

CANADA / JUDGMENT

Chan-Henry v. Liu

2016 BCSC 1948

COURT

Supreme Court of British Columbia

DECIDED

24 October 2016

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2016 BCSC 1948 Chan-Henry v. Liu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chan-Henry v. Liu,

2016 BCSC 1948

Date: 20161024

Docket: E113516

Registry: Vancouver

Between:

Christopher Michael Chan-Henry

Claimant

And

Jennifer Yee-Ping Liu

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Claimant:

J. Stein

Counsel for Respondent:

D.S. Klein

Place and Date of Hearing:

Vancouver, B.C.

August 29, 2016

Place and Date of Judgment:

Vancouver, B.C.

October 24, 2016

- [1] The claimant in this family matter, Mr. Chan-Henry, seeks two orders. The first order would bar the respondent, Ms. Liu, from bringing further applications related to their children without leave of the court for a period of three years. The second order would require the respondent to pay his expenses or a fine of \$5,000.
- [2] These orders were among a number of orders sought in an application and cross-application that came before me on August 29, 2016. I dealt with the other matters on that date, but gave leave for filing of further written submissions on these remaining issues.
- [3] The parties were married in 2006. They have two sons who are now seven and nine. They separated in 2010 and divorced in 2014. A separation agreement dated February 16, 2011 dealt with division of property, spousal and child support and a parenting schedule ("Separation Agreement").
- [4] On June 19, 2015, the parties consented to a final order that, among other things, confirmed that the parenting schedule set out in the Separation Agreement continued to be in the best interests of the children. The order also required Mr. Chan-Henry to pay \$74,200 to settle claims for arrears of child support and arrears of spousal support.
- [5] On September 18, 2015, Ms. Liu filed a certificate of judgment ("COJ") against the former matrimonial home, which Mr. Chan-Henry was then in the process of selling. (He had purchased her interest in the home pursuant to the Separation Agreement.) Ms. Liu also commenced a new action and filed a certificate of pending litigation ("CPL") against the former matrimonial home. On November 6, 2015, Master Taylor made an order declaring that the COJ had been paid and cancelling both the COJ and the CPL.
- [6] On November 23, 2015, another CPL was filed against the property in a family law action commenced in the name of a third party, Ms. Nguyen, who Mr. Chan-Henry says he doesn't know and suspects may not exist. That CPL was cancelled by order of Madam Justice Bruce on November 26, 2015 and Ms. Nguyen's notice of family claim was struck by order of Master Keighley dated December 21, 2015. Mr. Chan-Henry deposed in that proceeding that he suspected Ms. Liu was involved in the commencement of that action.

- [7] The new action commenced by Ms. Liu seeks to vary the Separation Agreement and to obtain a new division of property. It alleges lack of financial disclosure and other improper conduct by Mr. Chan-Henry. A trial of that action is set for November 21, 2016.
- [8] At the hearing on August 29, 2016, I dismissed an application by Ms. Liu to vary the parenting schedule. I found there was no evidence of a change of circumstances that would justify variation of a previous order of the court. I also made an order appointing a parenting co-ordinator; and an order that the Registrar General of Vital Statistics reverse a name change that had been registered for the children. Mr. Chan-Henry said he had not consented to that name change.
- [9] The orders now sought by Mr. Chan-Henry would be pursuant to s. 221 of the Family Law Act, S.B.C. 2011, c. 25 ("FLA"), which reads:

Misuse of court process

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

- (a) has made an application that is trivial,
 - (b) is conducting a proceeding in a manner that is a misuse of the court process, or
 - (c) is otherwise acting in a manner that frustrates or misuses the court process.
- (2) If an order is made under subsection (1), the court may do one or more of the following:
- (a) make the order apply
 - (i) for a specified period of time, or
 - (ii) until the party has complied with an order made under this Act;
 - (b) impose any terms and conditions respecting the granting of leave to make further applications or to continue a proceeding;
 - (c) require the party to pay
 - (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the party's actions, including fees and expenses related to family dispute resolution,
 - (ii) an amount not exceeding \$5,000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the party's actions, or
 - (iii) a fine not exceeding \$5,000.
- [10] Prior to the enactment of the FLA, an application to restrict access to the court in a family law case could only have been made under s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443, which reads:

Vexatious proceedings

18 If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

[11] A similar provision can be found in s. 29 of the Court of Appeal Act, R.S.B.C. 1996, c. 77. The Court of Appeal considered that section, in the context of a family proceeding, in *Dawson v. Dawson*, 2014 BCCA 44. The court, at paragraph 16, referred to a non-exhaustive list of factors to be considered in an application to declare a person a vexatious litigant:

- a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
- (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
- (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
- (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

[12] The court said at paragraph 17 that provisions permitting the court to declare a person to be a vexatious litigant give the court "the ability to control its own process [in order] to prevent the abuse of that process by a litigant repetitively bringing unmeritorious proceedings that result in the needless expenditure of judicial resources and cause unnecessary expense to other parties".

- [13] In Dawson, the court found that the appellant had repeatedly taken steps in both this court and the Court of Appeal in relation to matters that had already been decided. He was ultimately declared a vexatious litigant.
- [14] In Williams v. Williams, 2015 BCSC 928, Mr. Justice Punnett noted the differences in language between s. 221 of the FLA and s. 18 of the Supreme Court Act and concluded at paragraph 143:
- [143] It appears that the legislature, because of [a] tendency of family litigation to involve heightened levels of conflict, intended to provide "broader" tools to the courts under the FLA than had previously been available. That is, s. 221 is engaged by a wider scope of conduct than the vexatious litigant regime, though the relief available under s. 221 is more limited...
- [15] In Williams, there had been more than 21 applications resulting in approximately 27 orders over a four-year period. Punnett J. found that to be far in excess of what is normal, even in high conflict family cases, and found that the respondent's conduct amounted to attempts to control and harass the plaintiff.
- [16] Although the FLA allows the order to be made in response to a broader range of conduct, an order that restricts a party's access to the courts is still a drastic measure to be used with great caution.
- [17] A review of the court record in this action indicates that Ms. Liu has brought only one application in relation to the children, between the date of the consent order and the date her application that came before me was filed. That sole application was on the question of which school the children would attend, which was decided by Mr. Justice Pearlman on March 10, 2016.
- [18] Her conduct has nonetheless required Mr. Chan-Henry to bring applications in other actions to deal with the COJ and the CPLs that were filed against the former matrimonial home. . Ms. Liu has also commenced a separate action aimed at re-opening the property settlement in the Separation Agreement. The merits of that claim remain to be adjudicated.
- [19] Mr. Chan-Henry's present application only seeks to restrict further applications about the children. Those other matters did not clearly involve the children and have limited relevance to his request, although Ms. Liu apparently argued before Master Taylor that she registered the COJ because she was not receiving required ongoing payments for the children's special or extraordinary expenses.

[20] In my view, the circumstances do not yet approach the kind of situation Punnett J. dealt with in Williams and I am not persuaded that an order under s. 221 of the FLA is justified. Mr. Chan-Henry's application for such an order is dismissed, without prejudice to his right to bring a further such application based on subsequent conduct. As Mr. Chan-Henry was not successful under s. 221(1) of the FLA, his application under s. 221(2) for expenses or a fine is also accordingly dismissed.

"N. Smith J."

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