

CANADA / JUDGMENT

Ho v. Chu

2020 BCSC 927

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 927 Ho v. Chu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ho v. Chu,

2020 BCSC 927

Date: 20200619

Docket: E130812

Registry: Vancouver

Between:

Melanie Man Yee Ho

Claimant/Respondent

And

Sai Wah Chu

Respondent/Applicant

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

The Claimant, Appearing in Person:

M. Ho

Counsel for Respondent:

S.S. Silber

Written Submissions

May 29, 2020

Place and Date of Hearing:

Vancouver, B.C.

June 5, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 19, 2020

Introduction

[1] This is an application by the respondent, Mr. Chu, seeking to enforce an order of Master Vos dated January 29, 2020 made pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The relevant sections of Master Vos' order [the "Vos Order"] are as follows:

h) Pursuant to section 211 of the Family Law Act, the parties shall retain an assessor to prepare a report assessing:

i. the needs of Phoebe in relation to this family law dispute;

ii. the views of Phoebe in relation to this family law dispute; and

iii. the ability and willingness of each parent to satisfy the needs of Phoebe.

i) The Claimant shall have 14 days from the date of this Order to determine if an appropriate female section 211 assessor is available to conduct a section 211 report in this matter.

j) If another section 211 assessor is not agreed to between the parties by February 12, 2020, then Dr. Michael Elterman will be retained by the parties to prepare the section 211 report.

k) The cost of the section 211 report shall be shared equally by the parties.

l) The section 211 assessor shall be provided with a copy of the parties' respective affidavit materials filed in respect of the Respondent's Notice of Application for parenting time filed December 12, 2019.

m) Paragraphs 1, 2, 4(b), 5, 6, 7 (b) to (f), 8 and 9 of the Respondent's Notice of Application filed December 12, 2019 shall be adjourned and may be reset for hearing after the receipt of the section 211 report.

n) Paragraphs 14 to 21 of the Respondent's Notice of Application filed December 12, 2019, shall be adjourned generally.

[2] In his application, the respondent seeks the following orders:

- a) Pursuant to the Order of Master Vos pronounced January 29, 2020 requiring the parties to retain Dr. Michael Elterman to prepare a section 211 report in this matter:
 - i. Within seven (7) days of the date of this Order, the Claimant shall schedule appointments for herself and the child, namely Phoebe Annette Chu born [August 2006] ("Phoebe") with Dr. Michael Elterman;
 - ii. Within seven (7) days of the date of this Order, the Claimant shall pay to Dr. Michael Elterman her share of the retainer for the section 211 report ordered by Master Vos on January 29, 2020;
 - iii. The Claimant shall attend all appointments with Dr. Michael Elterman;
 - iv. The Claimant shall ensure that Phoebe attend any and all appointments scheduled with Dr. Michael Elterman.
- b) Pursuant to s. 230(2) of the FLA, the Claimant pay the Respondent the sum of \$5000 for failing to comply with the Order of Master Vos.
- c) In the alternative to (2), the Claimant pay the Respondent's costs of this application, payable forthwith.

Background Facts

- [3] The parties were married on November 20, 2004 and separated on January 1, 2012. There is one child of the marriage, Phoebe Chu, born August 2006 ("Phoebe").
- [4] On December 19, 2019, the respondent filed a notice of application seeking to replace the terms of the parties' separation agreement regarding parenting time with a shared parenting arrangement, on a week-on/week-off basis. He also had alternative suggestions for varying parenting time.
- [5] In her application response, Ms. Ho requested "a Hear the Child report be done with Phoebe".
- [6] The matter came on for hearing before Master Vos on January 29, 2020. Ms. Ho sought an order for a Hear the Child Report and Mr. Chu sought a s. 211 report to be prepared by Dr. Elterman. During the course of her submissions, Ms. Ho raised a concern that Phoebe may prefer a female assessor.
- [7] Master Vos made a numbers of orders; the relevant ones are set out above. He agreed with Mr. Chu and ordered a s. 211 report. In response to Ms. Ho's concern, Master Vos provided the parties with time to agree on a female assessor. In the absence of agreement, Dr. Elterman would be jointly retained by February 12, 2020. The requested variations to the parenting time arrangement were adjourned until after the parties received the s. 211 report.
- [8] The Vos Order was pronounced on January 29, 2020.

- [9] On February 5, 2020, Ms. Ho suggested Dr. Rebecca England be retained to prepare the s. 211 report. On February 7, 2020 Mr. Chu advised Ms. Ho he was not agreeable because Dr. England was not available until September 2020. He was also concerned that the cost of her report would likely be higher than Dr. Elterman's report.
- [10] On February 11, 2020, Ms. Ho informed counsel for the respondent that Phoebe told her she does not want to be interviewed by a male assessor and that Ms. Ho had concerns about Dr. Elterman's credentials and reputation. Ms. Ho deposed: "I did not want to have to go through the court process and was hoping that we could settle out of court with Mr. Chu changing his mind and we could both agree on Dr. England instead."
- [11] Despite wanting to settle, Ms. Ho did not propose any alternative names of potential female assessors. She did not appeal the Vos Order.
- [12] On February 12, 2020, Mr. Chu retained Dr. Elterman. Mr. Chu subsequently paid a \$5,000 retainer to Dr. Elterman. Ms. Ho took no steps to participate in the process.
- [13] On March 17, 2020, Mr. Chu suggested to Ms. Ho that the parties jointly appoint Dr. England. This was proposed to avoid a further court application.
- [14] On April 1, 2020, Ms. Ho replied that she no longer agreed to the appointment of Dr. England. She further stated that she intended to make an application to the court to vary the Vos Order once the court "reopens for regular operations".
- [15] Mr. Chu has now had five appointments with Dr. Elterman. Neither Ms. Ho nor Phoebe have met with Dr. Elterman. Dr. Elterman confirmed in a letter dated May 7, 2020 that Ms. Ho has not paid her \$5,000 retainer fee to him. He also confirmed the next steps required to complete the assessment are "to interview Phoebe, observe the child and parents, and speak to the collateral references selected by each parent".
- [16] On May 11, 2020 Dr. Elterman advised counsel for Mr. Chu, copied to Ms. Ho, that during the pandemic he has been interviewing adults and older children by video. His observation sessions can be done by video or at his office, as his office is large enough to accommodate meetings.

Procedural History

- [17] On May 13, 2020, Mr. Chu filed the application in this matter seeking to have Ms. Ho and Phoebe schedule appointments with Dr. Elterman and for Ms. Ho to pay her \$5,000 retainer.
- [18] On May 19, 2020, Ms. Ho responded, opposing the orders sought. She did not consent to the application proceeding on the basis of written submissions. She requested that the s. 211 report be deferred until Mr. Chu's notice of application dated December 12, 2019 has been heard.[1] Although she filed her application response, she did not file written submissions.

- [19] Upon review of the application, application response, and written submissions, I noted that Ms. Ho did not agree to proceed on the basis of written submissions. I therefore requested a telephone hearing to seek directions regarding how to proceed.
- [20] On June 5, 2020, the telephone hearing commenced. Ms. Ho advised the Court that she was fine to proceed by way of written submissions as long as she could tell me her concerns regarding the s. 211 report orally. Both parties agreed to proceed on June 5, 2020 with Ms. Ho augmenting her application response and affidavit materials with oral submissions. Ms. Silber made reply submissions orally.
- [21] After hearing the oral submissions, I reserved judgment.

Parties' Positions

- [22] The respondent argues the importance of complying with court orders is fundamental to the proper administration of justice and maintenance of the rule of law. The evidence is abundantly clear that Ms. Ho has failed to comply with the Vos Order requiring the parties to jointly retain Dr. Michael Elterman. Ms. Ho has refused to engage in the s. 211 process altogether by failing to:
- a) provide her share of the retainer to Dr. Elterman; and
 - b) schedule appointments with Dr. Elterman for herself and Phoebe.
- [23] While her initial reasons for objecting to Dr. Elterman focused on Phoebe's desire to have a female assessor, Ms. Ho refused to engage Dr. Rebecca England when given the opportunity to do so.
- [24] Mr. Chu argues it is not up to Ms. Ho to unilaterally decide not to participate in the s. 211 process in the face of a court order. This Court has the ability under both its inherent jurisdiction and pursuant to ss. 222, 224, 227, and 230 of the FLA to enforce the Vos Order.
- [25] Ms. Ho advised me that she takes court orders very seriously. However, Master Vos made his decision based on limited information. There was not enough time to permit him to address all the evidence. Ms. Ho stated in her application response that at the hearing before Master Vos she did not object to the s. 211 report "aside from the cost factor". She also raised that she preferred a female assessor. After the order was made, as a parent, she needed to ask Phoebe about her preferences and Phoebe confirmed "her preference for a female assessor." She also did research regarding Dr. Elterman and found his credentials "were not good." Considering her child's best interests, she was not prepared to have Phoebe assessed by Dr. Elterman. She had to err on the side of caution.
- [26] By the time Mr. Chu agreed to use Dr. England, Ms. Ho "found out that some parents will use the court system to make up things that really didn't happen in order to harass the other parent and one way to do that is with a s. 211 report."

[27] Ms. Ho alleges Mr. Chu made false statements and accusations in his affidavit, confirmed in the emails she referred to in her affidavit. She believes Mr. Chu can make false statements and allegations in the privacy of an assessor's office. After much careful consideration she realized, for her own protection, she could no longer agree to the s. 211 report. Therefore, relying on s. 216(3) of the FLA, she will ask the Court to vary the Vos Order. She will do so once the court reopens.

[28] In her application response, she concluded with the following statement:

I hereby ask the court that this order from Master Vos be varied given the evidence of false accusations against me made by the Respondent. I ask that a s.211 report be deferred until the Respondent's notice of application dated December 12, 2019 has been heard by a Judge. Only then, if it can be clearly established that the Respondent has strong reasons to require a s.211 report will it be done. This report must be done for the right reason - for the best interest of the child. If the party requesting for this report is the one who is making numerous false statements in his sworn affidavits, it is a serious red flag for misuse of the court system. This kind of action must be prohibited.

[29] Counsel for Mr. Chu replied that s. 216(3) of the FLA does not apply because the evidence to which Ms. Ho refers was before Master Vos. Ms. Ho could have made the same arguments before him. In any event, Ms. Ho does not have an application to vary the Vos Order before me. This is Mr. Chu's application.

[30] Counsel for Mr. Chu argues the s. 211 report has already been ordered and it cannot be deferred. It is needed to determine the parenting issues.

Legal Principles

[31] The respondent's application seeks to compel the claimant to comply with the Vos Order and is brought pursuant to ss. 222, 224, 227, and 230 of the FLA. These sections of the FLA provide this Court with the ability to make certain enforcement-related orders to control the court process and manage behaviours.

[32] Section 222 of the FLA authorizes the court to make orders to "manage behaviours that might frustrate the resolution of a family law dispute" and to "facilitate arrangements pending final determination of a family law dispute".

[33] Pursuant to s. 227(c) of the FLA, a court may make an order requiring a party to "do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222". Section 227 is based on the court's in personam jurisdiction over a litigant and gives the court broad powers to make conduct orders: *Quigg v. Quigg*, 2018 BCSC 853 at para. 60.

- [34] The remedies in ss. 230 and 231[2] of the FLA are designed to enforce and secure a party's compliance with court orders made under the FLA: *Kanta v. Kanta*, 2017 BCSC 2321 at para. 19.
- [35] Section 230 can be used where no other provision of the FLA provides an effective remedy to enforce the order. It enables the court to require a party to pay an amount not exceeding \$5,000 to or for the benefit of the other party whose interests have been negatively affected by their actions.

Analysis

- [36] Ms. Ho has failed to comply with the Vos Order requiring the parties to jointly retain Dr. Elterman to prepare a s. 211 report prior to this Court addressing the parenting issues. Ms. Ho has refused to engage in the s. 211 process altogether by failing to schedule appointments with Dr. Elterman for herself and Phoebe. She also failed to pay her share of the retainer to Dr. Elterman.
- [37] Subsequent to Vos Order, Ms. Ho raised concerns regarding Dr. Elterman. As set out in her affidavit:

I proceeded to do research on finding an assessor for the s. 211 report and came across some alarming information on Dr. Elterman. After doing more extensive research on him and finding multiple sources of unfavorable information and reviews about him, I knew I could never agree on using him. Whether all this negative information about Dr. Elterman is real or not, it is imperative that we as parents err on the side of caution. An improperly done assessment could potentially result in causing Phoebe unnecessary emotional and/or mental stress...

- [38] Ms. Ho suggested Dr. England on February 5, 2020, whom Mr. Chu rejected. Ms. Ho did not offer further names and she did not apply to vary or appeal the Vos Order. Consequently, Mr. Chu retained Dr. Elterman and paid his share of the retainer.
- [39] Ms. Ho and Phoebe did not participate in the s. 211 interview process with Dr. Elterman. Despite having paid the retainer for Dr. Elterman and having attended two appointments with him for the s. 211 assessment, Mr. Chu offered to engage Dr. England rather than going back before this Court to enforce the Vos Order. Ms. Ho then refused to retain Dr. England stating she was concerned that Mr. Chu would make false statements behind closed doors with the assessor. She deposed: "He will create more false stories to further harass me."
- [40] I have serious concerns regarding this chronology. I see nothing in Mr. Chu's affidavit materials to suggest he is harassing Ms. Ho. She did not raise this in front of Master Vos although, according to counsel for Mr. Chu, those affidavits were before him. The way in which Ms. Ho has raised her concerns persuades me that she is simply trying to delay--or worse, obstruct--the process. I note that Ms. Ho benefits from the status quo as she has the majority of parenting time with Phoebe.

- [41] Ms. Ho stated before me that she respects court orders. However, she has unilaterally chosen to ignore one. Although she states that when the court resumes regular operations she will apply to vary the order, at the date of the hearing she had not yet done so. I appreciate the courts have not been available for regular court hearings. However, Ms. Ho did not file a cross application to vary the order, nor did she appeal the Vos Order during the limitation period, prior to the pandemic, despite already having concerns. It is now too late to appeal the Order.
- [42] Mr. Chu deposed that Phoebe has numerous males involved in her life, "both through school and extracurricular activities, and with whom Phoebe has willingly and happily interacted." Even if Phoebe has a preference for a female assessor, the Vos Order was specific and provided Ms. Ho with an opportunity to protect Phoebe's interests. When given the opportunity to have a female assessor appointed, Ms. Ho only provided one name. Further, when given a second opportunity to have Dr. England prepare the s. 211 report, Ms. Ho declined offering new reasons, months after the s. 211 report was ordered.
- [43] In terms of the new reasons, Ms. Ho argues that Mr. Chu is attempting to misuse the court system through the use of a s. 211 report and his "numerous false statements in his sworn affidavits". Yet it was Ms. Ho who initially raised the idea of a neutral assessor when she requested a Hear the Child Report. Mr. Chu responded by saying he would prefer the more comprehensive s. 211 report. At the hearing before Master Vos, Ms. Ho advised she preferred to have a female assessor and raised concerns regarding the cost of the report. She did not raise other concerns regarding the s. 211 process.
- [44] In terms of inconsistent and unsubstantiated statements in Mr. Chu's affidavit, in high conflict family cases it is not unusual for the parties to have different interpretations of events. This has no bearing on the s. 211 process, where Ms. Ho would be interviewed and could provide her version of events. Further, Ms. Ho can raise her concerns regarding the accuracy of the affidavit evidence with the chambers judge when the parenting time application is finally heard.
- [45] While I cannot vary the Vos Order without an application to do so before me, even if I had an application I would decline to do so. This is because Ms. Ho cannot unilaterally decide not to participate in the s. 211 process in the face of court order: *D.F.S. v. L.K.S.*, 2015 BCPC 363 at paras. 57-58. This is not in the best interests of the child. Ms. Ho has impeded the right of Phoebe to have a neutral assessor provide this Court with some insight into Phoebe's wishes, not filtered through her parents' perspectives. It is an opportunity for a neutral assessor to provide the court with some insight into the family dynamics. Master Vos specifically adjourned Mr. Chu's application for increased parenting time so that a s. 211 report could be prepared to assist the court.
- [46] I also note that Dr. Elterman has prepared a large number of reports under s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 128 and subsequently under s. 211 of the FLA. He has been mutually agreed to by many family law litigants.

- [47] I am satisfied that Ms. Ho has acted in a manner that frustrates the court-ordered s. 211 process. This Court can order a fine to enforce a court order: s. 230(2)(b). At this juncture, I am not prepared to order a \$5,000 penalty for Ms. Ho's non-compliance with the Vos Order. I am prepared to order costs of this application against Ms. Ho, to be paid forthwith. This is more appropriate for a first time breach.
- [48] Lastly, I emphasize that court orders are serious and cannot simply be ignored. Compliance is not discretionary. The importance of complying with court orders is fundamental to the proper administration of justice and maintenance of the rule of law: A.J.F. v. N.L.S., 2020 BCSC 26 at para. 75.

Disposition

[49] Based on the above, I expect Ms. Ho to comply with the Vos Order. Specifically, I order:

- 1) Within seven (7) days of the date of this Order, Ms. Ho shall schedule appointments for herself and Phoebe with Dr. Michael Elterman.
- 2) Within seven (7) days of the date of this Order, Ms. Ho shall pay to Dr. Elterman her share of the retainer for the s. 211 report.
- 3) Ms. Ho shall attend all appointments with Dr. Michael Elterman.
- 4) Ms. Ho shall ensure that Phoebe attends all appointments scheduled with Dr. Elterman.
- 5) Ms. Ho is to pay, forthwith, Mr. Chu's costs of this application.

"D. MacDonald J."

- [1] This is the application Master Vos adjourned pending the s. 211 report.
- [2] The remedies set out in s. 231 of the FLA are extraordinary remedies applicably only if "the court is satisfied that no other order under [the FLA] will be sufficient to secure the person's compliance": s. 231(1)((b). A s. 231 remedy is not necessary here.

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