases in an effort to discern the kinds of conduct that had been characterized as reprehensible and thus warranting an award of special costs. Justice Griffin also categorized the conduct that had been found to

justify an award of special costs in a number of family cases. From her reasons, it is apparent that the kinds of conduct that warrant an award of special costs include the following:

- acting with an improper motive, such as to intimidate, exhaust or financially drain the other party in the hopes that they will give up or soften their position in the litigation;
- dissipating and/or not disclosing assets;
- abusing the court's process by, among other things, failing to disclose documents, delaying in disclosing documents, failing to respond to reasonable requests, causing unnecessary interlocutory applications, and breaching the Rules of Court in a manner that prejudices the other party;
- misleading the court, through outright fabrications or through evasive and/or equivocal responses; and
- disobeying a court order.

[Citations omitted.]

[55] In *Bobyn v. Bobyn*, 2014 BCSC 1441, Justice Donegan found that Mr. Bobyn's conduct was reprehensible as he deliberately disobeyed court orders, and was abusive and obstructionist. Noting that the court appearances would have been unnecessary had Mr. Bobyn complied with court orders, Donegan, J. ordered that Mr. Bobyn pay to Ms. Bobyn special costs.

[56] In *Hazen v. Hazen*, 2022 BCSC 1900 at para. 14, Tammen, J. awarded the claimant special costs for the application "and all matters necessary and incidental to ensuring compliance with the previous orders".

[57] There is no question that Mr. N has engaged in reprehensible conduct. He has continually breached virtually every court order made in this litigation. He was warned in November 2021. That warning went unheeded; he continued to breach with abandon. It is clear that Mr. N has no respect for the court or its orders. The court appearances are all a result of Mr. N's breaches.

[58] Accordingly, I award Ms. N special costs for this application and all matters necessary to ensuring Mr. N's compliance with the orders I have made in this litigation. This includes correspondence by counsel and other steps taken to address/ remedy Mr. N's breaches.

CONCLUSION

[59] I make the following orders:

- 1) Pursuant to s. 228 of the FLA, within 10 days of the date of this judgment Mr. N must pay to Ms. N \$100,000 for his continuous breaches of the conduct orders;

- 2) Pursuant to s. 61(2)(g) of the FLA, within 10 days of the date of this judgment Mr. N must pay to Ms. N \$100,000 for his continuous breaches of the parenting orders;
- 3) Ms. N's application pursuant to s. 230(2)(b)(i) of the FLA for reimbursement of the legal fees she has incurred arising from Mr. N's breaches is dismissed; and
- 4) Mr. N must pay to Ms. N special costs of this application and all matters necessary to ensuring his compliance with all court orders I have made in this litigation.

"The Honourable Madam Justice Murray"

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