
CANADA / JUDGMENT

D.L.G. v. R.A.G.

2010 BCSC 1013

COURT

Supreme Court of British Columbia

DECIDED

20 July 2010

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2010 BCSC 1013 D.L.G. v. R.A.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.L.G. v. R.A.G.,

2010 BCSC 1013

Date: 20100720

Docket: 26418

Registry: Penticton

Between:

D.L.G.

Plaintiff

And

R.A.G.

Defendant

Before: The Honourable Madam Justice Beames

Reasons for Judgment

Counsel for the Plaintiff:

I.N. McAndrews

Appearing on his own behalf:

R.A.G.

Appearing on behalf of the Director of

Ministry of Children and Family Development:

J.J. Peterson

Place and Date of Hearing:

Kelowna, B.C.

June 4, 2010

Place and Date of Judgment:

Penticton, B.C.

July 20, 2010

- [1] On May 25, 2009, I gave reasons for judgment in this case following a trial which was heard over a period of 37 days and which spanned approximately 10 months, ending in December 2008. With respect to the parties' three minor children, R, born September 16, 1993; T, born January 14, 1995; and V, born April 27, 1998, I ordered that the plaintiff mother have interim custody and guardianship. I ordered that the defendant father have many of the rights normally granted to a parent granted joint guardianship, although I did not label those rights as such. I also ordered that the defendant have extensive access, given the geographical separation of the parties. That access was to include seven weeks in the summer, half of other school vacations, and alternating weekends. Despite the fact that the order followed a trial, I gave the plaintiff mother interim custody only. I warned her that if access visits were missed, as a result of the children failing to attend for access, then the defendant had leave to bring the matter back before me. The reasons for that form of order were set out in my reasons following trial, which is indexed as 2009 BCSC 687. I also seized myself of any applications with respect to custody, guardianship or access for three years, which period will expire on May 25, 2012.
- [2] Unfortunately, problems arose with respect to access almost immediately. The commencement date for summer access in 2009 was postponed, as the children initially refused to attend for summer access. The summer access did eventually take place, and on the defendant's evidence, it went very well. Starting in the fall of 2009, there were a couple of alternating weekend access visits which took place without difficulty, and then problems arose again.
- [3] On January 28th, 29th and February 1st, I conducted a hearing of the defendant's application to have the three children moved into his care, and for other miscellaneous relief. On February 4, 2010, I gave oral reasons on the defendant's application, which are indexed at 2010 BCSC 244. I ordered that the plaintiff and the defendant would share joint custody and joint guardianship of R and T, who would be permitted, given their age, to choose their place of primary residence. I ordered that the defendant have sole custody and guardianship of V,

whose primary residence would be with the defendant. In order to ensure a continuation of the close bond between V and the plaintiff, as well as V and her siblings, I ordered that the plaintiff have access to V every second weekend.

- [4] On February 8, 2010, V's place of residence was changed from the plaintiff's home to the defendant's home. The two older children chose to remain with the plaintiff. The circumstances of the change of V's residence, which involved police attendance and much trauma and stress, were such that on February 9, 2010, the defendant requested that the plaintiff's access to V be suspended for an extended period of time. I heard from the defendant and counsel for the plaintiff on February 11, 2010, and suspended access until there could be a full hearing of the application for a suspension of contact between the plaintiff and V. On March 3 and March 17, 2010, I heard submissions. I initially ordered that the plaintiff be permitted to have defined e-mail and telephone contact with V, and on April 1, 2010, I ordered that the plaintiff have daytime access every second weekend commencing April 17, 2010 through to and including May 29, 2010. Thereafter, the plaintiff was to have alternating weekend access from Friday to Sunday, for the weekends commencing June 11 and June 25, 2010.
- [5] From the defendant's perspective, problems arose immediately upon the commencement of the in-person access. Consequently, he initiated another hearing which took place on June 4, 2010. These are my reasons with respect to that hearing.
- [6] There were essentially three separate issues before me on June 4, 2010. They were: the defendant's application for various orders that third parties produce records; the defendant's application that the plaintiff be found in contempt of court orders and that punishment be imposed both with respect to past findings of contempt where punishment has been suspended and with respect to new findings of contempt; and finally, the defendant's application that the plaintiff's access to V be suspended.
- [7] With respect to third party disclosure, the defendant seeks disclosure of records from the Royal Canadian Mounted Police - Princeton Detachment, Penticton Detachment, and Kelowna Detachment; the Ministry of Children and Family Development - Langley, Princeton, and Penticton, and the Cindy Parolin Safe Homes Program.
- [8] As can be seen from my previous decisions in this case, there is some history of the plaintiff, and sometimes the children, making complaints to various third parties with respect of the alleged conduct of the defendant. The defendant is convinced that this kind of conduct is ongoing. He wishes production of documents from the third parties that may relate to any complaints made about him by the plaintiff, by the parties' adult child K, or by R, T or V. He says that such documents may be of assistance to the court in evaluating what is happening and will also be of assistance, potentially, to the counsellor who is treating V. The defendant served the notice of motion on all of the third parties. Counsel attended on behalf of the Ministry and a representative of the Cindy Parolin Safe Homes Program attended in person. No one attended on behalf of the RCMP. The position of counsel for the Ministry is that no

further production of documentation should be required by the Ministry. They were an active party for part of the trial of this matter and produced a significant volume of material in the past. It is the Ministry's position that no further documentation is necessary or should be required. Counsel for the plaintiff takes a similar position. It is suggested that anything that has happened, if anything at all, between the plaintiff and the Ministry or any of the children and the Ministry is not particularly relevant or helpful at this point in time. The defendant, on the other hand, says that he has been contacted by the Ministry recently, and spoken to about the same kinds of allegations that have been made about him in the past. Under all of the circumstances of this case, I am going to order the Ministry to produce, within 30 days of service of my order upon them, copies of any documents they have in their files in the Langley, Penticton or Princeton offices with respect to complaints made about the defendant by any of the plaintiff, R, T or V, since February 1, 2010.

- [9] With respect to the Cindy Parolin Safe Homes Program, I am satisfied, based on the representations made to me in court, that there are no documents that would be of any assistance in this case, and no order will be made for production of documents from that third party.
- [10] With respect to the RCMP, both parties already have documents with respect to the transfer of custody of V. I am not satisfied that any further documents exist that might be relevant. Consequently, no order will go with respect to disclosure by the RCMP.
- [11] I turn to the next issue, which is the defendant's application to have the plaintiff held in contempt and to have punishment imposed with respect to previous findings of contempt and any new findings of contempt made now. In my reasons following trial, I found the plaintiff in contempt of access orders made in December 2005 and June 2006. Specifically, I found her to be in contempt of the two access orders on nine different occasions between February 24 and December 1, 2006. Counsel for the defendant at trial did not seek to have a penalty imposed with respect to the contemptuous acts, and I concluded that under all of the circumstances the imposition of a penalty for the contemptuous actions would be suspended for a period of three years. I expressly warned the plaintiff that:

[i]f there are no further acts which constitute contempt of court, no penalty will be imposed; however, if this matter comes back before the court on contempt proceedings, punishment with respect to the contempt I have found may be imposed.

- [12] With respect to new allegations of contempt, they are as follows:

1. the plaintiff failed to send the children on an access visit at the ordered time on January 30, 2009;
2. the plaintiff varied the time of the January 30, 2009 access visit without the leave of the court or the agreement of the defendant;
3. the plaintiff failed to send the children on the July 1, 2009 summer access visit;

4. the plaintiff failed to send T and V on November 6, 2009;
5. the plaintiff failed to send T and V on the November 21, 2009 access visit;
6. the plaintiff failed to send T and V on the December 5, 2009 access visit;
7. the plaintiff failed to send T and V on the December 26, 2009 access visit;
8. the plaintiff enrolled T and V in an activity that took place during the defendant's December 5, 2009 access visit weekend;
9. the plaintiff failed to send T and V on the January 16, 2010 access visit;
10. the plaintiff failed to send T on the March 12, 2010 access visit;
11. the plaintiff sought non-emergency medical treatment for V on the May 1, 2010 access visit.

[13] With respect to the particulars of the alleged contempt, I will set them out very briefly.

[14] The issue concerning January 30, 2009, relates to what was a unilateral change made by the plaintiff to the access arrangements and imposed on the defendant. Pursuant to court order, the defendant was to have weekend access commencing on January 30, 2009, with pick up of the children from the school. The plaintiff had been ordered, on June 8, 2006, not to vary the access arrangements without leave of the court or the defendant's agreement. In the later afternoon on January 29, 2009, the plaintiff wrote to the defendant's then counsel to advise that access would commence at 4 p.m., with pick up from her home, rather than at 3 p.m., with pick up at the school. The defendant says he did not consent to that change, and that the plaintiff's conduct amounts to a flagrant disregard of the court orders of December 13, 2005 and June 8, 2006 with respect to access.

[15] With respect to the July 1, 2009 through to and including January 16, 2010, the facts are summarized in my reasons of February 4, 2010 and I reproduce them here:

[7] The first problem with regard to access arose 37 days after my reasons were delivered. The defendant was to have had the children for seven weeks in the summer, commencing on July 1. His father attended the plaintiff's home to pick up the children for the commencement of access, and the children advised him they would not attend for access.

[8] I was advised of the problem by way of a telephone conference on July 9, 2009. At that time the plaintiff advised me that "unbeknownst" to her, to use her words, the children had set up a meeting with someone, maybe somebody at the Ministry, and had been told that they were at an age that if they did not wish to go for access they could simply say so. She advised me that the children's refusal to go for access had nothing to do with her. She told me there was nothing she could do to force the children to go for access.

- [9] I ordered that the summer access would commence on July 16, 2009 and would continue for the originally scheduled length of time, and I told the plaintiff that the children would either go for access with their father or they would live with their father. The summer access took place and, on the defendant's evidence, went very well, although the plaintiff says that she received complaints from the children by phone during the summer and then when they returned to her care in late August.
- [10] Notwithstanding those complaints, the alternating weekend access commenced as scheduled in September and took place up to and including the weekend of October 9 to 11, 2009. The defendant had previously advised the plaintiff that he would be unable to exercise his scheduled access on the weekend of October 23 to 25, 2009.
- [11] On October 12, 2009, the defendant advised the plaintiff that he would be suspending his access visits with R until further notice. The defendant explained, although not until a few weeks later, his reasons for suspending access with R; namely, his concern that R was being made, by the plaintiff, to feel that he had to attend access visits to protect his sisters from the defendant, which expectation the defendant felt was causing emotional harm to R.
- [12] On November 6, 2009, the next scheduled access pick-up after the cancelled visit of October 23 to 25, the plaintiff refused to allow access to V, having communicated with the defendant in advance that V was sick with the flu. The defendant told the plaintiff he wanted medical confirmation, failing which he would attend and assess V's ability to have access himself. The plaintiff responded by saying that V had not seen a doctor, as the medical advice she had received, or the publically available advice from the Interior Health Authority, was to the effect that V should avoid contact with others, including doctors apparently, and that if the defendant attended her home to attempt to assess V's ability to have access, she would consider the defendant's actions to amount to trespassing. The defendant attended the school to pick up T as scheduled, but T ran to the school bus instead. The defendant did not attend the house to try to pick up V or T, due to his concerns that the plaintiff would try to involve the police and press trespassing charges.
- [13] On November 19, 2009, I had a telephone conference with the parties. The defendant advised that he wanted to apply for a number of orders, and I directed that the parties exchange material and appear in court before me on December 7, 8, or 9 of 2009, depending on courtroom availability, the date to be finalized by the trial coordinator. I also set the times during which the defendant would have access on the weekend of November 21 and 22 of 2009. I directed that the defendant could simply pull up in front of the plaintiff's home for the purpose of obtaining the children for the access visit, as had been his practice in the past and as the plaintiff confirmed she wished, as she did not want the defendant to come to her door.
- [14] On December 4, 2009, the parties again appeared before me by telephone conference, on the plaintiff's application to adjourn the hearing of the defendant's application, which was set for early the following week. The November 21 and 22 access had not taken place. I advised

the plaintiff that I would not be prepared to grant an adjournment unless she could assure me that she would send the children for access, both the alternating weekend access dates and the Christmas access, and that she would do so up until the time of the date to which I might adjourn the matter. The plaintiff said she would do everything she could to send the children on the access visits.

[15] As a result of her assurances, I granted the adjournment and I set the hearing over to January 21, 2010.

[16] No access took place in December 2009 or January 2010. ...

[16] The plaintiff's response with respect to those access visits and her conduct is neatly summarized in the outline filed by her counsel as follows:

1. The change in time with respect to the January 30, 2009 access was generated by the children's exams schedules. One child was at home and the other two were at school. The Plaintiff was trying to organize one pickup for the Defendant for access as the Defendant would not have been successful in picking up the child [R] as he was not at school.
2. With respect to the July 1, 2009 access, the children seemed concerned about the amount of time they would be spending away from their friends and their hometown of Princeton. The Plaintiff spent time convincing the children that they should go and she packed their bags for them. The children actually went outside and shut the door [and then] returned to the house and advised the Plaintiff that Grandpa had left.
3. With respect to the November 6, 2009 access [V] was ill. She had flulike symptoms and there was concern she may have the H1N1 virus. [R] was not going on the access visit. [T] apparently did not want to go and made her own decision to not attend to her father's vehicle at the school. The Plaintiff indicated that as far as she was concerned [T] was still attending access. As [V] was bed ridden the Plaintiff was concerned that the Defendant intended on coming into the Plaintiff's home to see if [V] was ill. None of the children had ever previously missed an access visit because of illness.
4. With respect to the November 21, 2009 access visit [V] and [T] appeared reluctant to go because their brother [R] was not going with [them]. The Plaintiff had packed their bags. During a discussion between the Plaintiff and the Defendant's girlfriend the Defendant's girlfriend left the residence[,] entered the Defendant's vehicle and the Defendant left.
5. With respect to the December 5 and December 26 access neither the Defendant nor the Defendant's girlfriend came to the door of the home and it was the Plaintiff's expectation...that the Defendant or his girlfriend would attend [at] the door to collect the children.

6. Although the children were enrolled in an activity on the December 5, 2009 access weekend this did not appear to have played a factor in the fact that the children missed this access visit. The children had been previously advised that they would have to miss participating in the play if it fell on an access weekend.
- [17] With respect to the March 12, 2010 allegation, the defendant was entitled to have access to T on March 12, 2010. He gave notice to the plaintiff that he intended to exercise that access. He arranged for his father to drive to Princeton to pick up T, and when the defendant's father arrived, the plaintiff advised him that she would need five minutes to pack up T's things. The defendant's father waited, and approximately 30 minutes later the plaintiff walked up to his truck and placed a suitcase in his truck. She advised the plaintiff's father that T was not going to go for access, and that T would be kicking and screaming if she was forced outside of the house. The defendant's father advised the plaintiff that he would not participate in that and that if T was not coming he would not need her suitcase. He then drove away after the plaintiff removed the suitcase from his truck. The plaintiff's position with respect to that access visit is simply that she would have had to physically force T to go for access and she was not prepared to do that.
- [18] Finally, with respect to the issue concerning the medical appointment on May 1, 2010, the evidence is clear that while the plaintiff was exercising daytime access to V on May 1, she took V to see a doctor. V had a skin rash. It was clearly not an emergency. The defendant says that this conduct by the plaintiff, in the face of an order of the court that she was only permitted to take V for medical treatment in the event of an emergency, amounted to contempt, and further, sent a message to V that the defendant was not properly taking care of her needs, such that the plaintiff was required to do so. The plaintiff concedes that she took V for a medical appointment, but says that she was under the misapprehension that she was permitted to do so. It was not until after May 1, 2010 that the form of order was settled.
- [19] There is no issue between the parties with respect to the law concerning contempt. As I set it out in my reasons following trial, the party alleging contempt must put a body of evidence before the court to prove beyond a reasonable doubt that there was a failure to abide by a court order and that the conduct alleged to constitute the contempt be wilful: *Ebrahim v. Ebrahim*, 2000 BCCA 398 at paras. 9 and 10. Contempt is a serious matter, and will not be found, in usual circumstances, where there has been a minor or trifling non-compliance.
- [20] With respect to the allegations of contempt in this case, I am not satisfied that the plaintiff's unilateral adjustments to the access commencement time and place of pick up in January 2009 are of sufficient magnitude to constitute contempt. There were reasons for the suggested change. They were in the nature of minor adjustments, driven by the children's school circumstances, and the weekend access did take place. Although the plaintiff had been ordered not to change the schedule without a court order or the defendant's consent, I am not satisfied that the minor adjustments amounted to a wilful breach of the court order.

- [21] With respect to the alleged breaches commencing on May 25, 2009 through to January 16, 2010, I am satisfied that in each instance the plaintiff was in contempt of a court order. While she has, in the past, complained about having a fear of the defendant, insisted that the defendant not attend on her property and complained about having to deal with the plaintiff's girlfriend on access exchanges, she attempts to use the fact that the defendant, when he attended to pick up the children for access, sat with his girlfriend in the car in front of her house rather than coming to knock on the door as an excuse for not ensuring that access takes place. Most egregious was her enrolment of the children in a play, the performance of which took place on an access weekend, and which the defendant, and the court, only found out about as a result of a chance viewing of the poster promoting the play in a local business by the defendant. That weekend is illustrative, in my view, of the contempt the plaintiff has for the court, and also the contempt she has for the notion that the relationship between the defendant and the children ought to be fostered and not discouraged.
- [22] With respect to T not attending for access on March 12, 2010, I have concluded that having recognized, as of February 4, 2010, that T was able to decide where she would reside, a failure by T to go for access is not something that will give rise to a finding of contempt against the plaintiff.
- [23] With respect to the medical appointment of May 1, 2010, I accept that the specific terms of the order were, at least in the mind of the plaintiff's counsel and the plaintiff, somewhat unclear. I cannot find that the plaintiff, knowing she was prohibited from doing so, wilfully breached the court order by taking V to the doctor.
- [24] With respect to the punishment that ought to be imposed in this case, the defendant submits that the plaintiff ought to be fined by the court separately for each event of contempt. He submits that \$500 for each of the acts of contempt found in the reasons for judgment following trial and \$600 for each act of contempt for any new findings of contempt made today would be appropriate. Those fines, by his calculations, would total \$6,000. The plaintiff can afford such a fine, according to the defendant, as she has received or will shortly be receiving \$101,000 pursuant to the reasons for judgment, in addition to \$2,500 she has already received, plus \$15,000 by way of RRSP rollovers. He also notes that she has been employed since July 2009 and she is receiving \$4,800 per year in spousal support. In his submission, such a fine would not create serious financial hardship for the plaintiff, but it should be sufficient to make her seriously consider whether to continue her contemptuous behaviour.
- [25] Counsel for the plaintiff does not take significant issue with the proposed penalty, if the court finds contempt, despite his submissions that the defendant has not proved contempt beyond a reasonable doubt with respect to any of the incidents that have occurred since my reasons for judgment following trial were released. He did indicate that the plaintiff would prefer to address the court with respect to any findings of contempt after those findings have been made, and before penalty is imposed. Consequently, I will give the plaintiff an

opportunity to address the court, by way of letter, before I formally impose penalty. She may do so through the Kelowna Supreme Court Scheduling office within 30 days of the date of these reasons.

- [26] I turn now to the final, and no doubt in the view of both parties most important, issue before the court, and that is the issue of the plaintiff's access to V. As I indicated earlier, the plaintiff currently has access on alternating Saturdays from 10 a.m. until 5 p.m. The first access visit was on April 17, 2010. The defendant says that since the plaintiff's in-person access commenced, V is angry, contemptuous, and hostile towards him for at least several days after the access visit. He says that prior to the commencement of the plaintiff's access visits, V was successfully reconnecting with him, talking openly with him, hugging him, and generally being kind and respectful toward him. He is concerned that the plaintiff is continuing with some of her alienating behaviours during the access visits, with the result that V is being further traumatised and put in a difficult situation.
- [27] I do not intend to review in detail what each party has said about the first couple of access visits, and particularly the exchanges for the access visits that took place on April 17 and May 1. I will say that with respect to the events of May 1, 2010, given the independent witness' confirmation, on material points, of the defendant's version of what occurred on the access exchange, I prefer the defendant's version to the plaintiff's. I also do not intend to comment specifically on the drawings that V made and which the defendant found shortly before the hearing of this matter. While those drawings are disturbing, I am not satisfied that they form the basis for an order terminating or suspending the contact between V and her siblings as well as the plaintiff. V is receiving regular counselling, and I would expect that she will be able to work out some of the difficulties associated with the resumption of access through the counselling process. Given the history of these parties, it is not unexpected, in my view, that there will be some challenges in ensuring that the access goes smoothly, and that V becomes comfortable in an established routine. It cannot be expected that that will happen overnight.
- [28] Having carefully reviewed the submissions and all of the evidence that has been put before the court, I have concluded that it would not be in V's best interests to suspend the plaintiff's access, nor would it be in her best interests to expand the plaintiff's access at this point in time. Consequently, e-mail and telephone access will continue as previously ordered and the plaintiff will continue to be entitled to have access on alternating Saturdays from 10 a.m. until 5 p.m. The issue of access may be revisited on the application of either party in the event of a material change in circumstances or any time after October 1, 2010.

Beames J.

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