

CANADA / JUDGMENT

D.N. v. J.M.M.

2024 BCSC 1354

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 1354 D.N. v. J.M.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.N. v. J.M.M.,

2024 BCSC 1354

Date: 20240726

Docket: E69104

Registry: New Westminster

Between:

D.N.

Claimant

And

J.M.M.

Respondent

Before: Associate Judge Krentz

Reasons for Judgment

In Chambers

Counsel for the Claimant:

J.M. Dreyer

Counsel for the Respondent:

P. Ghai

Place and Date of Hearing:

New Westminster, B.C.

July 16, 2024

Place and Date of Judgment:

New Westminster, B.C.

July 26 2024

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[1] This is an application by the claimant seeking to enforce the order made by Justice Bantourakis on April 30, 2024, with respect to his parenting time with his children. As the hearing of the application concluded late in the afternoon, I made an order setting out the claimant's parenting time and terms with respect to supervision, along with makeup parenting time for him. At that time, I advised the parties that I would provide written reasons and further orders with respect to the balance of the application, which included that the respondent would be required to pay a fine for failure to comply with the order of Justice Bantourakis and special costs. These are my reasons for judgment.

BACKGROUND

[2] The parties began living together in a marriage-like relationship in August 2018. They were married on August 27, 2021 and separated on December 2, 2023.

[3] The parties have two children together: a daughter, A.N., currently six years of age; and a son, T.N., currently four years of age. The respondent has a daughter from a prior relationship, namely A.W., currently 13 years of age. A.W. is developmentally delayed and the claimant considers her to be his stepchild.

- [4] The claimant has been a police officer for over 25 years. The respondent was previously employed in the medical field but is currently a homemaker. All of the children have been residing with the respondent since the separation.
- [5] Shortly after the separation, the respondent made allegations against the claimant to the local police and the Ministry of Children and Family Development ("MCFD"). The claimant has cooperated with the investigations and voluntarily moved out of the family home so that the respondent and the children could continue to live there.
- [6] In her first affidavit filed in this proceeding, the respondent deposes that after the separation all three children disclosed to her that the claimant has been mentally, emotionally, psychologically and sexually abusing them for years. She further deposes in that affidavit that on January 30, 2024, she took A.W. to BC Children's Hospital, as she had told the respondent that she wanted to kill herself and the claimant.
- [7] Immediately after the separation, the respondent filed an application in the Provincial Court, Surrey Registry, seeking a protection order. In her application, she stated the following:

My husband has been molesting my three kids as well as verbally, emotionally and physically abusing them. He threatened to kill my daughter and me if she told. The children are scared as am I as I do not know who he is. My five-year-old disclosed my husband has been molesting her (vagina and anus for two years) since the beginning of preschool. She also told me that she witnessed her dad molesting her sister.

- [8] The above is just a brief snippet of the allegations made against the claimant. The claimant denies all of the allegations that have been made against him.

PREVIOUS ORDERS

- [9] On January 2, 2024, a protection order was made in the Provincial Court, prohibiting the claimant from having any contact with the respondent and the children, and from attending at the former family home or the children's school. At that hearing, the claimant was representing himself and the order was made without prejudice to his right to apply to set aside the protection order.
- [10] On January 25, 2024, this Court ordered that the Provincial Court proceeding be consolidated with this proceeding. At that time, the claimant's parenting time application was adjourned. That application came on for hearing before Justice Bantourakis on April 15 and 16, 2024, with oral reasons for judgment delivered on April 30, 2024.
- [11] Justice Bantourakis made the following order set out at paras. 1-4 of the order (the "Bantourakis order"):

1. The Claimant will have supervised parenting time with the children, A.N., born [D.O.B.], 2018, and T.N., born [D.O.B.], 2020, on an interim, without prejudice basis, until further order of the court on the following schedule:
 - a. On Saturday, May 4, 2024 for 2 hours, at times agreed to between the parties;
 - b. On Saturday, May 11, 2024 for 3 hours, at times agreed to between the parties;
 - c. On Saturday[,] May 18, 2024 and every Saturday thereafter for 4 hours, at times agreed to between the parties; and
 - d. On Father's Day for 4 hours, at times agreed to between the parties.
 2. The Claimant will have interim, without prejudice supervised parenting time with A.W. born [D.O.B.], 2010, on the same schedule as A.N. and T.N. if requested by A.W., which request can be communicated to the Claimant through a social worker, counsellor or psychologist involved with her care or through her maternal grandmother.
 3. The Claimant's parenting time as provided for in paragraphs 1 and 2 of this Order will be supervised by any member of the RCMP of the Claimant's choosing who is aware of the Respondent's allegations and the said supervisor will be provided with copies of the Claimant's Affidavits #2 and #3, without the exhibits, prior to supervising the Claimant's parenting time.
- 4, The Claimant and his parenting time supervisor will collect the Children from a public place of the Respondent's choosing or at the Respondent's residence if she agrees. The Claimant and his parenting time supervisor will drop the Children off at the same agreed upon location at the end of his scheduled parenting time.
- [12] Justice Bantourakis also ordered that the protection order made in the Provincial Court be set aside.
- [13] At the hearing before Justice Bantourakis, the parties provided the contents of the MCFD file current to April 12, 2024. At that time, the court was also provided with letters from A.W.'s pediatrician and her family doctor.
- [14] In his letter, the pediatrician described A.W. as having a rare genetic abnormality, which is likely the cause of her intellectual disability. The pediatrician indicated that he had reviewed the psychoeducational evaluation of A.W., which indicated that she is significantly impaired. He said based on his experience as a pediatrician, he expected that she was functioning like a youth 3 to 4 years younger than her actual age, but could still understand when she is touched inappropriately.

EFFORTS TO EXERCISE PARENTING TIME

- [15] Immediately after the Bantourakis order was made, the claimant took steps through his counsel to arrange supervised parenting time. The first visit was arranged for May 4, to be supervised by a female police officer that works with the claimant. The exchange would take place outside a Tim Horton's coffee shop.
- [16] When the respondent arrived with A.N. and T.N. for the exchange, she was accompanied by her mother and father, her aunt and A.W. As the group approached the claimant and his supervisor, the respondent's mother was holding A.N.'s hand and the respondent's father was holding T.N.'s hand. In his affidavit, the claimant deposes that the adult group and A.W. all had angry looks or scowls on their faces, and the respondent's mother and aunt were recording the interaction on their cell phones.
- [17] The claimant further deposes that when A.N. first saw him, she was smiling. He asked both children if they wanted to go with him to a gym for a couple of hours. A.N. said no and T.N. didn't say anything. The claimant describes her response as being somewhat "singsong" and she was not upset. During this time, the adult group continued to glare at him with the respondent's mother and father continuing to hold tightly to the children's hands. No one encouraged the children to go with the claimant.
- [18] At this juncture, A.W. began to confront the claimant saying, "you hurt us you put a bag over my head and you put your thing inside me". The claimant remained calm but then the respondent is described by the claimant as suddenly howling in fake cries and then held on to her aunt. The claimant deposes that both A.N. and T.N. had bewildered looks on their faces, as if they could not understand what was unfolding. The claimant told the children that we could try on another day. Before leaving, the claimant appealed to the respondent's mother, saying there is no truth to what was being alleged and she responded in a loud and angry retort that the claimant was not to talk to her.
- [19] Shortly after that aborted visit, the claimant's counsel wrote to the respondent's counsel inquiring as to why all of the adults were present at the exchange, why was it being recorded and why was A.W. present, if she was not going with the claimant for parenting time.
- [20] For the next parenting time to take place on May 11, the claimant arranged for another police officer to attend with him as a supervisor, but neither the respondent nor any other adult attended at the exchange with the children.
- [21] The claimant later found out that the respondent's counsel had sent an email to his counsel on the Friday afternoon before the visit (when the office of claimant's counsel's was closed for personal reasons), advising that the visit was cancelled due to recommendations contained in letters from a doctor that were attached to the email.
- [22] The letters that were provided, one for each child, were from a locum for the family doctor of the respondent and the children. The locum recommended that since there had been disclosures by the children of sexual abuse levelled against their father that it was not safe

for the children to see their father, whether supervised or unsupervised. The letters did not make any reference as to whether or not the locum was aware that the court had made the order on April 30; and, at the hearing, the family doctor's previous letters dated April 4, 2024, were provided to Justice Bantourakis, which also recommended against any parenting time.

- [23] After the claimant made further attempts to seek compliance with the Bantourakis order, counsel for the respondent provided further letters dated May 17, from the same family doctor, again advising against any supervised visits with the claimant. These latest letters were being used by the respondent to deny parenting time to the claimant, even though the doctor's recommendation was the same as in his previous letters that were before Justice Bantourakis when she made her order.
- [24] Later, the claimant's counsel wrote to the family doctor asking if he was aware of the order made by the court on April 30, when he prepared the letters on May 17. The doctor never replied to the claimant's counsel.

APPLICATION TO ENFORCE ORDER

- [25] As the claimant had not seen the children since the separation, he filed another application with this Court on May 20, 2024, seeking enforcement of the Bantourakis order, including a police assistance clause.
- [26] On May 31, 2024, Associate Judge Nielsen made the order sought by the claimant and made an additional order that the claimant, as an alternative to having his parenting time supervised by a police officer, may retain a professional supervisor and that the supervised parenting time would occur on Saturdays from 10:00 a.m. to 2:00 p.m., with the exchange location to be at the same Tim Horton's coffee shop.
- [27] The request that was made by the claimant to arrange for professional supervision resulted from a further allegation being made against the claimant after the Bantourakis order was made. The allegation was that some time before the separation, the claimant and another male police officer molested A.N. and T.N., and took nude photos of them while they were tied up. The claimant was concerned that if a fellow police officer supervised parenting time, that they could also be subjected to false allegations.

JUNE 8 SUPERVISED PARENTING TIME

- [28] After the order was made by Associate Judge Nielsen, the claimant arranged for a supervisor with Axiom Investigations Ltd. to be available for June 8. The supervisor was a female staff member with Axiom and it would be the first parenting time visit for the claimant since the separation.
- [29] After an unnecessary amount of intake communication between both counsel and Axiom, arrangements were made to pick up the children at noon and that they would be taken to a children's playground, to be returned at 4:00 p.m. At the exchange, with the claimant waiting

in his car some distance away, the respondent in an intimidating manner, insisted upon the supervisor providing photo identification such as a driver's license. As that would reveal her home address, the supervisor explained to the respondent that they specialize in high risk cases and for that reason do not provide their addresses under any circumstances. The respondent then released the children to the supervisor.

- [30] Immediately after the exchange, the respondent contacted Axiom to say she was concerned that the supervisor appeared to be "shaking when she dropped the kids off". The respondent further questioned Axiom as to whether the supervisor had some type of medical condition.
- [31] In her report, the supervisor noted that the children went to their father willingly and showed no signs of distress but no physical affection was exchanged. The supervisor noted that the claimant was appropriate throughout the visit, including his discussions with the children.
- [32] When the children were returned by the supervisor to the respondent, the respondent wanted to speak with the supervisor but the respondent was having difficulty keeping the children inside her car. At one point T.N. ran away from the respondent, causing her to chase after him. The supervisor mentioned to the respondent that the children had not run around like that during the visit.
- [33] The respondent had brought her mother with her and after leaving the children with her mother, the respondent approached the supervisor while she was in her car. She told the supervisor that A.N. had told her that the claimant had whispered in her ear that he has "motorcycle friends". The respondent then prompted A.N. to tell the supervisor what the claimant said to her. A.N. repeated the words "motorcycle friends" and the supervisor asked when he said this and A.N. advised it was when she was exiting the car. The supervisor did not hear this exchange. The supervisor noted that the respondent seemed upset and distressed.
- [34] Later that evening, the supervisor was contacted by the local police in relation to a communication that they received from the respondent. The supervisor was advised by the police that the respondent alleged that both children were sexually assaulted during the visit. The police then attended at the supervisor's home and took a statement from her. Immediately thereafter, Axiom sent an email to the parties and counsel advising that such outrageous allegations would not be tolerated, so they had no option but to withdraw their services.
- [35] In her 4th Affidavit, the respondent deposes as follows:
6. On or about June 8, 2024, both the children told me that they were sexually molested by the Claimant.
 15. After I went home [we] were going to Walmart to get a new shoe organizer, my 6 year old told me that she had been sexually assaulted on the visit. Her brother advised the same I immediately called 911 and put the kids into my vehicle and headed to BC Childrens

Hospital . A general check was done by a doctor which was not the usual case and no swab or kit was done which is not usually the case. The Children advised they were given some sort of pills and it made them sleepy. The hospital staff kept the kids there for some time due to the drug ingestion. A drug panel did not find anything in their system that could be checked for as they only have a certain threshold on their guidelines but that does not mean they did not ingest anything. [The] Police and the Social Worker were in attendance who spoke with me. Police [officer] took a statement from me. Social Worker advised they were recalling MCFD to provide a report.

- [36] As it was not clear to me from the submissions of the respondent's counsel as to whether the respondent was alleging that the supervisor acquiesced or stood by while the claimant sexually assaulted the children or if she actively participated, the court asked the respondent's counsel for clarification. Counsel advised the court that the respondent believes both children were sexually assaulted by both the claimant and the supervisor, and that they were drugged during the visit.
- [37] As a result of this allegation and the withdrawal of services by Axiom, the claimant did not have parenting time until the weekend of June 29 and it was only after the manager for Axiom offered to supervise that parenting time visit. The claimant was unable to exercise parenting time during the weekend of July 6, as a supervisor could not be arranged. However, he did have parenting time on July 13, as he was able to arrange for a fellow police officer to supervise that visit.

ANALYSIS

- [38] In *N.N.N. v. D.E.B.*, 2016 BCSC 1778, Master Keighley noted at para. 1:

When dealing with interim applications, the court often has a less than panoramic view of the case. Applicants seldom are afforded more than a couple hours for hearing and the evidence is received in affidavit form: This deprives the court of subtle nuances which are often crucial to the resolution of complex claims and makes it difficult for the court to make realistic assessments as to credibility.

- [39] In *C.L.D. v. J.J.P.D.*, 2024 BCSC 1123, Justice Matthews noted the following when assessing the credibility of witnesses:
- [22] J.J.P.D.'s counsel submitted that C.L.D.'s evidence should not be accepted when it conflicts with that of J.J.P.D. because C.L.D.'s evidence was unreliable in some respects and on other issues, she was untruthful.
- [24] Credibility and veracity are about whether the witness is telling the truth in a moral sense. If the witness is shown to be giving evidence inconsistent with what the witness may know or believe to be true, the witness' veracity is called in to question. Reliability and accuracy are about whether a witness's evidence is sound for reasons other than the intention to tell the truth, such as ability to remember or observe events. Credibility and reliability are related,

although they are conceptually distinct. Nevertheless, they are often referred to together as credibility.

[40] With respect to the application for compensatory parenting time, the relevant sections of the Family Law Act, S.B.C. 2011, c. 25 are ss. 61 and 62.

Denial of parenting time or contact

61(1) An application under this section may be made only:

- (a) by a person entitled under an agreement or order to parenting time or contact with a child, and
- (b) within 12 months after the person was denied parenting time or contact with a child.
- (2) If satisfied that an applicant has been wrongfully denied parenting time or contact with a child by a child's guardian, the court on application may make an order to do one or more of the following:
 - (c) specify a period of time during which the applicant may exercise compensatory parenting time or contact with the child;
 - (g) require the guardian to pay
 - (ii) a fine not exceeding \$5000.

When denial is not wrongful

62(1) For the purposes of section 61 [denial of parenting time or contact], a denial of parenting time or contact with a child is not wrongful in any of the following circumstances:

- (a) the guardian reasonably believed the child might suffer family violence if the parenting time or contact with the child were exercised;
- (b) the guardian reasonably believed the applicant was impaired by drugs or alcohol at the time the parenting time or contact with the child was to be exercised;
- (c) the child was suffering from an illness when the parenting time or contact with the child was to be exercised and the guardian has a written statement, by a medical practitioner or nurse practitioner, indicating that it was not appropriate that the parenting time or contact with the child be exercised;
- (d) in the 12-month period before the denial, the applicant failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact with the child;
- (e) the applicant
 - (i) informed the guardian, before the parenting time or contact with the child was to be exercised, that it was not going to be exercised, and

(ii) did not subsequently give reasonable notice to the guardian that the applicant intended to exercise the parenting time or contact with the child after all;

(f) other circumstances the court considers to be sufficient justification for the denial.

(2) If, on an application under section 61, the court finds that parenting time or contact with a child was denied, but was not wrongfully denied, the court may make an order specifying a period of time during which the applicant may exercise compensatory parenting time or contact with the child.

[41] In *S.K.B. v. D.S.B.*, 2017 BCSC 2569, the court discussed the purpose and appropriate use of these sections:

[31] It is apparent s. 62 is intended to offer specific, very focused justifications for a denial of parenting time or contact with a child that would otherwise be found to be wrongful, in the course of an application by the denied parent pursuant to s. 61. In other words, s. 62 exists for the purpose of adjudicating applications made under s. 61. Given that s. 61 requires an application by the denied parent, I think it is inevitably true that a prompt vindication of that parent's right to time with the children under an order or agreement requires that parent to take the initiative and apply under s. 61.

[32] But the circumstances envisioned by s. 62 are all quite narrowly circumscribed and relatively serious. The section should not be seen by primary care parents as a charter empowering the exercise of their discretion to decide that parenting time is not appropriate in response to more general concerns. A parent who does not employ these provisions in good faith, applies them to circumstances outside their scope, or tries to use them as a substitute for a variation application will likely find themselves subject to some of the more coercive remedies provided in s. 61, as well as the costs of a successful application by the denied parent. In other words, parents misuse s. 62 at their peril.

[42] The court reviewed the video recordings of the May 4 event. As previously indicated, the recordings were made by both the respondent's mother and her aunt. The recordings corroborate the description of the event as provided by the claimant. The court was not provided with an affidavit or any explanation from the respondent as to why the other adults were present, including A.W. The recordings confirm that A.N. told her father that she did not wish to go with him. However, she gave no reason for not wanting to go with him. As events unfolded, I agree that the children looked both confused and bewildered. To say that the adults were glaring at the claimant would be a fair assessment. Despite the high tension, the claimant remained calm throughout.

[43] It is unfortunate that A.W. was brought to this exchange. It only heighten the tension and, if it is true as alleged by the respondent that she wants no contact with the claimant, it is puzzling why she was there. Although for much of the recording the respondent is off-camera, one can clearly hear her wailing as described by the claimant in his affidavit. That would likely have caused even more confusion to A.N. and T.N.

- [44] When the children came to the visit on June 8, the supervisor described them as showing no hesitation in going to their father and they enjoyed spending time with him. This is in contrast to the exchange on May 4, when the children in the company of the respondent and her extended family indicated that they did not wish to go with the claimant. I would expect that the tension that was created at that exchange would not allow the children to feel positive about going with their father and spending time with him. It is my conclusion that the purpose of the respondent attending the exchange with the other adults and A.W. was to frustrate the ability of the claimant to have the parenting time ordered by the court. I do not conclude that the children on their own came to a decision that they did not want to go with their father.
- [45] Furthermore, when the claimant arranged for a professional supervisor to be available for the June 8 visit, the respondent took an egregious step to further frustrate the claimant's parenting time by making outrageous allegations against the claimant and the supervisor. Such allegations would not only cause unnecessary distress to the claimant and the supervisor but also resulted in the children being taken to a hospital for a physical examination that included a drug panel test.
- [46] I find that the nature of the allegation made by the respondent with respect to the June 8 parenting time is similar to the allegation made against the claimant and a fellow police officer that they tied up the children and nude photos were taken of them. As noted by Justice Matthews, when assessing reliability and accuracy of the evidence of a witness, I cannot find the evidence of the respondent to be credible.
- [47] I also find that the respondent obtained further letters from her family doctor and the locum in an attempt to further frustrate the Bantourakis order, knowing full well that the court had similar letters before it when the order was made for supervised parenting time. This resulted in the claimant missing further visits that were ordered by the court.
- [48] In conclusion, I cannot find that the respondent was acting in good faith and falls within the circumstances envisioned by s. 62. Accordingly, I find that the respondent wrongfully denied the claimant his parenting time.

ORDERS

- [49] At the conclusion of the hearing, I ordered that the claimant's parenting time with A.N. and T.N. as provided for in the Bantourakis order, shall be varied to allow the parenting time schedule, the exchange location and the specific day be varied to allow for Axiom to specify the exchange location, the day (provided it is Saturday, Sunday or Monday) and time for the exchange, if supervisors are unable to supervise on the day or times set out in the current order. I further ordered that Axiom may require the parties to facilitate a closer parenting time exchange location than provided for in the current order, so long as Axiom provides notice to both parties 48 hours in advance of the parenting time. The aforesaid order is on the condition that the claimant will make all reasonable efforts to arrange a supervisor on

Saturdays, as set out in the Nielsen order, using the same Tim Horton's location.

[50] I further ordered at the conclusion of the hearing that the claimant be provided makeup parenting time for the time lost, namely:

- two hours on May 4, 2024;
- three hours on May 11, 2024;
- four hours on May 18, 2024, May 25, 2024, June 1, 2024, June 15, 2024, June 22, 2024, and July 7, 2024.

The missed times for each of those visits shall be added onto the claimant's parenting time for the next eight weekends.

[51] The claimant seeks an order that the respondent be required to pay a fine to him for her failure to comply with the Bantourakis order. The claimant further seeks special costs of this application.

[52] Having found that the respondent has wrongfully denied the parenting time, the next issue is whether the respondent should pay a fine to the claimant pursuant to s. 61. Such a remedy is not intended to punish but rather to ensure future compliance with court orders. The purpose of a fine or penalty is to send a message to a party that court orders must be abided by. If the penalty and fine imposed is not sufficient to secure the respondent's future compliance with court orders, the respondent can expect increased fines in the future.

[53] As there have been no previous fines imposed against the respondent for non-compliance with court orders, I find that a fine in the sum of \$750 should be sufficient, that is payable forthwith to the claimant.

[54] Special costs may be awarded at the discretion of the court when a party's conduct in the litigation has been reprehensible. Reprehensible conduct includes both outrageous behaviour and milder misconduct deserving reproof or rebuke. Special costs awards are punitive in nature and the purpose is to express disapproval of the party's conduct (Q.T. v. C.J.H., 2023 BCCA 119 at para. 72).

[55] Special costs may be awarded when a court seeks to disassociate itself from some misconduct in the course of litigation. The word "reprehensible" is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke.

[56] While I find that the respondent's conduct does meet the threshold to award special costs, it is a discretionary order. At this juncture, the parties are still within the early stages of the litigation. I have imposed a fine against the respondent for non-compliance of court orders. If such conduct continues, as previously indicated, the fines will likely increase upon further application. It is my intention to provide a short, sharp lesson to the respondent by imposing the fine. It is meant to ensure future compliance with court orders. While her

conduct is deserving of rebuke or reproof, I am not prepared at this time to order special costs against her.

[57] Accordingly, I am awarding ordinary costs of this application to the claimant in any event of the cause.

"Krentz A.J."

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