

CANADA / JUDGMENT

Lynch v. Lynch

2023 BCSC 1024

COURT

Supreme Court of British Columbia

DECIDED

14 June 2023

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2023 BCSC 1024 Lynch v. Lynch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lynch v. Lynch,

2023 BCSC 1024

Date: 20230614

Docket: E190327

Registry: Vancouver

Between:

Denise Richelle Lynch

Claimant

And

William Gregory Lynch

Respondent

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for the Claimant:

A. James

The Respondent, appearing on his own behalf:

W.G. Lynch

Place and Date of Hearing:

New Westminster, B.C.

December 16, 2022

Place and Date of Judgment:

New Westminster, B.C.

June 14, 2023

Introduction

- [1] In this application, the claimant Denise Lynch is seeking to have fines imposed on the respondent William Lynch, to address his conduct after the parties arrived at an order that concluded the family action between them. These fines are sought pursuant to s. 230 of the Family Law Act. In the alternative, she asks that the respondent be found in contempt of certain provisions of that order.
- [2] The respondent denies having acted improperly in any respect after the order was pronounced.

Background

- [3] The parties were married in 1989 and separated in 2018.
- [4] The claimant deposes that she has been unemployed for more than 30 years. Besides spousal support, her only other income is from CPP disability benefits, which she receives as a result of her chronic health conditions.
- [5] The respondent is a portfolio manager who earns a substantial income in that role.
- [6] Their only child was born in 1991. He also suffers from chronic health conditions, is unable to work, and requires support for his living expenses to supplement the disability payments that he receives from the provincial government.
- [7] The order in question was granted on April 30, 2020. The family action was not defended by the respondent, so the order was granted without an oral hearing, pursuant to Rule 10-10 of the Supreme Court Family Rules (also known as a desk order divorce). However, both parties were represented by counsel in the discussions that led to the order being granted, and it was intended as a settlement of all outstanding matters between them. For that reason, the claimant and her counsel refer to it as a consent order, and I will use that term as well.
- [8] In addition to granting the parties a divorce, the consent order addressed spousal support, division of family property and debt, and the parties' continuing support of their son by payments to him of \$500 each per month.
- [9] Additional terms that are relevant to the present application are that the respondent would:

- Amend his will to provide that 50% of the after-tax proceeds of the sale of his "book of business" as a portfolio manager would be paid to the claimant. (The order characterized the book of business as a family asset that was subject to equal division between the parties whenever it was "realized");
- Designate and maintain his estate as the beneficiary of his RRSP/RIF and TFSA accounts. (Their son was to receive not less than the first \$900,000 of the estate under the respondent's will); and
- Update the claimant annually on her entitlement as a beneficiary under two insurance policies that were held by him. The parties' son was to be the beneficiary of the remaining proceeds of one of the policies. (The respondent was also to be a beneficiary under a policy held by her, and was to be updated by her in the same way.)

Behaviour Leading to the Present Application

- [10] The first difficulty that arose is that the claimant's counsel was unable to obtain confirmation from the respondent that he had complied with the requirements to amend his will on the proceeds of the sale of his book of business and designate his estate as the beneficiary of his RRSP/RIF and TFSA accounts. The claimant had to make a court application in September 2019 to enforce his compliance with these requirements.
- [11] In his response to that application, the respondent, who was no longer represented by counsel, expressed a different understanding of some of the terms of the consent order than the claimant had put forward. Most importantly, he took issue with the provision dealing with the claimant's interest in the sale proceeds of his book of business. He claimed that he had never agreed to this provision, because it would have granted the claimant a share of the ownership of his actual business. In the event that he was unsuccessful in that argument, he sought an order that she contribute to the business's operating expenses on the basis of her "ownership".
- [12] Next, in November 2020 the respondent, who held a power of attorney for the claimant's stepfather (and was also designated as his executor), began a civil action on the stepfather's behalf against a trust that the claimant's mother had set up to provide income to herself and the stepfather. The action was also brought against the claimant as its trustee. The notice of civil claim alleged that the claimant had mishandled the trust in various ways, which had prejudiced the interests of the stepfather, who was then in care due to advanced Alzheimer's.
- [13] The claimant deposes that she felt so stressed by being opposite the respondent in another court action that she designated their son to act as the trustee in her place. (Before this action by the respondent, the claimant had filed a petition to have him removed as the trustee of that trust. He eventually agreed to step down without the necessity of a court application, although the trust incurred legal fees to file the petition.)

- [14] A trial date in that action was set for October 2022. In August of that year, the respondent wrote to the claimant's counsel and said that if she did not make him a settlement offer he would remove the parties' son as a beneficiary of one of his life insurance policies.
- [15] He then filed a notice discontinuing that action, which incorrectly asserted that a notice of trial had not been filed yet. The claimant's counsel made a successful application to have the notice of discontinuance set aside. The action was eventually the subject of a consent dismissal.
- [16] The trust spent over \$100,000 in legal fees to defend this action. The claimant says she wished to run the trial in order to obtain costs against the respondent, but decided on the consent dismissal to avoid depleting the trust's resources any further.
- [17] After the consent dismissal, the claimant's counsel wrote to the respondent seeking his confirmation that the claimant remained the beneficiary of the two insurance policies specified under the consent order. He replied that he had never received that claimant's "end of the bargain" under the consent order, and that she was four years in arrears of her required contributions to his business. The claimant takes the position that such contributions are not required of her.
- [18] The respondent then demanded that the claimant provide proof of her monthly payments to their son as required under the consent order. He also demanded that all communications between the claimant's counsel in the family action and counsel in the civil proceeding be preserved, made allegations of misconduct against counsel in the civil proceedings, and advised the claimant's counsel that the present application had given him his "second wind."
- [19] As of December 6, 2022, when the claimant swore her most recent affidavit, he had not made his payment to their son for November of that year, although their son deposes in a more recent affidavit that he received the payment on December 9. Their son advises that the respondent also provided the claimant's counsel the required confirmation with respect to the insurance policies, and repeated his demand that the claimant provide contributions to the expenses of his business.

The Respondent's Explanations

- [20] His affidavits responding to this application simply attach documents (including proof of the current state of the two life insurance policies and his make-up payment to his son). However, his application response was very detailed and so I permitted him to affirm the truth of its contents during the hearing, thus allowing it to stand as further evidence on his behalf.

- [21] He explains that after the consent order was "executed" in December 2019, but before it was actually filed in April of 2020, he noticed that it contained a clause that he had not agreed to during the negotiations leading up to it. I infer from his description of it ("the claimant would have legal ownership of half my business"), which is similar to his response to the enforcement application, that it was the term that designated his book of business as a family asset, and subject upon its sale to equal division of the proceeds between the parties.
- [22] When he decided to pursue his lack of agreement to this term against his lawyer's advice, his lawyer withdrew. He went on to pursue it in his response to the claimant's application to enforce the consent order, as I have previously indicated, and acknowledges that he was not successful in that effort.
- [23] He regards the claimant's interest in his business as the result of a "windfall erroneous clause" in the consent order, and therefore considers himself to have been justified in demanding contributions to business expenses from her.
- [24] He takes the position that the trust litigation was undertaken as his fiduciary duty under the power of attorney granted by the claimant's stepfather and as the stepfather's executor, and that in any event it has nothing to do with the family litigation.
- [25] He concedes that it was a mistake to file the notice of discontinuance in that action, and notes that he promptly paid the costs that were ordered when it was set aside.
- [26] With respect to the threat to remove their son as a beneficiary of his insurance to obtain a settlement in the trust action, he points out that under the consent order he is not required to maintain any insurance for their son on one of the policies, and that on the other policy their son and the claimant are irrevocable beneficiaries. I took him to be saying that whatever criticism may legitimately attach to that threat, it would not have involved a breach of the consent order.
- [27] He adds that the claimant also failed to disclose her insurance coverage to him for three years, which he has never brought an application to enforce.
- [28] Finally, he says his missed payment to the parties' son in November 2022 resulted from either an error on his part or a refusal by their son to accept it. He made it up promptly upon learning of the difficulty, and it was his first such omission since the consent order was reached. In short, it was not an "egregious" breach, he maintains, and it has been rectified.

Discussion

- [29] Section 230 of the FLA provides that "[f]or the purposes of enforcing an order made under" it, the court may order a party to provide security, pay the expenses incurred by the other party, provide an amount not exceeding \$5000 for the benefit of that other party, or pay a fine not exceeding that amount.

- [30] It has been observed that this section is "designed to enforce and secure a person's future compliance" with orders made under the FLA: *Kanta v. Kanta*, 2017 BCSC 2321 at para. 19. Such orders "may be necessary to impart on one or both parties that they are bound by the FLA and must comply with court orders": *A.J.F. v. N.L.S.*, 2020 BCSC 26 at para. 85.
- [31] This crucial focus on securing future compliance is demonstrated by the decision of *D.Z. v. R.H.Z.*, 2020 BCSC 891 at para.185, in which a party's past failure to abide by orders that had since been superseded was found to be insufficient to justify the application of this section.
- [32] The most straightforward issue here is with respect to the trust action. It is impossible to determine its merits based on the current material, but even if it was without merit I am unable to find that it gives rise to any concern about the respondent's future compliance with the consent order, or any other orders in the family action. If it was brought vindictively and in the absence of evidence, as the claimant appears to believe, then the appropriate remedy would have been an application for special costs in that action, once the respondent's attempt to discontinue it had been defeated.
- [33] Further, while the respondent's threat to remove the parties' son as a beneficiary of an insurance policy to coerce a settlement of that action does him no credit on a human level, he is correct in his reading of the consent order that the required designation for their son is under only one of the policies, and is irrevocable, so the threat did not raise an issue of compliance with the order. Once again, special costs against him in the civil action might have been an appropriate recourse.
- [34] A family litigant who truly seeks to use parallel civil actions to harass the opposing party or gain a tactical advantage in the family action could in theory be made the subject of a conduct order that required that such civil actions be subject to prior court approval. But such a motive on the respondent's part has not been demonstrated here, and in any event the claimant has not proceeded under s. 222 of the FLA, which deals with conduct orders.
- [35] The respondent's position on confirming that his will had been changed to make the claimant the 50% beneficiary of the proceeds of his book of business is supported by his contemporaneous response to the enforcement application, which asserted his belief that the applicable provision in the consent order had been inserted without his agreement. Even if the consent order was properly concluded by his counsel acting with ostensible authority on his behalf, as seems likely, it cannot be said that his contrary view reflected a wilful refusal to comply with the consent order as it stood, so as to require the enforcement of his future compliance with it. In fact, he describes himself as having been unsuccessful in establishing his version of events at the enforcement application, and therefore being bound by the outcome.
- [36] His requests for contributions by the claimant to the expenses of his business are ill-advised, but they reflect his fixed belief in the consequences of the consent order, rather than an intention not to comply with it. If it assists him in letting go of that issue, I would not interpret the disputed provision as granting the claimant an ownership interest in his actual

business, as he believes, only a right to receive an equal share of the eventual sale of the business's key asset, which was found to be family property. She is therefore under no obligation to contribute to his business expenses.

- [37] Both parties were apparently in default of their obligation to confirm the other's entitlements under their respective insurance policies, so pointing out the claimant's complicity in that failure cannot reasonably be interpreted as an unwillingness by the respondent to comply with the consent order. Nor can his request that she confirm her contributions to the support of their son since the order be interpreted in that manner.
- [38] Finally, his late payment to their son for November appears to have been the only such omission on his part since the consent order was reached, and falls short of demonstrating a disregard for the order that needs to be addressed.
- [39] As a result, while the evidence certainly shows that the respondent has a disagreeable manner of communicating with the claimant's counsel (which benefits no one in this process, least of all himself), very little of his actual conduct actually supports the need to enforce future compliance with the consent order. Having a poor attitude towards the claimant in general is not within the ambit of s. 230.
- [40] For the same reasons, these actions would not rise to the level of a wilful refusal to comply with the order, so as to support a finding of contempt.
- [41] The one exception to the application of s. 230 here is that the term of the enforcement order that requires the respondent to confirm that his estate is the beneficiary of the RRSP/RIF and TFSA accounts still has not been complied with. Standing alone, I think his need to comply with that term can be adequately emphasized by imposing a fine of \$750, which will be suspended on the condition that he provides the ordered information to the claimant's counsel within 14 days of these reasons for judgment. If he has already provided the information but reference to it was inadvertently omitted from the application material, the fine will be suspended upon his confirmation to the claimant's counsel of that previous disclosure.
- [42] In my estimation the claimant has not had substantial success in comparison to the relief sought, so the parties will each bear their own costs.

"Schultes J."

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