

CANADA / JUDGMENT

D.R.S. v. D.A.S.

2024 BCSC 1363

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1363 D.R.S. v. D.A.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.R.S. v. D.A.S.,

2024 BCSC 1363

Date: 20240730

Docket: E67140

Registry: New Westminster

Between:

D.R.S. and A.S.

Claimants

And

D.A.S. and R.D.C.

Respondents

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Claimants:

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Place and Date of Hearing:

New Westminster, B.C.

February 2, 2024

Place and Date of Judgment:

New Westminster, B.C.

July 30, 2024

Table of Contents

Introduction.. 3

Admissibility of Further Affidavit. 3

Application for Protection Order.. 4

The Protection Order 4

Conclusions and Costs. 7

Is a Protection Order Available?. 7

Application Concerning Waiver of Privilege. 10

Conclusion on the Issue of Solicitor-client Privilege. 11

Introduction

- [1] This hearing directly involves the identity of a young person. To protect that identity, I have chosen to refer to the young person as "the young person" and to use initials to identify the parties named in the proceeding. No disrespect is intended, but protection of the young person is essential.
- [2] A preliminary issue was raised concerning the admissibility of an affidavit which was filed on February 1, 2024, and served thereafter.
- [3] The two applications which were scheduled for hearing involved: (1) an application for a protection order with respect to the young person; and (2) a disputed allegation that solicitor-client privilege was waived in the circumstances of this case, which would have required further disclosure by the respondents.

- [4] These applications are very different and do not relate to the same subject matter, though both applications happened to be set down for hearing at the same time. The parties seemed to agree that the application with respect to the protection order was filed first in time; on that basis, the Court decided to hear that matter first.

Admissibility of Further Affidavit

- [5] The claimants objected to the filing of an additional affidavit by D.A.S in support of the application for a protection order. The objection, related to the late admissibility of an affidavit, is based on Rule 10-6(13) of the Supreme Court Family Rules, B.C. Reg. 169/2009, which states:

Unless all parties consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (6), (8), and (12).

- [6] The claimants submitted that an affidavit filed in breach of this rule should not be admitted and that the Court should therefore not consider it. In *Muller v. Muller*, 2015 BCSC 370, the Court stated:
- [15] In *Ivarson v. Lloyd's M.J. Oppenheim Attorney In Fact In Canada for Lloyd's Underwriters et al*, 2002 BCSC 1627 at para 25, Mr. Justice Barrow held that the court should exercise its discretion to admit an affidavit pursuant to this rule sparingly, and only in meritorious cases where to exclude the evidence would result in a "substantial injustice". After considering the contents of the affidavit, I am not satisfied excluding the affidavit and the attached materials would result in a "substantial injustice". Ms. Muller's previous affidavit sufficiently outlines her positions on the various issues, and the additional information provided in the subsequent affidavit would not materially change the Court's determinations on those issues. The Court will thus not consider Ms. Muller's August 19 affidavit in the disposition of this application.
- [7] The late-filed affidavit includes a number of matters which were clearly dated well before the end of the period in which a responsive affidavit could have been filed in accordance with the Supreme Court Family Rules. Nothing in that affidavit deals with any allegation of violence, so there is no urgent safety concern, and the exclusion of the affidavit would not result in a substantial injustice. As a result, there is no basis for this Court to exercise its discretion to admit the affidavit. The application to refuse the admission of the affidavit is granted and the affidavit is not admitted into evidence.

Application for Protection Order

- [8] The protection order was sought by the mother (D.A.S.) of the young person based on behaviour of the grandmother, A.S.

The Protection Order

- [9] As noted in the introduction of these reasons, the application for a protection order was filed first in time, on January 3, 2024. As it relates to child protection issues, the Court decided to hear that matter in precedence to the application concerning waiver of privilege.
- [10] Relying upon s. 183(3)(a) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], D.A.S. sought an order that: (1) A.S. must have no contact or communication, directly or indirectly with D.A.S. or the young person; (2) an order that A.S. must not go to (or be within 1,000 metres of) anyplace where D.A.S. and the young person live, work, attend school, or worship, or happen to be, even if A.S. is an owner of any such place or otherwise has the right to possess or enter such a place. If A.S. sees D.A.S. or the young person, A.S. must leave their presence immediately without any words or gestures; and (3) pursuant to s. 183(3)(c)(i) of the FLA, any police officer, including any RCMP officer having jurisdiction in the province of British Columbia, who is provided a copy of this order is directed to remove A.S. from the residence located at a specified address in Langley, British Columbia.
- [11] The evidence presented by D.A.S. was that when the young person was approximately 13 years old, he was told by A.S. that he could choose to live with his grandparents rather than with his mother, D.A.S. (Affidavit #1 of D.A.S., Ex. N). A.S. used insulting and negative language to describe the young person's mother, including calling her a "slut" and stating to the young person that D.A.S. was infected with the herpes virus (Affidavit #1 of D.A.S. at para. 16). The young person reacted by telling D.A.S. that he did not want contact with A.S. until she had attended counselling and appreciated the damage her language was causing to the young person. At the time, the sole guardian of the young person was D.A.S.
- [12] Further, when A.S. travelled with the young person to California in July 2022, A.S. continued discussing D.A.S. in the presence of the young person, asking personal questions about her, and making disparaging comments about her in the presence of the young person (Affidavit #1 of D.A.S. at para. 22).
- [13] At para. 58 of the second affidavit of D.A.S., details of the contents of an envelope left in the parking lot of the young person's school on or about December 20, 2023, are discussed. The envelope was addressed to the young person and is stated to have been prepared by A.S. The envelope was found by a parent of another student at the same school and turned in to the school administration. D.A.S. refers to the contents of the envelope as inappropriate and as being "full of lies". A two-page letter was signed by "GeeGee", said to be a representation of "grandmother".
- [14] The letter starts with the words "I don't want to upset you, but I would like you to read something. If you decide to show this to your mom, that's fine. She will yet again call the police on me as you want no contact with me or anyone. Thats [sic] because by the time you read this I'll be on a plane out of the country."

- [15] The author of the letter provides details about the mother of the young person, the fact she has repeatedly called the police to report the conduct of the author, and that the author was aware that the young person wanted no contact with the author.
- [16] The letter continues to complain about the child support that the father of the young person has been ordered to pay by a court, and the amount of child support, suggesting that D.A.S. wanted to destroy R.D.C. financially. The letter also suggests that the wife of R.D.C. had to get a higher paying job to afford court costs. The contents of the letter sent by A.S. to the young person were wholly inappropriate, in particular comments about court proceedings and child support.
- [17] The envelope also contained an incomplete copy of a without prejudice letter written by Ms. Clair, counsel for D.A.S., with a number of handwritten comments, some of which pertain to the truthfulness of the contents of the letter, numerous meetings by A.S with police, the use of phrases such as "Total B.S.", the offer of a bribe to encourage the young person to change his residence, as well as portions of this letter which had been redacted. The fact that the envelope containing these materials was left in a public space and in fact was retrieved by a member of the public is a further demonstration of an intention to cause harm to the young person.
- [18] The law is clear that the statements of A.S. are both inappropriate and dangerous to the well-being of the young person. This Court has noted that "demeaning remarks" about a child's parent in the child's presence is an example of family violence which causes emotional harm: *K.R.W. v. P.M.M.*, 2023 BCSC 981 at para. 68, citing *K.W. v. L.H.*, 2018 BCCA 204, citing *K.R. v. J.D.*, 2017 BCSC 182 at para. 17.
- [19] While, in this case, A.S. is not a family member, so cannot be said to have committed family violence, she is a party to this proceeding. Taken together, the provisions of s. 222 and 227(c) of the FLA permit restrictions of similar effect to a Protection Order, in addition to the *parens patriae* jurisdiction of this Court.

Conclusions and Costs

- [20] Taking the statements in the first letter and the handwritten comments on the redacted without prejudice letter, together with a number of other references in both of the letters, it is clear that the author of the first letter is A.S. and the redactions on the second letter were also made by A.S. The envelope containing these documents bore the name of the young person on its exterior and was left on the school grounds for a highly negative purpose: inappropriate communications between an adult and a child, communications which would have profoundly negative effects on any child.

Is a Protection Order Available?

- [21] Counsel for A.S. submitted that because A.S. was not a family member as defined in s. 1 of the FLA, a protection order could not be granted against A.S. While this Court accepts that A.S. is not a "family member", the matter does not end there. Where a child is found to have been subject to negative behaviour as exhibited in this case, the Court is obliged, by fundamental need to protect children from harm, to engage its parens patriae jurisdiction to order appropriate protection, in addition to the provisions of the FLA, ss. 222 and 227(c).
- [22] As noted when the oral reasons were granted, additional reasons would be given to support the Court's conclusion expressed at that time. The Court considered several decisions, including C.J.J. v. A.J., 2016 BCSC 676, a trial decision involving allegations that a 16-year old son had been alienated by the respondent father; the father maintained that the child was "estranged from his mother by choice and for valid reasons": at para. 1. At para. 392(g), the Court wrote:
- g) confiding in the children: the evidence establishes beyond question that [the mother] inappropriately shared details of the legal disputes as well as confidential marital information with the children. Although [the son] may have learned some of these things when he read legal documents posted on the door, the sharing of legal and confidential information long precedes the likely timing of that event. To take just one example, [the son] told P.D. that the customer accounts his mother had were really his father's accounts. This was highly inappropriate information to share with a child.
- [23] Delivering a copy of a without prejudice letter (with added handwritten comments) to the young person is similar conduct involving highly inappropriate information to share with a child.
- [24] In the case of D.A.B. v. C.A.S., 2020 BCSC 807 at paras. 102 and 108, the Court noted:
- [102] There is additionally the issue of inappropriate communications with the children. The claimant admitted he shares some details about the family dispute with A.B., including showing him parts of the Separation Agreement. I found under the credibility section that the claimant shared more than he was willing to admit at trial.
- []
- [108] There is nothing in the email to establish abusive behaviour by the respondent. That said, I find that the respondent contributed to her poor relationship with A.B. through some of her conduct. However, the likely reason A.B. was looking for fault was because the claimant was discussing adult information with him. Such discussions were totally inappropriate.
- [Emphasis added.]
- [25] A third case dealing with family violence and the best interests of a child is A.B. v. C.D., 2020 BCCA 11. The case concerned a transgender teenager, A.B., who was still a minor and wished to pursue hormone therapy. One parent opposed treatment and the other parent supported the minor's wishes for hormone therapy. Three Supreme Court orders were

made: the first declared A.B. was able to validly consent to the treatment; the second imposed a protection order which restrained the father from speaking to others, including media outlets and A.B. about the decision to obtain hormone therapy; and the third dismissed an action by C.D. as vexatious.

[26] C.D. appealed all three orders. The Court of Appeal observed there was no reason to interfere with the finding that A.B.'s consent to treatment was valid. The Court found the other two orders were procedurally irregular and could not stand, so two appeals were allowed.

[27] Related to the issues in this case, the Court of Appeal discussed alternative remedies to a protection order commencing at para. 182, where the Court describes the relevant provisions as "giv[ing] the court broad powers to regulate the conduct of parties to a family law proceeding". This includes a conduct order under ss. 222 and 227(c) of the FLA, which are set out as follows:

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

- (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
- (c) to prevent misuse of the court process;
- (d) to facilitate arrangements pending final determination of a family law dispute.

227 A court may make an order requiring a party to do one or more of the following:

[]

- (c) do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222 [purposes for which orders respecting conduct may be made].

[28] The Court of Appeal, at para. 185, referred to s. 225 (quoted below) as providing "specific authority to make orders restricting communication":

225 Unless it would be more appropriate to make an order under Part 9 [Protection from Family Violence], a court may make an order setting restrictions or conditions between parties including when and how communications may be made.

[29] Based on the foregoing, the oral reasons given aforesaid are confirmed as conduct orders pursuant to the FLA and the *parens patriae* jurisdiction of this Court.

[30] Having drawn this conclusion, and having no contrary evidence submitted by or on behalf of A.S., oral reasons were pronounced at the close of the hearing of this application where a conduct order was granted pursuant to ss. 222 and 227(c) of the FLA and the *parens patriae*

jurisdiction of this Court to prevent any contact or communication, by any means, including in writing or by any electronic means, direct or indirect, by A.S. on the one hand and D.A.S. and the young person on the other hand. This order was granted with immediate effect commencing on February 2, 2024.

- [31] Further, this order shall be binding on any party to this action or any other person having knowledge of these orders: orders which restrict communication between A.S., on the one hand, and D.A.S. and the young person on the other hand.
- [32] The costs of the application are payable by A.S. to D.A.S. forthwith after assessment by the Registrar on Appendix B of the Supreme Court Family Rules, as a matter of ordinary difficulty.

Application Concerning Waiver of Privilege

- [33] On January 11, 2024, the claimants D.R.S. and A.S. filed a notice of application ("NOA") seeking a declaration that D.A.S. had waived privilege over: (a) the file of Jazmin Clair, her counsel of record from the Zukerman Law Group; (b) all communications between D.A.S. and Ms. Clair, from first contact until January 4, 2024, with respect to:
- i. the respondent, R.D.C.;
 - ii. the 2009 consent order;
 - iii. consolidation of the Provincial and Supreme Court actions;
 - iv. the young person's birth;
 - v. R.D.C.'s care for the young person;
 - vi. guardianship status, responsibilities, and rights;
 - vii. D.A.S.'s pleadings, including the amended pleadings; and
 - viii. intentions to proceed with relief via applications.
- [34] The NOA does not contain details of any written or electronic communications between D.A.S. and Ms. Clair. Paragraph 8 of the factual basis section is also incomplete, and does not provide any discernible factual basis to assist or support the NOA.
- [35] Counsel for the claimants agreed that there were no documents of the type referred to in the case law, such as emails or memos. Counsel argued that if a legal opinion was rendered to D.A.S. orally and disclosed, then privilege was waived and any and all other documents which might be related must be disclosed. This submission presumes that there are other documents which might be disclosed. There have been no other documents referred to in this application and therefore nothing to disclose.

- [36] F.C.A.S. v. C.E.S., 2023 BCSC 1098, cited by the claimants, deals with emails between the client and former counsel. Unlike F.C.A.S., there are no emails in the evidence before this Court. The existence of emails provides a basis for disclosure where the Court finds a waiver of privilege.
- [37] Pacific Concessions, Inc. v. Weir, 2004 BCSC 1682 also involved an affidavit to which email communications between a party and his counsel were appended. There the Court found that solicitor-client privilege had been waived "with respect to the email of February 1, 1999, and any communication passing between the defendants and their solicitor in response to the issues raised in the email": at para. 22. Again, this case is based on disclosure of the contents of a document, an email. In the case at bar, there is no assertion of documents upon which such a finding could be based.

Conclusion on the Issue of Solicitor-client Privilege

- [38] In the circumstances I am unable to grant the application with respect to solicitor-client privilege, but as this action is at a relatively early stage, and the evidence may change as the file develops, I dismiss the application without prejudice to the ability of the claimants to refile the application based on new evidence.
- [39] I do not intend to make any order as to costs with respect to the January 11, 2024 application.
- "Ball J."

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