
CANADA / JUDGMENT

J.K.H. v. M.S.B.

2020 BCSC 96

COURT

Supreme Court of British Columbia

DECIDED

27 January 2020

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2020 BCSC 96 J.K.H. v. M.S.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.K.H. v. M.S.B.,

2020 BCSC 96

Date: 20200127

Docket: E55203

Registry: New Westminster

Between:

J.K.H.

Claimant

And

M.S.B.

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Claimant:

S. Sihota

Counsel for the Respondent:

G. Kang

Place and Date of Trial/Hearing:

New Westminster, B.C.

April 3, 2019

Place and Date of Judgment:

New Westminster, B.C.

January 27, 2020

Introduction

- [1] The parties have each brought applications for family orders. There are two young children of the marriage referred to in these reasons. To maintain their privacy, all of the parties and the children will only be referred to by their initials.
- [2] In his notice of application filed March 21, 2019, the respondent has applied for an order setting aside or varying orders of this Court made September 21, 2018 (the "Order"). In particular, the respondent seeks to set aside or vary the orders contained in paras. 1, 2(a) and (c), 3(a), 4, 5, 6(ii)(iii), and 10 of the Order. The respondent also seeks several additional orders under the Family Law Act, S.B.C. 2011, c. 25 (FLA), namely:
- a. his child support obligation be decreased;
 - b. varying his parenting time with the children;
 - c. to stop Family Maintenance Enforcement Program ("FMEP") enforcement;
 - d. orders for a police enforcement clause pursuant to s. 231 of the FLA allowing police to apprehend the children and search locations they believe the children may be if they are satisfied that parenting time is being wrongfully withheld;
 - e. compensatory parenting time;
 - f. an order for contempt against the claimant and that she pay \$5000 as a fine;
 - g. an order that this matter be set down for trial.
- [3] The claimant opposes the orders sought by the respondent and, in particular, all of the orders seeking to set aside the Order of this Court. The claimant also seeks the following orders:
- a. a divorce under s. 11(4) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.);
 - b. that the respondent be declared in contempt of the Order referred to above and ordered to pay a \$5000 fine with a combination of jail time or, in the alternative to jail time, to perform community service for 30 days;
 - c. pursuant to s. 45(3) of the FLA, the respondent's parenting time be professionally

supervised;

- d. pursuant to s. 211 of the FLA, that an investigation be undertaken and report be prepared by a psychologist in relation to the matters of guardianship, parenting time, parental responsibilities and to make recommendations how they should be allocated between the parties and that the costs of such investigation and report be shared proportionally to the parties' incomes reflective of their income in 2017, and if the parties are unable to reach an agreement on an expert within 14 days hereof, that Mary Korpach be appointed to prepare the said report; and
- e. the respondent be awarded special costs of this application or, in the alternative, that the respondent pay the claimant's costs of this application in any event of the cause with the cost being fixed on a summary basis.

The Contents of Affidavits

- [4] Significant problems arise with the affidavits filed in this case, particularly the 4th affidavit filed on behalf of the respondent.
- [5] An affidavit filed in a family law action must be in form provided in the Supreme Court Family Rules, B.C. Reg. 169/2009. Rule 10-4(12) provides that a person swearing an affidavit must only state what a person would be permitted to state in evidence at a trial. In other words, statements in an affidavit are inadmissible if the statements are not known to the affiant as a matter of personal knowledge or, in limited circumstances, where stated to be on information and belief. Conclusions or opinions of an affiant or statements of argument are not admissible in the form of an affidavit.
- [6] In the 4th affidavit of the respondent, paras. 7 and 8 both refer to something "learned" from an unspecified source, clearly not personal observation nor firsthand knowledge of the respondent. The contents of these paragraphs are not admissible. Paragraph 9 contains three sentences: the first begins with the words "I understand" and is acknowledged not to be firsthand knowledge of the respondent; the second begins with the words "I do not know" and is empty of evidentiary value; and the third is a statement of belief without a source for the basis of belief, and speaks to the thinking process of the claimant, which can never be firsthand knowledge of the respondent. The same comment applies to the contents of para. 19, in which the respondent purports to rely upon a description of the thought process of the claimant when she filed the separation agreement with the FMEP to enforce arrears of family support unpaid by the respondent.
- [7] At para. 13, the respondent refers to signing the separation agreement "under duress and undue influence". There is no factual description of either duress or undue influence. Those are both conclusions of law which are not supported by any factual statement, and are not within the expertise of the respondent. Paragraph 13 is otherwise inadmissible in this form.

- [8] Paragraphs 25, 26, 27, and 41 contain argument, which is not firsthand knowledge of the affiant. Paragraphs 27, 39, and 42 again refer to the respondent's beliefs about facts which are not supported by any stated source. The contents of these paragraphs are not admissible. Paragraphs 43 to 46 lead to a conclusion about what the respondent "would like", which again is not a statement of fact.
- [9] Continuing a paragraph by paragraph review of this affidavit would serve little purpose; an affidavit in the form filed in this case carries little evidentiary weight and has little use or value in this hearing.

Historical Background

- [10] The parties were married on May 25, 2003 in the United Kingdom. They separated on November 1, 2016. There are two children of the marriage: A.S.B., born May 2009, and M.K.B., born May 2012. The parties entered into a separation agreement on March 2, 2017 (the "separation agreement").
- [11] On September 7, 2018, the claimant served the respondent's counsel with an application which was heard on September 21, 2018. The application sought orders for drug testing of the respondent, changes to parenting exchange locations, that the respondent not remove the children from the lower mainland, that the respondent sign passport applications for the children, compensatory parenting time, contempt of the separation agreement for failing to pay spousal or child support, revisions to the protection order and orders under section 231(5) of the FLA for a police enforcement clause, and costs fixed at \$1500 payable forthwith.
- [12] Counsel for the claimant and the respondent had been unable to agree on a hearing date for the application for some months. As a result, the claimant set down the application on a date approximately two weeks after service of the application. Between September 7, 2018 and September 21, 2018, the respondent did not file a response to the application and neither the respondent, his counsel, nor any agent on their behalf attended at the hearing on September 21 to seek an adjournment or otherwise contest the claimant's application. As a result, the matter proceeded on September 21, 2018 in the absence of the respondent or his counsel.
- [13] At the September 21, 2018 hearing, the orders sought by the claimant were granted, including the following specific orders related to drug and alcohol testing:
1. That the respondent undertake drug and alcohol testing:
 - a. every 45 days with a hair follicle test at his own expense at Citahealth Total Health Clinic located at 106-20171 92nd Avenue in Langley, British Columbia V1M 3A5 ("Cita").
 - b. The respondent authorize Cita and/or such other drug or alcohol testing agency to release any and all reports directly to the claimant and counsel for the Claimant; and

- c. The Respondent provide a hair follicle sample at the Cita facility and not simply drop off a sample at Cita for testing.
- [14] As noted above, the respondent's application seeks to vary or set aside portions of the above order and seeks additional orders.
- [15] Between September 21, 2018 and April 1, 2019, the respondent:
- a. has not performed a single hair follicle test;
 - b. has not made payments on costs ordered earlier;
 - c. continues to attend at the exchange of children with other persons;
 - d. asks the children about where the claimant is residing;
 - e. has not made payments of costs payable forthwith for contempt;
 - f. speaks to the children in an intimidating way;
 - g. has failed to provide compensatory parenting time between September 21, 2018 and April 3, 2019; and
 - h. did not apply to set the order aside and made no effort to comply with the order.
- [16] There is no explanation in the material before the court why the respondent did not, either on his own behalf or through counsel or an agent, appear on September 21, 2018, or why no response to the application of the claimant was filed before that date. A review of the fifty-page affidavit of the respondent does not explain either of these problems. The respondent now attempts to rely upon evidence that was available prior to the September 21, 2018 hearing.
- [17] The respondent appears to rely upon section 216(3) of the FLA, which allows a court to change, suspend or terminate an interim order if a change in circumstances has occurred since the interim order was made, or if evidence of a substantial nature that was not available at the time the interim order was made has become available.
- [18] The seminal case in this area is *Miracle Feeds v. D. & H. Enterprises Ltd.*, [1979] B.C.J. No. 1965, which was discussed in *Nichol v. Nichol*, 2015 BCCA 278:
- 35 The framework set out in *Miracle Feeds*, which in my view applies generally to an application to set aside a R. 10-10 final order, provides for the following three part inquiry (appropriately modified for the family context):
- 1) The respondent must establish that he or she did not willfully and deliberately fail to file a Response to the NOFC [Notice of Family Claim]. This inquiry is meant to focus on personal and actual intent of the respondent and not his or her counsel.

- 2) The respondent must establish that he or she applied to set aside the R. 10-10 final order as soon as reasonably possible after having had obtained knowledge of the R. 10-10 final order or, alternatively, must offer a reasonable explanation as to any delay in applying to set the order aside.
- 3) The respondent must establish that he or she has a meritorious defence or at least a defence "worthy of investigation".

37 The factors set out in the *Miracle Feeds* decision are not meant to be applied inflexibly, nor are they immutable: see *H.M.T.Q. In Right of the Province of British Columbia v. Ismail*, 2007 BCCA 55 at para. 11. The discussion by Mr. Justice Voith in *British Columbia (Director of Civil Forfeiture) v. Doe*, 2010 BCSC 940 at para. 15 in the context of the R. 17(12) of the previous Supreme Court Rules is apt:

- [15] ... [I]t does not follow as a matter of necessity that the failure of the defendants to expressly address each of the various requirements set out in *Miracle Feeds* precludes them from being successful on an application under Rule 17(12) [the rule in the previous Supreme Court Rules that permitted a party to apply to set aside default judgment]. These requirements are not immutable. The failure or inability of a defendant to address a particular factor in *Miracle Feeds* is not necessarily fatal. Conversely, there may well be additional factors identified by a defendant which are relevant to its application and to the court's discretion.
- [19] At para. 36 of *Nichol*, the court also says that the above three factors must be "established to the satisfaction of the court through affidavit material filed by or on behalf of the defendant" or be supported by inferences having regard to the totality of the circumstances of the case.
- [20] In *B.K. v. J.B.*, 2018 BCSC 2290 at para. 31, Madam Justice Shergill referred to the decision in *Fitzgibbon v Fitzgibbon*, 2014 BCCA 403 at para. 22, stating "Interim orders are primarily designed to maintain the status quo and to provide short-term solutions until issues regarding the best interests of a child can be fully canvassed at trial".
- [21] Madam Justice Shergill stated the following at para. 34:

At the first stage, the applicant must pass the threshold of establishing a material change in circumstances or new evidence, as required by s. 216(3) of the FLA. A change will not be material "unless it relates to the child's best interests": *K. (B.) v. B. (J.)* at para. 32. A material change is one that "was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order": *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 13.

- [22] The contents of para. 41 of Madam Justice Shergill's judgment is apposite in this case:

I disagree with Mr. B. that the relevant time period for the material change analysis for all of the orders sought starts from the JCC Order. "A function of the material change threshold is to prevent parties from re-litigating issues that were already considered and rejected": *Dedes v. Dedes*, 2015 BCCA 194 at para. 25 citing *Gordon* at para. 15. In the 2017 Decision, Madam Justice

Iyer considered and rejected Mr. B.'s application for overnight visits and travel with D. to Alberta. Any variation of the 2017 Order must therefore be based on any new facts or evidence which have emerged since the 2017 Order.

[Emphasis added]

- [23] The respondent's submissions do not address the Miracle Feeds test. There is no indication in the affidavit materials filed by the respondent of any reason why he failed to file a timely response or, notwithstanding the disagreement of counsel over the hearing date, failed to attend the hearing. Nor is there any indication of why it has taken him over eight months to apply to set aside the order. Given the timing of service, I find that the failure of the respondent to respond with appropriate pleadings or appear in person, by counsel, or by agent, was deliberate.
- [24] In the present case, the respondent appears to be relying on evidence which dates back to the separation agreement around February 2017, and refers to events in 2017 and before September 21, 2018. Clearly evidence was available by September 21, 2018, but the respondent failed to attend the hearing personally, through counsel, or through an agent and present the available evidence or make any reasonable attempt to adjourn the hearing. That evidence could have been considered in this court on September 21, 2018, but no one appeared to advance that proposition on behalf of the respondent.
- [25] Finally, there is no meritorious defence advanced. As a result, the respondent's notice of application seeking to set aside the order made on September 21, 2018, as contained in paras. 1 to 7 inclusive, is dismissed.

The Director of Maintenance Enforcement

- [26] The Director of Maintenance Enforcement (the "Director") was an active participant represented by counsel in this proceeding, although not correctly named in the notice of application of the respondent. The Director became involved because the respondent sought an order to stop enforcement of the separation agreement, which required support payments by the respondent. The Director took no position on the granting of orders set out in paras. 1 to 13 and 15 to 18 of the respondent's notice of application.
- [27] The Director asserts the applicant owes support pursuant to an agreement on March 2, 2017. As of March 22, 2019, the support arrears were in excess of \$20,002.03, inclusive of statutory interest and fees. The Director and FMEP have a statutory mandate to enforce payment of support orders so long as they remain in arrears.
- [28] The Director took the following actions prior to the April 3, 2019 hearing of this matter:

- a. The issuance of a notice of attachment to her Majesty the Queen in Right of Canada pursuant to Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127, s. 15 (FMEA) and the Family Orders and Agreements Enforcement Assistance Act, (R.S.C., 1985, c. 4 (2nd Supp.);
 - b. The issuance of notices of attachment to various parties pursuant to FMEA s. 15;
 - c. The issuance of a Federal License Denial pursuant to the Family Orders and Agreements Enforcement Assistance Act;
 - d. The issuance of a driver's license hold pursuant to FMEA s. 29.1. The hold was withdrawn on March 4, 2019 when the applicant's current employment requiring a driver's license was confirmed; and
 - e. The registration of a charge in the Personal Property Registry pursuant to section 26.1 of the FMEA.
- [29] The Director filed the agreement on title to two properties owned by the applicant pursuant to the FMEA, which acts as security for the support payable.
- [30] With respect to the respondent's application for a general stay of FMEP enforcement, it is open to the respondent to bring an application under the provisions of the FMEA to deal with specific enforcement actions as described below. This is the mechanism provided for in the governing legislation.
- [31] Supreme Court Family Rule 15-4(31) states that at or after the time of making an order, the court may stay the execution of the order until such time as it thinks fit. However, the Rules of Court are procedural in nature and do not create jurisdiction where there is none (see *Dima v. Dima*, 2011 BCCA 86 at para. 12). Therefore, the use of Rule 15-4(31) is predicated on there being legislative authority to apply for a stay. There is no statutory authority to apply for a general stay of enforcement under the FMEA.
- [32] With actions taken under the FMEA, a stay in these circumstances would be directly contrary to the legislation which, for example, requires a debtor to prove a material error in a notice of attachment in order to have it set aside. The respondent has not provided evidence to support the setting aside of any notices of attachment. Furthermore, the inherent jurisdiction of the court may be used to fill gaps in legislation, but not to directly override it.
- [33] Alternatively, if this Court does have the ability to order a general stay of enforcement in exercising its inherent jurisdiction, the applicant has not established that a stay of execution is appropriate in all the circumstances (see *Attorney General of Canada v. Lau*, 2002 BCSC 1155). In these circumstances, it is not necessary for this court to fashion an extraordinary remedy by using inherent jurisdiction to order a general stay of enforcement proceedings.
- [34] The application to stay enforcement of the settlement agreement is dismissed.

Hair Follicle Drug Testing

- [35] The respondent was ordered to complete hair follicle tests every 45 days at his own expense. These tests are designed to provide long-term evidence of drug use. This evidence was sought and ordered as it goes directly to the ability of a parent to protect children and keep children safe. The court would not place children in the care of a parent under the influence of illicit drugs.
- [36] The respondent admitted to drug use and developed a drug addiction. The respondent swore that the claimant became aware of his drug use by talking to friends and relatives. That statement is on its face inadmissible.
- [37] The evidence of the claimant was that she had observed the respondent drinking alcohol and snorting cocaine during the course of the marriage.
- [38] The respondent offered the results of a urine test, which only provides evidence of a few days' drug use or abstinence. In the case at bar, given the length of time the respondent has used drugs, a urine test does not provide the court with any confidence about the use of drugs by the respondent over time. Hair follicle analysis provides reliable drug use data for three months or more. This factual understanding is set out in the case of *S.K.B. v. D.B.S.*, 2017 BSCS 2569 at para. 17.
- [39] In addition, the respondent submitted that he could not provide hair follicle samples because of his religious beliefs. The respondent also submitted that he had been unable to remove his turban as required in his work site, and had been unable to work for a period of time while he sought an accommodation from his employer. He states he therefore temporarily lost his ability to earn income and pay child support.
- [40] However, the respondent noted at para. 18 of his 4th affidavit that he removed his turban and wore a smaller one when he wanted to ride his motorcycle because it was "required by law". The respondent did not address why this same accommodation would not solve the problem of wearing a hard hat.
- [41] Rights to religious beliefs are not absolute and may be limited by the freedoms of others, including the best interests of children. In the case of *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141 at 182, L'Heureux-Dubé J., writing for the majority, stated:

As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion.

- [42] Similarly, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 226, Iacobucci and Major JJ. stated that "although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower".

- [43] When considering an order respecting guardianship, courts are required to consider only the best interests of the children. The best interests of a child involve protecting, to the greatest extent possible, the child's safety and security: FLA, s. 37(3).
- [44] In this case, the safety of the children must be given priority when considering the contact between the children and the respondent, an admitted drug addict. The affidavits of the claimant reveal safety concerns posed by the respondent's drug use. Without the benefit of hair follicle testing to determine whether the respondent is still using drugs, the court cannot know whether the children are safe in the respondent's care. This provides a further reason for this Court to refuse to set aside the portion of the Order made on September 21, 2018 which made hair follicle testing a mandatory legal requirement for the respondent.

Change in Child Support

- [45] In order to provide appropriate evidence for a reduction in child support under s. 152 of the FLA, there must be a material change in circumstance, such as a permanent loss of employment. Generally, a material change must have some degree of continuity, and not merely be temporary: L.M.P. v. L.S., 2011 SCC 64 at para. 35. The onus is on the party seeking a variation to establish such a change: L.M.P. at para 32.
- [46] In the case at bar, the respondent achieved a negotiated accommodation with his employer and returned to work. It is also noteworthy that the respondent provided the Court with no details of when he actually returned to work or for what salary. His loss of work was temporary and would not therefore support a finding of a material change of circumstances. The respondent has not met the burden of establishing a material change in circumstances, and his application to reduce his child support payments is therefore dismissed.

Divorce

- [47] The claimant has proven the grounds necessary for a divorce based on separation of the parties pursuant to s. 8 of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.). The divorce will be effective 31 days after the pronouncement hereof.

Supervision of Parenting Time

- [48] The claimant has sought an order that the parenting time of the respondent be professionally supervised. The respondent opposed this application. Given the refusal of the respondent to comply with the previously-ordered hair follicle tests, I have no confidence in the ability of the respondent to reliably care for his children without supervision. Therefore, I order that parenting time, if any, by the respondent shall be supervised by a professional agency or other party agreed to in writing by the parties until the respondent has provided eight clean hair follicle test results over a period of one year, with hair follicle tests being conducted every 45 days during that said year. A copy of each of the test results shall be provided by the respondent to the claimant within ten days of receipt of each of the eight

test results by the respondent. The cost of the hair follicle tests shall be paid solely by the respondent.

Section 211 Report

- [49] The claimant sought an order that a section 211 report be prepared for the purpose of guiding the court in the preparation of an appropriate parenting plan in this case (FLA s. 211(1) as discussed in *Goudie v. Goudie*, [1993] B.C.J. No. 1049 at para. 33). In the circumstances of this case, the parties shall divide the cost of the s. 211 report in relation to their 2019 Guideline income. The s. 211 report shall be prepared by Dr. Mary Korpach.

Contempt

- [50] Both parties have applied for orders for contempt against the other in relation to these proceedings. There is an existing order for contempt, made against the respondent on September 21, 2018, which has not yet been complied with by the respondent. He must obey that order and fulfill its requirements forthwith. He had made no effort to comply with that order or otherwise purge his contempt.
- [51] That aside, given the limited resources of the parties and the other orders made herein, no further orders for contempt will be made at this time.

Other Orders

- [52] The claimant has also sought orders respecting a variation in his parenting time, compensatory parenting time, police powers if parenting time is wrongfully withheld, and an order that this matter be set down for trial. I do not find it appropriate to grant any of these orders in the circumstances of this case.
- [53] The parenting time variation proposed by the respondent is minor, and does not account for the previously agreed-upon parenting time arrangement on the parties' respective birthdays and Mother's and Father's Day. The respondent has not presented any compelling reason why the current parenting time arrangement should be modified.
- [54] I also do not find that the claimant wrongfully denied the respondent parenting time, and decline to make an order for compensatory parenting time. While the claimant admitted that she denied parenting time in the past, I find that she had appropriate grounds to do so. One instance was after she was involved in a car accident and was advised to have the children rest. Another instance was after one of the children found a substance in the respondent's pocket which was alleged to be cocaine. The respondent denied the allegation, but as noted above, he has not complied with the previous order for drug testing. He has therefore not provided the claimant with assurances of his sobriety.

- [55] Further, the respondent is asking for an order under s. 213 of the FLA that would allow a police officer to apprehend the children if the children have been wrongfully withheld. Section 231 only allows the apprehension of a child if a court determines contact has been wrongfully withheld. Since I have not found that contact has been wrongfully withheld, there is no basis for making this order.
- [56] Finally, with respect, this Court will not direct the holding of a trial in this action at the behest of the respondent unless and until the respondent complies with existing orders including the payment of costs and purges his contempt. The parties are of course free to attempt to arrange a mutually agreeable trial date amongst themselves.

Costs

- [57] The claimant has been substantially successful in the application and is entitled to her costs payable by the respondent forthwith after assessment pursuant to Appendix B of the Supreme Court Family Rules as a matter of ordinary difficulty. The claimant made a claim for special costs, and that claim was seriously considered by this Court. That said, the Court has concluded that, while this case is very close to the threshold for the payment of special costs, in all of the circumstances, special costs will not be ordered in this case.

"Ball, J."

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