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C.A.L. v. D.E.L.

2018 BCSC 772

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Supreme Court of British Columbia

DECIDED

11 May 2018

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2018 BCSC 772 C.A.L. v. D.E.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.A.L. v. D.E.L.,

2018 BCSC 772

Date: 20180511

Docket: E171130

Registry: Victoria

Between:

C.A.L.

Claimant

And:

D.E.L.

Respondent

Before: Master Bouck

Reasons for Judgment

Counsel for the Claimant:

M. Kinney

Counsel for the Respondent:

S. Tucker

Place and Date of Hearing:

Victoria, B.C.

May 2, 2018

Place and Date of Judgment:

Victoria, B.C.

May 11, 2018

The Application

- [1] These reasons address the claimant's application for a remedy pursuant to s. 228 (enforcing orders respecting conduct) of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") and a protection order pursuant to s. 183. These remedies are but two of the several orders sought by the claimant in her notice of application filed April 16, 2018[1]. Most of those other matters will be spoken to at a one-day hearing scheduled for the June 4th assize week. At the June hearing, the court will be asked to decide cross applications relating to property, document disclosure, parenting of the parties' daughter H. as well as a protection order against the respondent with respect to the parties' son N.
- [2] The respondent seeks dismissal of the two applications or, alternatively, a direction that these applications be adjourned to allow for cross-examination of the parties on their affidavits.
- [3] Counsel did not agree on a time estimate for this hearing. Ms. Kinney estimated two hours, while Ms. Tucker suggested that up to three hours was necessary for her full submissions. On my direction and due to the court's schedule, the hearing was concluded after two and one-half hours. Ms. Tucker did not complete her submissions nor, of course, was Ms. Kinney able to make reply submissions. At that time, I reserved my decision with the expectation that the application could be decided on the evidentiary record without further oral submissions. That expectation has been met.
- [4] For reasons that follow, I order that the respondent pay the claimant the sum of \$250 by May 31, 2018, as the consequence for his breaches of a conduct order. I direct that the application for the protection order be re-argued in conjunction with the application for a protection order with respect to N. The claimant's application for a monetary payment or fine flowing from possible prospective breaches of the conduct order is dismissed.

Facts

- [5] Although voluminous, much of the affidavit material included in the application record relates to issues that will be decided at the June hearing. At the outset of the hearing, counsel were advised that I would not be considering any facts stated in the claimant's April 30, 2018 affidavit that do not represent true reply. With a very few exceptions, I make no findings of fact where the affidavit material is in conflict between the parties.
- [6] The parties are in the process of ending their approximate 16-year marriage. The parties disagree on the length of their relationship and the date of separation. The claimant says that the parties separated on November 30, 2016, while the respondent pleads the date as January 25, 2017. As already noted, there are two children of the marriage, H., soon to be 16 years old, and N, aged 12. The parenting of H. has been the source of great controversy between the parties.
- [7] Neither of the parties currently reside in the former family home. Following separation, the claimant stayed in the home with the two children. In May 2017, the claimant and N. left the home following a physical altercation between H. and her mother. The respondent then returned to the family home and resided there with H. for the months of June, September and October, 2017[2]. Otherwise, H. resided in the home on her own until January 2018 but had visits from social workers and a housekeeper hired by the respondent. Since January 2018, H. has shared the home with a third party adult, J.M. Ms. L. has never met J.M. The circumstances as to how H.'s living arrangement came to be are detailed in the affidavit material and will be featured evidence at the June hearing. N. continues to reside with his mother. Although N.'s "in person" parenting time with the respondent appears from the evidence to be supervised, there is some direct text and perhaps telephone communication between father and son.
- [8] This proceeding was commenced on March 17, 2017. The respondent filed his counterclaim in September of that year. The issues raised in the pleadings include the allocation of parenting time and responsibilities, child support, imputation of income to both parties, spousal support (both entitlement and quantum), the enforceability of a cohabitation agreement and the resulting division of family property and debt. Title to the family home is registered to both parties as joint tenants but the respondent claims the property as an excluded asset pursuant to a cohabitation agreement.
- [9] The claimant is a 39 year old nurse employed by the Vancouver Island Health Authority[3]. The respondent is 51 years of age. In recent affidavits, Mr. L. describes himself as unemployed due to disabilities. On November 30, 2017, Power J. determined the respondent's Guideline income at \$100,000 and the claimant's Guideline income at \$65,000. Power J. ordered the respondent to pay the claimant interim monthly child support of \$946 for N. The respondent was granted liberty to apply to vary the determination of his Guideline income upon certain further disclosure.

- [10] The parties have been involved in Provincial Court proceedings initiated by the respondent and a further child protection proceeding involving H. For a period of time, H. was represented by counsel appointed by the Ministry of Children and Family Development ("MCFD"). On March 29, 2018, MCFD withdrew from its involvement with the family. Whether that involvement will be re-engaged remains to be seen as the respondent has been charged with assaulting H. A preliminary inquiry on those charges will be held in mid-June 2018. Mr. L. denies assaulting his daughter and says that H. has recanted on her statements that led to the charges.
- [11] Despite efforts at communication, H. remains estranged from her mother. At the time of this hearing, Mr. L.'s bail conditions prevented him from having any contact whatsoever with H. However, while this judgment was under reserve, Ms. Tucker delivered a letter to the court with attachments. It appears from those attachments that the bail conditions are now modified such that Mr. L. may have communication and contact with H., but must leave her presence upon her request or that of a police officer.
- [12] Thus, since January 2018, J.M. has been the only adult constant in H.'s day to day life. Although Mr. L. has entered into a tenancy agreement with J.M. with respect to the family home, the payment of rent is waived. Mr. L. says that the waiver is in consideration of J.M. providing care and companionship to H.
- [13] The parties' dealings with each other since this action began (if not before then) have been acrimonious and tumultuous. Whether one party is more to blame than the other for this circumstance is best determined at trial. What is clear from the evidence is that the parties are unable to effectively communicate with each other about almost any issue arising from the marital breakdown.
- [14] On September 18, 2017, the parties attended a judicial case conference before Mr. Justice Gaul (the "JCC"). A consent order pronounced at the JCC (the "JCC Order") included the following terms with respect to the parties conduct:
- a. All communications between the parties are to be through counsel and both parties are prohibited from contacting the other by text message, e-mail, phone, or in person except as follows:
 - i. during scheduled parenting time, arranged through counsel, the parties may text or call leading up to the exchange but only if required, for example a party is going to be late due to traffic;
 - ii if there is an emergency with one of the children (for example, the police or MCFD have been called), a child is missing (for example H. leaves the home and the parent who is responsible for her cannot get hold of her) or a child is required to attend at the hospital,
- in which case the parties will communicate by text and that text will contain only the required information and no commentary. The other party will respond in the same manner;

- b. Neither party may attend at or near the other's residence or place of employment unless it is an emergency;
- c. Neither party is to call the other's work place;
- d. Neither party shall discuss the ongoing litigation with the children, including telling them details about the negotiations or proceedings or their views on the other party or the other party's legal counsel, and neither party shall show to the children, or keep in a location where the children are likely to discover them, the court documents respecting the family law case;
- e. Neither party is to discuss the parties' family law matters, including their views on the other party, their legal counsel, or the proceedings, with any person from the other's place of employment, or the other's family, friends, acquaintances or neighbours;
- f. Neither party shall e-mail or contact the other's legal counsel, except through their own legal counsel, except in the case of emergency;
- g. The parties are barred from posting details or references to these legal proceedings on facebook and the internet or any public sources, including references to or about the other party, their family and their legal counsel. A party will remove any internet postings previously made with reference to the above, if any.

[15] The JCC Order was not entered until November 17, 2017, as the respondent declined to endorse the order and the court was required to settle the terms. The respondent still takes the position that he has not consented to the terms (b) through (g)[4] above but "accepts that the Order has now been made".

[16] The claimant's October 2017 notice of application obviously preceded the entry of the JCC Order but was brought on the basis that the conduct order was allegedly not being followed by the respondent.

[17] The claimant exhibits to her affidavit a series of text messages sent by the respondent to her directly as well as text messages exchanged between herself and H. and a Facebook posting by H. In her text messages and the Facebook posting, H. appears to disclose specific knowledge about this family law proceeding. Furthermore, the claimant suggests that the respondent has masqueraded as H. in communicating directly with her using H.'s cell phone.

[18] The messages sent directly by the respondent to the claimant in October 2017 include:

"You turned H.'s data for her phone off again and it is not safe when she is out can you please for our daughter's safety turn her data back on."

"Can you please god H. her assets so we can avoid going to he police again (sic). Thank you."

"I will come and get H."

"I sent \$60 etransfer to N. from money H. borrowed can you please transfer the funds to N.'s account."

[19] The text messages sent by H. to the claimant in October 2017 contain references to child support and other information that may have been discussed at the JCC. For example:

"Child support is to be payed (sic). You have been not paying and it is unacceptable."

"Also dad says the child support of 458 for [H.] on a monthly basis goes to [H.'s] account. H. will accept it."

"Why the f--would you show the Snapchat video in court?"

"Remember in court a couple days ago, you showed the video don't even f--lie I saw everything."

"If paying child support is the end of the f---g world for you and you insist on wrecking everything so you don't have to pay, then don't f--g pay and leave me alone."

[20] And, when the claimant messages that matters of child support "are not your business, that is between your father and I will not be having this discussion with you", H. replies:

"Your behaviour is completely unacceptable and incredible inappropriate and illegal. Lieing (sic) to police, lieing on documents, child services, everything under the sun. You are expected to start behaving."

[21] Despite these exchanges, the text messages between mother and daughter are interspersed with a few genuinely warm responses from H.

[22] The claimant further describes instances where the respondent appears to refer to the court proceedings in his text messages with N. post-JCC. As an example, the respondent sent this message to N.:

"It won't be long we have allot (sic) of evidence."

"H. gets to talk to judge."

[23] When N. replies to his father with "I thought you said you weren't allowed to talk about court", the respondent's answer is "I never said that your mom did."

[24] In December of last year, the respondent again communicated directly with the claimant via text messages. The messages arose at a time when the claimant was attending at the family residence and removing certain items. The respondent was alerted to the claimant's actions by neighbours and by a surveillance camera that he had installed on the property. The claimant says that she went to the home to check on H., to retrieve personal belongings and some items for N., and ensure that the house was in good order. Examples of the messages sent by the respondent in December 2017 and January 2018 are:

"So you can bring this up in your next Motion even though you do not ring the doorbell we see everything you do on camera--blond hair does not help your disguise. The neighbours are pretty disturbed over your behaviour."

"You are violating a JCC Order and have been video taped stealing items leave the house immediately as that is my place of residence."

"RCMP is on the way and I am filing theft charges."

[25] The respondent says that the claimant had no reason to be at the family home given that she and H. are estranged, property issues remain in dispute, and the home continues to be "his residence" as defined by the JCC Order since most of his personal belongings are still at the home.

[26] The claimant's attendance at the home on January 30th resulted in the respondent also attending, with each party then calling 911 and requesting police assistance.

[27] About one week after this event, the respondent sent more text messages to the claimant:

"Please have Miss Kinney file a motion that I texted you, wait, because it was an emergency there was a potential break and enter by you. The agreement states I can text! You tried 4 different codes to break into a rented premises. Please file the motion I have a few more surprises for you and your council (sic). It appears you and your council (sic) are very litigious. Please and thank you."

[28] In early April of this year, the respondent felt compelled to text to the claimant this message after there was a parenting time dispute concerning N.:

"This is an emergency text you are illegally refusing N. to see me and he should call Central Saanich Police to confirm and June [the tenant of the family home] wanted to see him so I will file another motion Monday ."

"Try to think of these children first the drama is ridiculous and this does not help N. or H. N. has told you for months that he was one week with me (June and H.) and one week with you. We do this quickly with a letter signed as well as passports or you and Kinney can do it the hard way. Trying to use your phone to entrap a statement does not help the children that are in crisis mode. I can you assure the criminal charges against me that you and Dianne created will not stick nor will I not respond at trial. So think Long (sic) and hard for once do something for H. and N. as opposed to your needs. If I do not hear from you by 1800 today I will have Shauna file the motion."

[29] Finally, the respondent included Ms. Kinney as a recipient in an email that he delivered on April 4, 2018. Besides Ms. Kinney, the identified recipients of the email were J.M., H.'s MCFD appointed counsel and, it appears, Ms. Tucker's legal assistant. The email was sent in the context of the parties negotiating the return of H.'s passport that was then being held by a third party. The email chain shows that Mr. L. had been forwarded earlier in the day both an email sent by MCFD's counsel to J.M. as well as an email that had been sent by Ms. Kinney to

Ms. Tucker, H.'s MCFD counsel and Ms. L.'s previous counsel.

- [30] The content of the email sent by Mr. L. is disparaging of Ms. Kinney. Mr. L. references a "ruling" that he sent to Ms. Kinney "but she chooses to ignore it". He states that Ms. Kinney will be called as a witness at trial and be subject to cross-examination.
- [31] Mr. L. says that the inclusion of Ms. Kinney as a recipient was entirely inadvertent and a result of the autofill feature in his email account. He apologizes for this inadvertence.
- [32] The respondent admits to initiating the direct messaging with the claimant but on the basis that he was provoked by the claimant's own breaches of the JCC Order. Furthermore, Mr. L. says that his direct communications were about matters of urgency or emergency involving the children, especially H. The respondent says that he is concerned with H.'s access to cell phone data as she is living independently from both of her parents and her whereabouts are generally unknown to them. Mr. L. also says that H. is extremely upset with the claimant's attendance at the family home and suggests that his contacts with the claimant were an effort to protect H. Mr. L. denies that he masqueraded as H. or used H.'s phone to communicate directly with the claimant.
- [33] The respondent also raises issues of the claimant's credibility, referencing past unsuccessful lawsuits and Ms. L.'s bankruptcy proceeding.
- [34] A ten-day trial date in the action has been set to commence on November 26, 2018.

Discussion

- [35] The result of this application is an attempt to both ensure consistency in judicial findings of fact as well as discourage the parties from descending further into the scorched-earth experience as described in *I.F. v. R.J.R.*, 2015 BCSC 793.

I. The Protection Order

- [36] Despite the respondent's request for an adjournment to pursue cross-examination on the affidavit evidence, I chose to hear the protection order application given the seriousness of this type of relief and the fact that such an order can be granted on a without notice basis.
- [37] Section 183 provides the court with the power to make a protection order. The factors for the court's consideration on such an application are found at s. 184:

184 (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 his or her 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.
- (2) If family members are seeking orders under this Part against each other, the court must consider whether the order should be made against one person only, taking into account
- (a) the history of, and potential for, family violence,
 - (b) the extent of any injuries or harm suffered, and
 - (c) the respective vulnerability of the applicants.
- (3) For the purposes of subsection (2), the person who initiates a particular incident of family violence is not necessarily the person against whom an order should be made.
- (4) The court may make an order under this Part regardless of whether any of the following circumstances exist:
- (a) an order for the protection of the at-risk family member has been made previously against the family member against whom an order is to be made, whether or not the family member complied with the order;
 - (b) the family member against whom the order is to be made is temporarily absent from the residence;
 - (c) the at-risk family member is temporarily residing in an emergency shelter or other safe place;
 - (d) criminal charges have been or may be laid against the family member against whom the order is to be made;
 - (e) the at-risk family member has a history of returning to the residence and of living with the family member against whom the order is to be made after family violence has occurred;
 - (f) an order under section 225 [orders restricting communications] has been made, respecting the at-risk family member, against the family member against whom the order is to be made.

- [38] In addition to the authorities cited by the respondent's counsel, I have considered the law as set out in *S.M. v R.M.*, 2015 BCSC 1344, *Morgadinho v. Morgadinho*, 2014 BCSC 192, and *J.R.E. v. 07XXXXX8 B.C. Ltd.*, 2013 BCSC 2038. Applicable to the circumstances of the case at bar is the court's observation in *S.M.*, at paras. 24-25:
- [24] I also agree with the observation made in *Morgadinho* that care must taken to distinguish between mutually unpleasant exchanges separating parties sometimes engage in, particularly through the informal medium that email and text messaging has become, and the commission of acts of "family violence" as defined in the Act. Without more, mere incivility is not the sort of conduct the Legislature intended would attract a protection order.
- [25] Having said this, the Legislature has made clear that judges hearing applications of this kind must approach the issue from a broad and contextual perspective, taking into account a variety of factors that frame the risk analysis in determining whether family violence is likely to occur. The inquiry is future oriented, but it takes its shape from past conduct and present circumstances that inform the assessment of risk.
- [Emphasis added.]
- [39] The court can make a finding that the claimant is an "at risk" individual but N. is not, or vice versa, or that neither meets the definition. Nevertheless, the court's findings with respect to family violence generally and on each of the s. 184[5] factors will inform the decision about the necessity of a protection order for both N. and the claimant or either one of them. There is considerable overlap in the evidence regarding those factors as they relate to N. and the claimant. Because of this overlap, there is a possibility of inconsistent judicial findings on the question of family violence and any number of the section 184 and 185 factors. I have concluded, therefore, that the same presider should determine both of the protection order applications. Indeed, that is how the claimant's notice of application was originally framed.
- [40] If those applications do not proceed at the June hearing, the claimant has liberty to re-set the relief in Part 1, paragraph 5 of her notice of application upon proper notice. It will be up to the presider hearing the protection order applications to determine whether cross-examination on the parties' affidavits is necessary.

II. Breach of JCC Conduct Order

- [41] This aspect of the claimant's application is less difficult to resolve, despite the evidentiary conflicts.

- [42] Section 228 of the FLA provides that:

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

- (a) make a further order under this Division;
- (b) draw an inference that is adverse to the party, and make an order based on the inference;

- (c) make an order requiring the party to pay
 - (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the non-compliance, including fees and expenses related to family dispute resolution,
 - (ii) an amount not exceeding \$5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the non-compliance, or
 - (iii) a fine not exceeding \$5 000;
 - (d) make any other order the court considers necessary to secure compliance.
- (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].
- [43] Section 228 is a new remedy to family law proceedings and the subject of very little judicial consideration to date. The language used in s. 228 is analogous to that found in s. 213 (enforcing orders respecting disclosure). The intent and proper application of s. 213 has been canvassed by the court on several occasions, most expansively in *J.D.G. v. J.J.V.*, 2013 BCSC 1274. In *J.D.G.*, the court finds that a robust application of the FLA's enforcement provisions is necessary so that the parties can focus on resolving the true merits of their dispute and not be bogged down in repetitive and costly pre-trial applications. See also the stated purposes of a conduct order: FLA, s. 222.
- [44] Before s. 228 comes into play, however, the court must find that a party has actually breached a conduct order. Whether a breach has occurred is determined objectively. Otherwise, anyone subject to a conduct order would be free to interpret the order's terms as they like and thus never be subject to sanctions. That outcome would leave the enforcement remedies toothless and could not be what legislature intended when enacting s. 228. The respondent's subjective motive in sending the impugned communications, together with the surrounding circumstances at the time, will go to the consideration of a proper remedy under s. 228.
- [45] I find that the respondent breached the conduct order in his communications with the respondent in October and December 2017, and in January and April 2018. I also find, on a balance of probabilities, that the respondent has shared information about this proceeding with H. as demonstrated in the exchange of text messages between H. and the claimant in October 2017. I find that the respondent has breached the conduct order by including information about these proceedings in his text messaging with N. Given his untested denial, I am unable to conclude that Mr. L. is the author of some of the other text messages exchanged between H. and the claimant (i.e. that he was masquerading as H.).

- [46] I also find that the respondent breached the conduct order in his April 4, 2018 email message sent to Ms. Kinney and others. The respondent's explanation regarding Ms. Kinney's inclusion as recipient in the April 4, 2018 email does not accord with common sense and is simply not believable. If I am wrong in that conclusion, then the references to Ms. Kinney in an email sent to third parties such as H.'s MCFD counsel is in itself a breach of the conduct order.
- [47] The claimant's behaviour during the relevant period, such as her attendance at the family home, may well come under future scrutiny and criticism by the court. However, even accepting that the respondent was provoked by the claimant, this is no excuse to breach the court's order. The respondent could have communicated his various concerns through counsel. The claimant's attendance at the family home was not an emergency involving the children. Considering all of the circumstances at the time, the failure or omission by the claimant to pay for H.'s cellular data was not an emergency. The disagreement with respect to N.'s parenting time was not an emergency. Moreover, the content of the respondent's messages go beyond required information and include commentary.
- [48] The claimant has sought as a remedy for these breaches the payment of a relatively modest sum of \$250. That remedy is appropriate and should signal to the respondent that there are consequences when the conduct order is not followed. This payment will not prejudice the respondent's financial position in this proceeding, nor interfere with his ability to pay child support.
- [49] I decline to grant any remedy under s. 228 for prospective conduct. It will be up to the court, not a party, to determine whether any future breach of the conduct order has occurred.

III. Costs

- [50] Subject to the trial judge's final determination, costs of the application should follow the event. The claimant has been partially successful on her application. But for the respondent's breaches of the conduct order, the application pursuant to s. 228 would not have been necessary. Accordingly, the claimant shall have her costs of this application in any event of the cause.

"C.P. Bouck"

Master C.P. Bouck

- [1] The same order is sought in the claimant's notice of application filed October 16, 2017. It is my understanding that this notice of application was adjourned generally sometime prior to the current notice of application being filed. However, an order was made by Justice Bracken on April 18, 2018. The order is not yet entered nor are the terms recorded in the court's CEIS system. That order may relate to this earlier notice of application.

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- [2] H. was in the care of a friend of the respondent's by agreement between the parties for a period of time. On September 21, 2017, H. was removed from the family home and placed under the care of the Ministry of Children and Family Development in September 2017. However, H. returned to live with her father at the family home, contrary to the Ministry's direction. The respondent left the family home on October 24, 2017.
- [3] The claimant may also derive income from a multi-level marketing business but a determination of that issue is irrelevant to these applications.
- [4] Affidavit #2 of the respondent at paragraph 72.
- [5] Additional factors will be considered with respect to the protection order for N.: s. 185.
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