

CANADA / JUDGMENT

Bouchot v. Baldini

2024 BCSC 1266

COURT

Supreme Court of British Columbia

DECIDED

15 July 2024

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2024 BCSC 1266 Bouchot v. Baldini

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bouchot v. Baldini,

2024 BCSC 1266

Date: 20240715

Docket: E60622

Registry: New Westminster

Between:

Belinda Karen Jacqueline Bouchot

Claimant

And

Lucien Eric Baldini

Respondent

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for the Claimant:

J. Dreyer

Counsel for the Respondent:

S. Sohi

Place and Dates of Hearing:

New Westminster, B.C.

March 7 and May 31, 2024

Place and Date of Judgment:

New Westminster, B.C.

July 15, 2024

Overview

- [1] These are reasons on two applications. The first is an application by the claimant to have the respondent found in contempt for failing to obey a without notice order of May 16, 2023 (the "Property Order"), requiring him to return property. In the alternative, the claimant seeks an order that the respondent's response and counterclaim be struck pursuant to Rule 11-2(1)(d) of the Supreme Court Family Rules [SCFR], as an abuse of process for failure to comply with the Property Order. The claimant also seeks special costs.
- [2] The second is an application by the respondent, first to set aside the Property Order, and second to vary a without notice protection order (the "Protection Order") made on the same day as the Property Order.
- [3] For the reasons that follow:
- a) the application to find the respondent in contempt is dismissed;
 - b) the application to strike the response and counterclaim is dismissed;
 - c) the application to set aside term 2 of the Property Order is granted;
 - d) the application to vary the Protection Order is dismissed; and
 - e) the costs of the applications are in the cause.

Background

- [4] The parties began living together in 1991. They separated sometime between 2011 and 2013, following which the parties resumed their relationship. There is a dispute as to when they finally separated; either July 2018 or June 2020. The children of the relationship are now independent adults.
- [5] To give context to some of the parties' arguments on these applications, the main issues in this action are property division and spousal support.
- [6] The two significant assets in dispute are a property in Langley (the "Langley Property") which the claimant and her father purchased while the parties were first separated, and a property in Creston (the "Creston Property") which the parties purchased in 2014 when they

reconciled. Both parties are on title to the Creston Property. Since 2018, the respondent has lived in the Lower Mainland, originally at the Langley Property, but moved from that property when disputes arose between him and the claimant's father. The claimant has lived at the Creston Property since its purchase. The Creston Property is a rural property of about 10 acres.

- [7] The claimant's father passed away in 2021. There is a dispute regarding his contribution of about \$400,000 to the purchase of the Langley Property, and what, if any, interest the respondent has in that property. Prior to his death, the claimant's father commenced an action against the claimant and the respondent. There is also a dispute regarding the condition of the land, outbuildings and home on the Creston Property. The claimant wishes to purchase the respondent's interest in that property.
- [8] Finally, with respect to spousal support, the respondent alleges that the claimant is in a marriage-like relationship with Mr. Ken Osmond. There is also a dispute regarding income.

Applications regarding the Property Order

Evidence

- [9] The claimant states that on several occasions after separation, the respondent attended the Creston Property, without informing her in advance, and removed various chattels. As a result of this and safety concerns (discussed with respect to the Protection Order), she changed the locks to the home and installed trail cameras. One camera was inside the mudroom door, one was mounted near the carport and was positioned to face the mudroom door, and two were in other locations on the property. In December 2022, she discovered that one of the last two mentioned cameras had been dismantled.
- [10] On April 19, 2023, the claimant returned home on her lunch break to find that the home on the Creston Property had been broken into. The mudroom door and frame were broken and the door forced open. The trail cameras in the mudroom and near the carport were missing. Her locked filing cabinet in her bedroom had been pried open and the contents were gone. A shelf in the glass cabinet where she stores paperwork and the filing cabinet under her desk were also emptied. The lock and chain on the glass cabinet was missing. Other paperwork which had been on a table and in the vicinity was also missing.
- [11] The claimant describes 31 items or groups of items that were taken. Other than the trail cameras and a key, it is all paperwork. These include:
- a) Mr. Osmond's personal and company financial records (the claimant had been working on Mr. Osmond's bookkeeping);
 - b) personal documents such as cards and letters from her father;
 - c) her personal financial records;

- d) documents subject to solicitor-client privilege (notes for and correspondence with her counsel in this litigation, and her father's correspondence with his counsel); and
 - e) documents concerning her father's estate she had either received from the executor or was intending to send to the executor.
- [12] The claimant reported the break-in to the police and they attended. She attaches photographs showing the state of the home as described above.
- [13] The one remaining trail camera that had not been removed recorded some of the events of that day. The images show the back of the respondent as he walks away from the home toward the property of the neighbour Mr. Wayne Sikora. The first set of images, at about 9:00 a.m., shows the respondent carrying a large white bag over his shoulder. I estimate the filled portion of the bag as being three feet by two feet. The second set of images shows the respondent walking away from the home a second time, 14 minutes later, carrying items with his right arm. The left arm is not fully seen. In one of these images, the corner of a fuchsia item is visible just above the respondent's right shoulder. It is consistent in size and shape with the corner of a folder or binder. The claimant identifies this as the folder which contained personal cards and correspondence. The claimant is not aware of anyone else accessing the Creston Property on that day.
- [14] Mr. Osmond was in Belize at the time of the break-in. He describes being informed and then urgently returning to Canada. He gives similar evidence as the claimant as to his missing records, and his out-of-pocket costs (over \$3,000) to make the unscheduled return to Canada, repair the mudroom door, and replace documents. He has been unable to complete his tax returns.
- [15] Following the break-in, claimant's counsel wrote to respondent's counsel advising of the break-in, that the police were investigating, and demanding the return of the taken items. They were not returned.
- [16] On May 16, 2023, the claimant obtained the without notice Property Order and Protection Order. She was ordered to have exclusive occupancy of the Creston Property. The term of the Property Order which is alleged to have been disobeyed states:
2. The Respondent shall immediately return all items removed by him from the Creston Property since June 29, 2020, including but not limited to those items removed on April 19, 2023 which include, but are not limited to, the items listed in Schedule "A" of the Claimant's Notice of Application, filed May 12, 2023, but not including the John Deere tractor.

- [17] Respondent's counsel was provided with a copy of the Property Order and the Protection Order on the same day they were obtained. On May 24, 2023, the respondent filed a notice of intention to act in person. Subsequently, the claimant wrote to the respondent at his email address for delivery, demanding return of the items. The respondent advised he was retaining new counsel and that the orders would be addressed. No items were returned except a USB stick (the "USB Stick").
- [18] On June 15, 2023, four weeks after obtaining the Property Order, the claimant filed this application seeking that the respondent be found in contempt. On August 1, 2023, the respondent filed his application to set aside the Property Order. For various reasons, the applications were not heard for nearly a year. The respondent did not apply for a stay of the Property Order.
- [19] The respondent states that "despite his better judgment", he "entered" the home using a screw driver. He states that he was frustrated that the claimant had not returned documents to him that he had requested. He states that he did not remove or take any trail cameras or any of the claimant's or Mr. Osmond's documents or chattels as alleged by the claimant. He denies that he pried open the claimant's locked filing cabinet, or removed any locks or chains.
- [20] He states that since separation and prior to April 19, 2023, he removed: (a) the tractor; (b) three to four boxes of clothing; (c) a welder unit; (d) hand tools; (e) a meat slicer; (f) a meat bandsaw; and (g) hunting gear. On April 19, 2023, he took the following items:
- a) a blue accordion file box that contained his personal documents and certificates;
 - b) a banker's box containing his personal documents including his company documents;
 - c) two binders belonging to him containing renovation receipts from past renovation jobs;
 - d) a small appliance (black garlic fermenter);
 - e) a black external hard drive that contains his family pictures;
 - f) the USB Stick (taken by mistake as he thought it was his; he subsequently returned this to the claimant through counsel); and
 - g) a mixer attachment.
- [21] The respondent also states that he "came across" some of the claimant's and Mr. Osmond's documents, while he was looking for his documents, and he took photographs of these documents using a scanning application on his cell phone. He attaches a copy of these to his affidavit. They are about 40 pages. Some of them are privileged communications of the claimant and her father with counsel. Some are Mr. Osmond's personal records. Some are the claimant's father's documents. Some could possibly assist the respondent in the issues in this lawsuit. For example, on a pension statement for Mr. Osmond, the claimant is stated to be his spouse.

- [22] In response, the claimant states that she did not have possession of the items the respondent states that he took on April 19, 2023, as they were taken by the respondent when they separated in 2020. She also states that the USB Stick, which was subsequently returned by the respondent, had files deleted from it. This USB Stick contained bookkeeping work she was doing for Mr. Osmond's company and her personal notes and questions for her counsel regarding this litigation. The USB Stick was inside a binder labelled as concerning Mr. Osmond's business. Mr. Osmond states that other deleted files include his passwords for his on-line accounts.
- [23] The respondent denies that he deleted any files from the USB Stick.
- [24] Finally, after being advised that the respondent had taken scanned copies of documents, at the end of June 2023, claimant's counsel wrote to respondent's counsel, requesting that the respondent attend his counsel's office and produce his phone so that screen shots could be taken of those scanned documents showing the date and time the scans were taken. Counsel for the respondent subsequently advised that the respondent had already disposed of his phone at the beginning of June 2023, when he upgraded his phone. Documents corroborating that the respondent had purchased a new phone on June 2, 2023, were produced. At the time of the hearing of this application, there was a pending application for the metadata of those scans to be produced.

Application for Contempt

- [25] The court's power to punish for contempt rests on its power to uphold the rule of law: *Larkin v. Glase*, 2009 BCCA 321 at para. 7. Unless an order states otherwise, it takes effect on the day it is made, and it must be obeyed until it is set aside, varied, stayed, or reversed on appeal: Rule 15-1(9) of the SCFR and *Larkin* at para. 7.
- [26] There are three elements of civil contempt, which must be established beyond a reasonable doubt: *Carey v. Laiken*, 2015 SCC 17 at para. 32. Those three elements are:
- a) The order alleged to have been breached "must state clearly and unequivocally what should and should not be done"; i.e., the order must be "clear and precise in its meaning";
 - b) The person alleged to have breached the order must have had actual knowledge of it; and
 - c) The person alleged to have breached the order must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. The required intent is of an intentional act or omission that is in fact in breach of the order. The person must have the ability to comply with the order when it was made. If the person does not have the ability, then there cannot be an intentional act disobeying the order.

See: *Carey* at paras. 32-38; *Hama v. Werbes*, 2000 BCCA 367 at paras. 8-9; and *Jackson v. Honey*, 2009 BCCA 112 at paras. 12-13.

- [27] Principles which govern a contempt application are:

- a) The proceedings are quasi-criminal in nature and the rules of strictissimi juris (the strictest interpretation of the law) apply. For example, evidence in support of the motion must be properly admissible as at a trial;
- b) As noted, the applicant bears the onus of proving the each of the elements beyond a reasonable doubt; and
- c) If the order alleged to be breached is ambiguous, the alleged contemnor is entitled to the most favourable construction.

See: Peel Financial Holdings Ltd v. Western Delta Lands Partnership, 2003 BCCA 551 at para. 18:

- [28] The obligations in the order alleged to be breached must be readily determinable, and contained within the four corners of the order itself. The order "should not require the person who is the subject of the order, to cross-refer to other material in order to know his precise obligation": Gurtins v. Goyert, 2008 BCCA 196, at paras. 14-16.
- [29] The contempt power is discretionary and should not be routinely used to obtain compliance with court orders. It should be used cautiously and with great restraint: Carey at para. 36. A contempt order "should be a last resort to obtaining compliance": Hokhold v. Gerbrandt, 2016 BCCA 6 at para. 13.

Parties' Arguments

- [30] There is no issue that the respondent had knowledge of the Property Order.
- [31] As to the first element of contempt, the claimant argues that the Property Order is clear and that the respondent has not returned the items which he took on April 19, 2023 or any other day. She says he could refer to Schedule A in the notice of application for what he was to return, and that he knows what he took.
- [32] The respondent argues that the order is not clear for three reasons. First, it requires him to refer to Schedule A of the notice of application: Gurtins at paras 14-15. Second, the words "items" and "immediately" are vague. Third, the order is vague because it does not direct how the items are to be returned nor to whom. The respondent refers to Skybound Dev. Ltd. v. Hughes Properties Ltd. (1988), 24 B.C.L.R. (2d) 1, 1988 CanLII 2991 (C.A.), and Hama as cases illustrating that precision is required in the order.
- [33] In response, the claimant argues that the words "immediately", "return", and "items" are clear. "Immediately" means at once, or as soon as can be done. "Return" means to put back, and since the Creston Property was referenced it means return to the Creston Property. "Items" is clear as the respondent knows what he took.
- [34] As to the third element, the claimant argues that the only item that the respondent has returned is the USB Stick. She says it is not up to the respondent to say that the items he took were his and he should not have to return them, because he was ordered to return everything. Further, in light of all the other evidence, his evidence that he did not take the

claimant's and Mr. Osmond's documents is not credible. She argues that the documents taken would not be of interest to anyone but the respondent. The scanned documents show that the respondent has selectively gone through binders and folders and taken documents he thinks may be useful to him in the litigation. She argues that the respondent had already listed some of his own documents that he claims he took on April 19, 2023.

[35] The respondent argues that he only took items that belong to him, and that his evidence is reasonable and raises a reasonable doubt. He submits that he would have no interest in taking many of the documents the claimant alleges that he took, as they would be of no benefit to him. Further, he argues that the claimant's evidence as to what documents she had in the home is not credible and raises a reasonable doubt. He points to various alleged inconsistencies between the claimant's evidence in this action and documents the respondent scanned. Further, the claimant's first affidavit in support of the Property Order, as to the documents which are alleged to have been taken, is not nearly as detailed as her affidavit filed months later on this application. To the extent the claimant alleges that these are documents she had and was going to use in the litigation, they were not listed in her list of documents. This action had been set for trial previously. He will contest any argument by her at the upcoming trial that an adverse inference should be made against him that these alleged documents would have helped the claimant's case. Other documents that the claimant claims he took, were already listed on her list of documents or have been produced. Finally, the respondent argues that the claimant proceeded with the application when she had not obtained the metadata from the scans, or from the USB Stick, and she could have obtained it. Nor did she produce the full videos from the trail cameras.

[36] The claimant responds to these arguments, submitting that the documents the respondent scanned do not undermine her credibility, and that she had only recently received some documents that had not yet been listed.

Analysis

[37] The claimant's and Mr. Osmond's affidavits collectively contain inadmissible hearsay, prior consistent statements of the claimant, and speculation and opinion as to who took the missing documents. I have only considered those portions that are admissible. I have not considered any hearsay or prior consistent statements. Where the claimant and Mr. Osmond state that the respondent took or stole the documents, I have ignored that evidence as inadmissible speculation or opinion, and have considered that evidence only to the extent that they state those documents were present in the home, and missing when they returned home.

[38] I find that the admissible evidence establishes beyond a reasonable doubt that: (a) the respondent had knowledge of the Property Order since shortly after it was made; (b) the respondent removed several items from the Creston Property prior to April 19, 2023, and several more items on that day (which he admits); (c) the only item he has returned is the USB Stick; and (d) not returning the items he removed is an intentional act. He has not

applied for a stay of the Property Order, but has applied to set it aside. None of these findings were in issue at the hearing. The issues are whether the Property Order is clear and concise, and what the respondent took from the home. As I will discuss, I need only discuss the first issue on the contempt application.

- [39] As to the first element of contempt, I do not find any ambiguity in the word "return" as the order refers to those items taken from the Creston Property. The Merriam-Webster Online Dictionary defines return as "to bring, send, or put back to a former or proper place". Nor do I find that the word "immediately" is unclear such that it would foreclose an order for contempt. The Merriam-Webster Online Dictionary defines "immediately" as "without interval of time". I acknowledge that the word "immediately" is not as clear as a reference to a date, for example, "by no later than May 31, 2023", but it does not mean more than a year later. Courts have found an implied term of a reasonable time in orders: see e.g., *Gabriola Island Local Trust Committee v. Fonseca*, 2022 BCCA 402 at paras. 52-68.
- [40] However, for two reasons, I find that the order is not clear and precise as to what was to be immediately returned. First, the Property Order requires the respondent to a cross-refer to another document, which is contrary to the principles discussed in *Gurtins*. Schedule A is not attached to the order. Second, it is not clear whether the order includes personal items that belong to the respondent. In my view, it would be reasonable to interpret the Property Order as only applying to items for which the claimant may have a claim, and not to documents or chattels for which the claimant would have no right to possession such as the respondent's personal clothing, financial documents and trade certificates. However, the terms of the Property Order leave it open as to whether, for example, the respondent's personal clothing, his personal papers, or the items that he removed to the knowledge of the claimant up to three years earlier when the claimant states they finally separated, were to be returned.
- [41] My conclusion on this first element of the contempt application makes discussion of the third element of contempt unnecessary. The application for a finding of contempt is dismissed.
- [42] Finally, while I have sympathy with the claimant's position and her suffering a break-in, the relevant case authorities are replete with comments that a contempt application is a remedy of last resort. In *Gabriola Island Local Trust Committee*, the Court stated the following:
- [28] At the same time, the contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders: *Carey* at para. 36. As noted in *Hokhold v. Gerbrandt*, 2016 BCCA 6:
- [31] Contempt of court is a heavy, blunt tool.
- [32] A measured response to non-compliance with court orders is the standard; a contempt order should be a last resort to obtaining compliance.

- [29] In all cases of contempt, it is crucial that courts be alert to the exceptional nature of their contempt power, and use it with restraint: *Morasse v. Nadeau-Dubois*, 2016 SCC 44 at para. 21; *Workers' Compensation Board of British Columbia v. Seattle Environmental Consulting Ltd.*, 2017 BCCA 19 at paras. 103-104 [*Seattle Environmental Consulting*].
- [43] The claimant proceeded directly to a contempt application within a month of obtaining a without notice order that implicitly assumes that the respondent took items, when the respondent did not have an opportunity to contest that allegation. Presumably, term 2 of the Property Order was made pursuant to s. 91(2)(a) of the FLA. There was no application under s. 230 of the FLA for an enforcement order. While made in the context of s. 213 of the FLA and disclosure, in my view, the comments of Justice Punnnett in *J.D.G. v. J.J.V.*, 2013 BCSC 1274 at paras. 26-27, are applicable. In "all but the most egregious cases", an application under the FLA if available, should be made initially.

Application to Set Aside the Property Order

- [44] As the Property Order was made without notice, Rule 10-9(8) of the SCFR applies. It provides that the court may change or set aside an order made without notice under subrule (6) on the application of a person affected by the order. The standard is a hearing de novo without the presumption that the first order was correct: *Kapoor v. Makkar*, 2020 BCCA 223 at paras. 8-11.

Parties' Arguments

- [45] The respondent applies to set aside term 2 of the Property Order. The parties' arguments were the same as for the third element of the contempt application. The respondent states that he took only documents and items belonging to him, and the claimant argues that the circumstantial evidence establishes that the respondent took her documents and Mr. Osmond's documents.
- [46] In addition, the respondent argues that the claimant should not have brought the application for the Property Order without notice as he had counsel at the time, and there was no urgency. He argues that had he and his counsel been given notice, he would have opposed the application, and the order would not have been made.

Analysis

- [47] Although the respondent argues that the Property Order should not have been made without notice, this is not an appeal of the Property Order. That argument is a collateral attack on the Property Order. This is a hearing de novo.
- [48] There are two aspects to the dispute: (1) what the claimant alleges that the respondent took, and (2) what the claimant claims that she had in the home to be taken. There is a dispute as to both.

- [49] Ultimately, the resolution of those issues depends to a large extent on the credibility of the parties. This is an application on affidavits where there has been no cross-examination, and both applications come very close in time to the trial of this action, where there will be cross-examination and a fuller evidentiary record, and where it appears that credibility will be a central issue.
- [50] The trail camera images show that the respondent accessed the home shortly after 9:00 a.m. on April 19, 2023. The claimant returned home on her lunch hour. Between these events, there is a three-hour gap during which the home was not secure. The image of the large white bag the respondent is carrying shows a series of line-like shapes across the bottom, which could be consistent with sheaves of paper, and does not appear to have any shape that is consistent with a banker box, but the respondent's left hand is not seen in the second set of images. His arm is down on his side in a position in which he might be carrying something. There is also the evidence of the fuchsia item which the claimant identifies and for which the respondent has not provided an explanation. There are also the several arguments each party made as to the credibility of the other party which would require cross-examination, such as whether in fact the claimant had some or all of the documents she alleges were taken.
- [51] While I find these are suspicious circumstances, given the multiple issues which depend on credibility and findings on other issues, the lack of cross-examination on affidavits, and the closeness of this application to the trial of this action where credibility findings will likely be made, in my view, term 2 of the Property Order should be set aside, and I so order.
- [52] The claimant did not seek an alternate order if the Property Order was set aside.

Application to Strike Response and Counterclaim

- [53] The claimant applies pursuant to Rule 11-2(1)(d) to strike the respondent's response and counterclaim because he has not obeyed the Property Order.
- [54] Rule 11-2(1) states:
- (1) At any stage of a family law case, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the family law case, or
 - (d) it is otherwise an abuse of the process of the court,
- and the court may pronounce judgment or order the family law case to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Parties' Arguments

- [55] The claimant argues that even if she has not established the elements of contempt, this Court can still strike the respondent's response and counterclaim because it is an abuse of process for him not to comply with the Property Order. Little time was spent by the claimant arguing in support of this order. The claimant argues that the respondent has attempted to use the privileged documents which he scanned, as a basis to request that the Court order production of further documents.
- [56] The respondent repeats his arguments that he did not take the items the claimant alleges he did. However, if the court finds he has, he argues that striking his pleadings would be an onerous remedy that is not proportionate.

Analysis

- [57] Abuse of process is a flexible doctrine which includes "the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute": *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC at para. 37.
- [58] I acknowledge that, in some circumstances, failure to comply with a court order might be an abuse of process. However, in this case, if there was a failure to comply, it does not come within those circumstances. No argument was made as to how the circumstances alleged were an attempt by the respondent to misuse the procedure of the court. The power of the court to punish for contempt supports the proper administration of justice, but I have already found that contempt was not established because the order was not sufficiently clear and unambiguous.
- [59] There are remedies available under the Family Law Act, short of an application for contempt, such as under s. 230, if a party does not comply with an order. Instead, the claimant chose to proceed with the blunt instrument of a contempt application. In argument, the claimant sought an alternative order of a fine, but there was no application under s. 230.
- [60] Finally, with respect to the argument that the respondent has tried to use documents he scanned as a basis to obtain further documents in this action, that application for documents is not before me. If the respondent is doing so, the claimant can make her arguments as to the appropriateness of his actions, and whether it is an abuse of process, in that application.
- [61] The application to strike the respondent's response and counterclaim is dismissed.

Application regarding the Protection Order

- [62] Sections 183-188 of the FLA provide the authority to order, set aside or amend a protection order. Section 183(2) states:

(2) A court may make an order against a family member for the protection of another family member if the court determines that

- (a) family violence is likely to occur, and
- (b) the other family member is an at-risk family member.

[63] Section 184(1) states:

(1) In determining whether to make an order under this Part, the court must consider at least the following risk factors:

- (a) any history of family violence by the family member against whom the order is to be made;
- (b) whether any family violence is repetitive or escalating;
- (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
- (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;
- (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;
- (f) the at-risk family member's perception of risks to the at-risk family member's own safety and security;
- (g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

[64] Section 186 provides that a protection order may be made without notice, but if it is, the party against whom the order is made may apply to set aside the order or to change or terminate the order under s. 187. This is also a hearing de novo:

R.C. v K.L., 2023 BCSC 1219 at para. 22; Williams v. Williams, 2022 BCSC 517 at para. 82.

[65] Section 1 of the FLA defines family violence:

"family violence" includes, with or without an intent to harm a family member,

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,

- (d) psychological or emotional abuse of a family member, including
- (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
- (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
- (iii) stalking or following of the family member, and
- (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

Evidence

- [66] The respondent did not seek to set aside all of the Protection Order, but instead sought to vary certain terms. The terms which are in issue, and the respondent's position on each, are as follows:
- a) Term 2 restrains the respondent from attending within one mile of or entering the Creston Property, and any other residence or place of employment of the claimant. He seeks that this be varied so that he can enter the Creston Property, but not the home on the property;
 - b) Term 3 restrains the respondent from following the claimant. The respondent seeks to set this aside; and
 - c) Term 4 restrains the respondent from possessing a weapon or firearm or possessing a license, registration, certificate or other document authorizing him to possess or use a firearm. The respondent seeks to set this aside.
- [67] Term 6 states that the Protection Order does not expire in a year, and remains in place until a trial decision is rendered unless rescinded by court order.
- [68] The respondent states that he visits Creston many times a year to visit friends and hunt. His friend Mr. Sikora lives on the property next door to the Creston Property, and he often stays with Mr. Sikora, and has done so in the past "without any issues". Although he does not state this is an affidavit, his counsel argues that he would like to attend the Creston Property to maintain it. There is affidavit evidence of a dispute between the parties regarding the condition of the Creston Property and the work the claimant is doing on the property.
- [69] The respondent states that he has enjoyed hunting as a hobby and past-time for 35 years. He holds a valid possession and acquisition licence ("PAL"), and for approximately 17 years was a federal firearms instructor, and a hunter education safety instructor for the BC Wildlife Federation

- [70] The claimant opposes any change to the Protection Order. In addition to the evidence of the break-in on April 19, 2023, she provided evidence of other times the respondent has accessed the Creston Property. She states that on August 15, 2020, while picking up items from the property, the respondent threatened to slit her father's throat and told her that she had no idea what he was capable of. On August 18, 2020, the respondent came to the property without advising her. It was not obvious she was in the home. She observed him go to the outbuildings and remove a number of items. Afterward, he drove up to the home, walked around the home to see if he could open windows, and yelled that he knew she was in there. On another occasion, she suspects the respondent accessed the home because her lingerie hanging in her closet was cut up and her boot collection was missing. On September 14, 2020, her dog alerted her to the presence of the respondent hiding in the bushes next to the driveway. She has trail camera pictures of the respondent taking a chain saw from the woodshed to Mr. Sikora's property in January 2021. On July 22, 2022, the respondent took the tractor from the property without her agreement. She did not see this, but the respondent has admitted it. Someone dismantled one of the trail cameras in December 2022.
- [71] She states that there is a history of domestic abuse by the respondent toward her and their son and her daughter during the relationship, but as no details of that are given, I give it no weight. Further, such a history was at least four years ago. She states that the respondent was charged with uttering a threat against her father. That charge was stayed following her father's death.
- [72] The claimant is fearful of the respondent and concerned about her personal safety and security and that of her pets. The claimant further states that disputes exist between her and her neighbour Mr. Sikora. The Creston Property is rural property and 20 minutes by car to Creston.
- [73] In response to the respondent's evidence, the claimant states that when they were a couple they did not socialize much with others because the respondent worked out of town or had moved to the Lower Mainland for work and his education, and when he came home, he did not want to go out. He did not have friends in Creston that he spent time with on his own. He and Mr. Sikora did not spend time together. After 2018, he did not spend much time hunting, and she does not recall him ever going hunting with friends while he was living in Creston.

Parties' Arguments

- [74] The respondent argues that there is no risk of family violence. He argues that he has a right to hunt in accordance with the law. None of the events of which the claimant complains involved violence or a weapon. He has been attending the Creston Property since 2020, which the claimant has known about, yet at no time did she feel the need to apply for a protection order. While he did enter the home on April 19, 2023, there was no imminent harm or reason for the claimant to bring the application for the Protection Order on a without notice basis. The respondent is also an owner of the home. Up until the exclusive occupancy order, he had a right to be at the home and on the Creston Property.

[75] The claimant argues that she is at risk of family violence. The respondent has threatened her, and her family resulting in a charge against the respondent for uttering a threat, and his actions have escalated as evidenced by the trips to the Creston Property prior to April 19, 2023, and the home break-in. He and the neighbour Mr. Sikora are aligned. The Creston Property is rural property, a 20-minute drive from Creston. The respondent does not have a right to possess firearms, and in the circumstances, he should not have access to a means of violence. Nor is there any reason for him to access the Creston Property. He can visit his friends elsewhere, and he never hunted much in the last few years.

Analysis

[76] To the extent the respondent argues that the application should not have been brought without notice, this is not an appeal. This is a hearing de novo.

[77] A protection order may be made if the court "determines that family violence is likely to occur against an at-risk family member": A.B. v. C.D., 2020 BCCA 11 at para. 159. The "framework is predicated on a finding that conduct meets the definition of family violence": A.B. at para. 162. While "[t]he ultimate purpose of a protection order is to prevent future family violence", the court is to assess that risk accounting for the factors in s. 184: A.B. at para. 164.

[78] For the following reasons, in my view, the Protection Order should remain in place without variation.

[79] The acts described by the claimant come within the definition of family violence, being psychological or emotional abuse. The circumstances surrounding the Property Order indicate a risk of family violence to the claimant which is likely to occur. There have been several times where the respondent has accessed the Creston Property without informing the claimant. I appreciate that he is on title, and that until the Property Order which granted the claimant exclusive occupancy, he presumptively had a right to be on the property. However, according to him, the parties had separated in 2018. Respect for another person's privacy should have dictated to him that notice he was coming onto the property was prudent and responsible.

[80] The respondent's acts described by the claimant were escalating, culminating in the break-in. The respondent's attempts to justify and sanitize his behaviour, describing that he "entered" the home, and "came across" the papers, leads me to conclude that he does not accept or realize the seriousness of his acts. The photographs of the broken door and frame, and shattered wood show what could only have been a violent entry of the home. It would create a feeling of lack of safety, particularly in someone living in rural property with a neighbour who is aligned with the respondent. Another example of threatening behaviour is the claimant's evidence of the respondent walking around the home, and trying to open windows and yelling that he knew that the respondent was in the home. Another example is the claimant finding her lingerie cut up, although of course she does not know who did that.

I appreciate these other assertions are denied generally by the respondent, but in my view, they establish a risk of likely family violence. There is also the evidence of a charge of uttering a threat against the claimant's father, and although that charge was against a different family member and was stayed (there is no evidence of why, but it was after the father passed away), there was also the statement to the claimant that she did not know what he was capable of. Further, the trial is approaching and stress can increase leading up to that.

[81] I am not persuaded that the respondent needs to access the Creston Property to maintain it. The claimant has been the person living on the property since 2018. There was no evidence the respondent needs to hunt for economic reasons. The fact that he has a PAL and was a firearms instructor are irrelevant. They did not prevent him from violently accessing the home.

[82] Nor am I persuaded that his friendship with Mr. Sikora is a good reason for the order to be amended. My view that the one-mile radius should remain in place is reinforced by the strained relationship between Mr. Sikora and the claimant and Mr. Osmond, the trail camera images showing the respondent headed in the direction of Mr. Sikora's home, and the respondent being found in the bushes along the fence line of the Creston Property. The respondent can visit Mr. Sikora elsewhere than Mr. Sikora's home.

[83] In considering all of the circumstances, in my view, all of the restrictions in the Protection Order are justified and appropriate. The application to vary the Protection Order is dismissed.

Application for Special Costs

[84] The claimant claims special costs. The basis of this claim is a successful contempt application, but she has not been successful.

[85] I order that costs of the applications will be in the cause, in accordance with Rule 16-1(9) of the SCFR.

"Norell J."

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Prepared on 29 October 2026 · Esheria