

CANADA / JUDGMENT

J.E.D.H. v. M.I.K.

2023 BCSC 648

COURT

Supreme Court of British Columbia

DECIDED

17 March 2023

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2023 BCSC 648 J.E.D.H. v. M.I.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.E.D.H. v. M.I.K.,

2023 BCSC 648

Date: 20230317

Docket: E222050

Registry: Vancouver

Between:

J.E.D.H.

Claimant

And

M.I.K.

Respondent

Before: Master Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

J. Pyde

Counsel for the Respondent:

D.A. Lal

Place and Date of Hearing:

Vancouver, B.C.

March 9, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 17, 2023

- [1] THE COURT: These are my oral reasons. I have made minor edits for grammar, clarity and readability in written form, but the result has not changed.
- [2] The claimant applies pursuant to s. 228(1)(c) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] for orders that the respondent pay the claimant the sum of \$5,000 for expenses reasonably and necessarily incurred by her as a result of his non-compliance with three terms of the parties' consent order dated September 23, 2022 (the "Consent Order"), and for the benefit of herself and the children, whose interests were affected by the non-compliance. She also seeks a \$5,000 fine payable by the respondent for the same offences, and an order requiring the parties to communicate only via a co-parenting app, unless it is an emergency.
- [3] The Consent Order includes certain conduct orders which the claimant says have been breached by the respondent. Specifically, the breaches alleged are as follows:
- a) With respect to para. 6(b) of the Consent Order, which provides that the respondent shall pick up the children from school each day;
 - b) With respect to para. 7, which provides that if a party requests to alter the parenting arrangements and the other party is unable to accommodate the requested change, the requesting party is responsible for securing and paying for alternate third-party childcare; and
 - c) With respect to para. 9, which is an order pursuant to s. 225 of the FLA, that the parties shall, at all times, communicate with each other in a respectful and courteous manner and, unless it is an emergency, for the purposes of arranging the children's care and the shared use of the parties' vehicles only.

Failure to Pick Up from School

- [4] The claimant has documented over 30 occasions between the date of the Consent Order and February 1, 2023, on which the respondent failed to pick up the children from school. The respondent acknowledges his non-compliance in this regard. His explanation is that he did not fully consider the practical ramifications of consenting to this order and found it impractical to continue. However, a remedy for this would have been to bring on a court

application to vary that term of the Consent Order, which he could easily have done as that term was on an interim, without prejudice basis.

- [5] Instead, the respondent sent several emails to the claimant culminating in an email on October 31, 2022, which read: "I am not going to be continuing with the school pickups as of next Monday, I'm done driving except for the days I have [child's name redacted]." This was a clear and deliberate disregarding of the Consent Order. The respondent's failure to comply with this term of the Consent Order caused uncertainty and logistical issues for both the claimant and the children.
- [6] The parties have now resolved this issue, as they consented to an order before Master Robertson on February 16, 2023 that they share the cost of a third-party driving service.

Third-Party Childcare

- [7] Not much time was spent on the issue of paying for third-party childcare when changing parenting arrangements. The claimant acknowledges that the respondent's job often requires him to travel out of town on short notice. She pointed to two examples of non-work-related changes on little or no notice, which forced her to scramble for childcare. Although the respondent may have breached para. 7 of the Consent Order, I note that para. 7 is not framed as a conduct order, and accordingly s. 228 does not apply to breaches of that term.
- [8] Further, no evidence was provided as to the quantum of any additional costs incurred by the claimant with respect to the respondent's failure to arrange third-party childcare on those occasions, or resulting from the respondent's failure to pick up the children from school.

Respectful Communication

- [9] Regarding the respondent's communications, the claimant pointed to a wide range of alleged breaches, from unpleasant to emotional to veiled threats. In his affidavit, he acknowledges that his past communications were experienced by the claimant as disrespectful, aggressive, or both. I agree with the respondent's counsel that the tone and nature of the communications have improved somewhat, and I was encouraged to hear that the respondent is now working with a divorce coach to improve his co-parenting communications. The claimant says that he has only done so after this application was served, which may well be true. Regardless, there appears to be some progress in that regard.

Consequences for Breach of Conduct Orders

- [10] Section 228 of the FLA provides as follows:

Enforcing orders respecting conduct

228 (1) If a party fails to comply with an order made under this Division, the court may do one or more of the following:

- (a) make a further order under this Division;
 - (b) draw an inference that is adverse to the party, and make an order based on the inference;
 - (c) make an order requiring the party to pay
 - (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the non-compliance, including fees and expenses related to family dispute resolution,
 - (ii) an amount not exceeding \$5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the non-compliance, or
 - (iii) a fine not exceeding \$5 000;
 - (d) make any other order the court considers necessary to secure compliance.
- (2) If a party fails to comply with an order made under section 225 [orders restricting communications], the court must consider whether it would be appropriate to make an order under Part 9 [Protection from Family Violence].
- [11] Touching briefly on s. 228(2), the claimant is not seeking an order under Part 9, nor do I consider such an order to be appropriate in the circumstances of this case.
- [12] As stated by Justice Murray in *A.N. v. A.M.N.*, 2021 BCSC 2228:
- [33] The remedies under s. 228 (and 231) of the FLA are not intended to punish, but rather to secure compliance with conduct orders. Deterrence and to a lesser extent, rehabilitation are important considerations. Unlike criminal contempt, concern for the administration of justice is less of a priority: *Larkin v. Glase*, 2009 BCCA 321, at paras. 49 and 50.
- [34] In order to find that s. 228 of the FLA applies, the court must find that a party has breached a conduct order. Whether a breach has occurred is to be determined objectively, considering the impugned conduct along with the surrounding circumstances at the time: *C.A.L. v. D.E.L.*, 2018 BCSC 772 at para. 44.
- [13] I find that the respondent has breached the Consent Order with respect to his failure to pick up the children from school as required, and to a lesser degree, in that his communications with the claimant have not always been respectful and courteous.
- [14] The claimant submits that the maximum penalty is appropriate, and her notice of application seeks both a penalty payable to her and a fine payable to the court, each in the amount of \$5,000. The respondent submits that his behaviour has improved, he has acknowledged his failings, and that if any penalty is ordered, it should be deferred as ordered in *Kanta v. Kanta*, 2017 BCSC 2321.

- [15] In *A.J.F. v. N.L.S.*, 2020 BCSC 26, Justice Skolrood (as he then was) made the following comments:
- [75] ... there can be no debate about the importance of complying with court orders. Compliance is not a matter of discretion or choice on the part of litigants. Rather, compliance is fundamental to the proper administration of justice and maintenance of the rule of law: *Grewal v. Nijjer*, 2011 BCSC 332 at para. 20, *aff'd* 2011 BCCA 505; *R.A. v. W.A.*, 2018 BCSC 1910 at para. 131; *Larkin v. Glase*, 2009 BCCA 321 at para. 7; *The Law Society of British Columbia v. Goodwin*, 2015 BCSC 2472 at para. 15.
- [83] As noted by Master Bouck in *C.A.L. v. D.E.L.*, 2018 BCSC 772 at para. 43, s. 228 has been considered a limited number of times, but shares much of the same language as s. 213, which was discussed in *J.D.G. v. J.J.V.*, 2013 BCSC 1274. Relying on *J.D.G.*, Master Bouck said, "a robust application of the FLA's enforcement provisions is necessary so that the parties can focus on resolving the true merits of their dispute and not be bogged down in repetitive and costly pre-trial applications." Like s. 213, s. 228 should be applied creatively in a manner sensitive to the particular issues before the court. The court should focus on what measure will be most effective in the circumstances: *J.D.G.* at para. 25.
- [84] In addressing s. 228, a court must also be mindful of the purposes of conduct orders as stated in s. 222 of the FLA: *C.A.L.* at para. 43. Section 230 is linked to s. 228 in this case because its application is only triggered if no other provision of the FLA applies: *S. 230(1)*; *I.J.G.P.G. v. K.M.*, 2018 BCSC 2468 at para. 20; *Partridge v. Partridge*, 2018 BCSC 1687 at para. 79.
- [85] The measures set out in ss. 228 and 230 should be resorted to when, and only to the extent, necessary and appropriate to enforce and secure compliance with orders made under the FLA: *Kanta v. Kanta*, 2017 BCSC 2321 at para. 19; *Kanta v. Kanta*, 2017 BCSC 1428 at para. 72. Orders under ss. 228 and 230 may be necessary to impart on one or both parties that they are bound by the FLA and must comply with court orders: *B.G.M.S. v. J.E.B.*, 2018 BCSC 1628 at para. 177.
- [86] Although compliance with the FLA and related court orders is critical, the FLA mandates a more holistic approach to resolving family disputes that minimizes delay, formality and conflict between the parties: *S. 199(1)*. The remedies available under ss. 228 and 230 empower the court to provide progressively more serious responses as a particular case may dictate. More importantly, a court's objective should be to fashion a remedy that ensures compliance while addressing the specific situation before the court: *J.R.B. v. J.H.F.*, 2015 BCPC 70 at para. 26.
- [16] The respondent's repeated and flagrant non-compliance with the terms of the Consent Order relating to picking up the children and respectful communications is disserving of rebuke, and a financial penalty is appropriate. However, in relative terms, his conduct was not so egregious as to warrant a penalty at the high end of the range. In my view, and being mindful that the object is deterrence rather than punishment, a penalty in the amount of

\$2,000 is appropriate, and I order that be paid to the claimant within 30 days of this order. If the respondent persists in his non-compliance with court orders, he can expect that future penalties may well escalate, although this comment is directed to the respondent and is not intended to fetter the discretion of future presiders.

AppClose

- [17] With respect to the application requiring the parties to use a co-parenting app, the respondent objects on the basis that he has security concerns about posting personal information about the children's health and whereabouts on a US-based third-party app. The claimant says he has provided no evidence other than his opinion as an IT professional. Conversely, however, the claimant has provided no evidence regarding the proposed app other than a couple of screenshots showing its features.
- [18] Parenting communication applications such as AppClose and OurFamilyWizard have been used by co-parents, either voluntarily or as ordered by Canadian courts, for many years. If the respondent had serious security concerns, he should have been able to provide independent evidence to support his objections. The only evidence provided is the respondent's stated concern in his affidavit.
- [19] Given the lack of independent evidence from the respondent, and the history of strained communications, as evidenced in the claimant's affidavits, I am satisfied that a communication application will likely have significant benefits for the parties. Accordingly, I order, pursuant to s. 225 of the FLA, that unless there is an emergency, the claimant and the respondent will only communicate with each other through counsel, or via the co-parenting application AppClose, until further court order or written agreement between the parties. Both parties must have notifications enabled so that they can receive messages from the other parent in a timely manner. This order relates to communication only and does not require the parties to use the electronic funds transfer features of the app for any child support payments, including s. 7 expenses.

Costs

- [20] Finally, the claimant seeks costs of this application and special costs with respect to the breaches of the conduct orders.
- [21] A significant portion of the notice of application, dealing with a s. 211 report and use of a third-party transportation service to drive the children to and from school, was dealt with by consent before Master Robertson on February 16, 2023. Master Robertson adjourned all of the contested items, including the issue of costs, to March 7, 2023. There was insufficient time to hear the matter in chambers that day, and the parties agreed to adjourn the matter over again to March 9, 2023.

- [22] I am satisfied that this application was necessary, and that the respondent would not have consented to the orders made by Master Robertson had this application not been brought. His involvement with the divorce coach and the improvement in his communications with the claimant also occurred only after this application was filed and served. Accordingly, the claimant has been largely successful and is entitled to her costs.
- [23] I am not satisfied that the respondent's conduct rises to the level of reprehensible conduct deserving of special costs, and I have already ordered a penalty payable to the claimant for the respondent's breaches of the conduct orders.
- [24] Pursuant to R. 16-1(14) of the Supreme Court Civil Rules, I assess costs summarily in the total amount of \$3,000, which includes \$500 for the appearance before Master Robertson on February 16, 2023, two half-days at \$1,000 each for the appearance before me on March 9, 2023, and taxes and disbursements. The respondent is to pay these costs to the claimant within 30 days.

"Master Hughes"

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