

CANADA / JUDGMENT

N.P.G. v. R.G.

2024 BCSC 680

COURT

Supreme Court of British Columbia

DECIDED

7 March 2024

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2024 BCSC 680 N.P.G. v. R.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.P.G. v. R.G.,

2024 BCSC 680

Date: 20240307

Docket: E-21682

Registry: Terrace

Between:

N.P.G.

Claimant

And

R.G.

Respondent

Before: The Honourable Mr. Justice Stephens

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

J.M. Reid

The Respondent, appearing in person:

R.G.

Place and Date of Hearing:

Terrace, B.C.

March 6-7, 2024

Place and Date of Judgment:

Terrace, B.C.

March 7, 2024

- [1] THE COURT: The parties are engaged in family law litigation and have two children, aged ten and six. I am advised that the parents currently share parenting time with the children on a week-on/week-off basis.
- [2] By order of the Provincial Court dated March 31, 2023, the oldest child is represented by legal counsel appointed by the Child and Youth Legal Centre. This legal counsel for the child did not appear at this hearing and made no submissions.
- [3] The notice of application before me was filed on September 13, 2023 and was previously heard by Justice Kirchner. In reasons given by Kirchner J. on September 25, 2023 (the "Kirchner Reasons"), Kirchner J. disposed of all but paras. 1 and 6 of the relief sought, which he adjourned. So, paras. 1 and 6 of this application are that which is before me.

The Application

Part 1 of the Notice of Application

- [4] Part 1 of the relief sought on the notice of application, which was subsequently modified by a letter from N.P.G.'s counsel on October 23, 2023, seeks as follows:
1. An Order pursuant to s. 228 and 230 of the Family Law Act [and section 231] that the Respondent be placed in gaol for attending at and breaking and entering into the Former Family Home ("FFH") located at [and then the address of the former family home is listed] contrary to the Order for Exclusive Occupancy made by Master Harper on March 16, 2023.
- [5] Paragraph 6 of the notice of application, relief sought, seeks:
6. An Order pursuant to section 228 of the Family Law Act that the Respondent pay a fine into a RESP for the benefit of the children for the following:
 - a. discussing inappropriate adult, court, or legal matters with the children
 - b. blaming, criticizing, and disparaging the other parent to the children
 - c. failing to refrain from any negative, hostile criticism, communication, or argument in front of the children

contrary to the Conduct Order made by Judge Bernt on March 31, 2023.

Discussion

Order Seeking Imprisonment

- [6] Associate Judge (formerly referred to as Master) Harper made an order on March 16, 2023, giving the claimant, exclusive occupancy of the former family home (the "FFH").
- [7] The claimant, N.P.G., contends that the respondent, R.G., entered into the FFH on April 6, 2023 without her consent. The respondent, acknowledges to the Court that he was present in the FFH on April 6, 2023 but asserts that he had her consent to do so.
- [8] A protection order was made against R.G. by this Court on April 26, 2023. That order also restrained R.G. from attending at or near the FFH.
- [9] In addition, by order of Justice Power of this Court on April 13, 2023, there was an order that R.G. is restrained from attending at or near or entering the FFH.
- [10] I have not been referred to any evidence that R.G. has visited the FFH without consent or otherwise since August 2023. In August 2023, he did so but in the presence of an intermediary.
- [11] Section 231 of the Family Law Act, S.B.C. 2011, c. 25 (the "Act") reads as follows:
- 231 (1) This section applies if
- (a) a person fails to comply with an order made under this Act, and
 - (b) the court is satisfied that no other order under this Act will be sufficient to secure the person's compliance.
- (2) Subject to section 188 [enforcing orders respecting protection], the court may make an order that a person be imprisoned for a term of no more than 30 days.
- (3) For the purposes of subsection (2),
- (a) a person must first be given a reasonable opportunity to explain the person's non-compliance and show why an order under this section should not be made,
 - (b) for the purpose of bringing a person before the court to show why an order for imprisonment should not be made, the court may issue a warrant for the person's arrest, and
 - (c) imprisonment of a person under this section does not discharge any duties of the person owing under an order made under this Act.

- (4) If satisfied under section 61 [denial of parenting time or contact] that a person has been wrongfully denied parenting time or contact with a child by the child's guardian, a court may make an order requiring a police officer to apprehend the child and take the child to the person.
- (5) If satisfied that a person having contact with a child has wrongfully withheld the child from a guardian of the child, a court may make an order requiring a police officer to apprehend the child and take the child to the guardian.
- (6) For the purpose of locating and apprehending a child in accordance with an order made under subsection (4) or (5), a police officer may enter and search any place the police officer has reasonable and probable grounds for believing the child to be.
- [12] Sections 228 to 231 of the Act are not intended to punish but to secure compliance with court orders.
- [13] The measures set out at 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 Act: O.P. v. J.D.P., 2022 BCSC 1823 at para. 239, citing A.J.F. v. N.L.S., 2020 BCSC 26 at paras. 75, 83-86.
- [14] Remedies available under ss. 228 and 230 empower the court to provide progressively more serious responses as a particular case may dictate. More importantly, the court's objective should be to fashion a remedy that ensures compliance while addressing the prospective situation before the court: O.P. at para. 239.
- [15] As stated by Kirchner J., a court jailing or incarcerating a party within a family law proceeding is extraordinary: Kirchner Reasons at para. 8.
- [16] Section 231 of the Act provides for a last resort remedy for breaches of orders under the Act.
- [17] Whether a breach of an order has occurred is to be determined objectively, considering the conduct at issue, along with the surrounding circumstances at the time: O.P. at para. 238, citing A.N. v. A.M.N., 2021 BCSC 2228 at para. 34.
- [18] Where there is conflicting evidence about whether a breach of an order occurred or not, depending on the nature of the conflicting evidence and the other circumstances, it may not be possible for the court to determine whether a party has complied with an order or not: Kirchner Reasons at para. 19.
- [19] Returning to the allegation of the breach by the respondent R.G. of Associate Judge Harper's exclusive occupancy order, as stated at this hearing, while R.G. asserts or acknowledges that he was present at the FFH on April 6, 2023, he claims that he had N.P.G.'s consent. He suggested, among other things, in his submissions that consent was provided by N.P.G. to a third party.

- [20] He has provided no affidavit deposing that he had N.P.G.'s consent or how he obtained it. In essence, he has provided no affidavit evidence at this hearing responsive to the assertion that he breached the exclusive occupancy order on April 6, 2023, although he denies a breach in his submissions.
- [21] N.P.G. relies on the fact that R.G. has no affidavit evidence in support of his argument that the relief sought against him for imprisonment or a fine should not be granted. N.P.G. urges the Court to rely on the absence of evidence by R.G. to make a finding of breach against him.
- [22] The situation of a self-represented litigant like R.G. making submissions to the Court in chambers on a point central to an application, but without evidence, presents a difficulty for the Court where, as here, the Court is asked to make a finding based on evidence whether R.G. has breached the order or not.
- [23] That difficulty of a self-represented litigant making submissions without affidavit evidence was addressed by the Court of Appeal in the case of *Rahman v. Windermere Valley Property Management Ltd.*, 2022 BCCA 258. While there are factual differences between that case and the case before me, the statements from the Court of Appeal, including at paras. 38 to 43, in my view, are relevant to this case.
- [24] The Court of Appeal states in *Rahman* that a chambers judge has several options at their discretion in circumstances where a self-represented litigant makes submissions about factual matters not contained in affidavit evidence. For example, it is open for a chambers judge, in their discretion, to give weight to unsworn evidence of a self-represented litigant, or, at their discretion, to adjourn the hearing and require that the self-represented litigant return with a further affidavit that reflects their in-court statements. A balancing exercise must be undertaken by the chambers judge to determine what is appropriate: paras. 35, 43.
- [25] In my view, it would be unfair to N.P.G. to solely rely on R.G.'s in-court statements in his submissions to find that there is a conflict in the evidence and then dismiss her application at para. 1 of the notice of application on this basis. N.P.G. has submitted that she has been negatively affected by what she characterizes as a break-in and entry by R.G. to the FFH on April 6, 2023 without her consent.
- [26] At the same time, I acknowledge that the relief sought against R.G. for this alleged breach is serious; among other things, an order for imprisonment is sought under s. 231. In my view, I must consider the rule of proportionality in R. 1-3(2) of the Supreme Court Family Rules in this regard.
- [27] N.P.G. further submits that R.G. has had many months to respond to the allegations against him and that it is unlikely and implausible that he, in fact, had N.P.G.'s consent to enter the FFH on April 6, 2023. Nevertheless, before me, R.G. maintains that he did have consent, and he also says that he was, earlier in these proceedings, confused about what date this alleged breach of the exclusive occupancy order was alleged to be.

- [28] R.G. submits today at this hearing that he is a self-represented litigant and he did not appreciate that he was required to file an affidavit to respond to the allegations against him in order for the Court to consider his statements about such matters in its consideration of this notice of application.
- [29] Given the seriousness of the allegation against R.G. and the relief sought against him, including imprisonment, I conclude reluctantly that this application should be adjourned, but with an order that R.G. be permitted to file an affidavit responsive to the allegations of his breach on April 6, 2023, so that this matter can be properly determined by a court.
- [30] I add that N.P.G. alleges breaches of the exclusive occupancy order of Associate Judge Harper on other occasions other than April 6, 2023. She submits that a pattern of non-compliance of the order exists. R.G. disputes breaching the order on other occasions.
- [31] My order permitting R.G. to file an affidavit in response to the April 6, 2023 incident does not preclude him from responding to allegations that he breached the exclusive occupancy order on other occasions as well.
- [32] I add that R.G. remains subject to Associate Judge Harper's exclusive occupancy order that N.P.G. shall have exclusive occupancy of the FFH. He also remains subject to the protection order Justice Punnett made on April 26, 2023, and the order of Justice Power of April 13, 2023.
- [33] I add that nothing in my reasons relieves R.G. of his obligation to present his case in court proceedings in accordance with the Supreme Court Civil Rules and the rules of evidence in any future hearing, including through tendering affidavit evidence where appropriate to substantiate relevant factual assertions relied on in this Court.
- [34] These reasons make clear to R.G. that at further hearings, he must file proper evidence in order to substantiate factual assertions he intends to rely on in court.

Order for a Fine for Non-Compliance with Judge Bernt's Conduct Orders

- [35] N.P.G. also seeks an order for a fine for a breach of para. 8 of Bernt P.C.J.'s order dated March 31, 2023.
- [36] Paragraph 8 of Bernt P.C.J.'s order reads:
8. The parties shall:
 - a. put the best interests of the children before their own interests;
 - b. encourage the children to have a good relationship with the other parent and speak to the children about the other parent and that parent's partner in a positive and respectful manner;

and

- c. make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of the children.
- [37] I was referred to, by N.P.G., several pieces of evidence advanced to support her contention that there has been a breach by R.G. of para. 8 of Bernt P.C.J.'s order.
- [38] As for the relief sought for imprisonment, previously addressed, the request for an order for a fine is a remedy that requires evidence capable of persuading the court that a breach or breaches of an order have occurred. In the event there were a conflict in the evidence, depending on the nature of the conflict and other circumstances, it may be the case that it would not be possible for the court to conclude a breach occurred and impose a fine for any such breach.
- [39] Here, N.P.G. does depose at para. 38 of her Affidavit No. 11 that after September 13, 2023, R.G. continued to say negative things to the children about her, and she described the Wednesday calls: "he routinely calls me a bitch or makes disparaging remarks about me to the children during these calls." This affidavit was sworn by N.P.G. in January 2024, and filed on January 18, 2024, after the hearing before Kirchner J. Such evidence, it is argued by N.P.G., demonstrates that R.G. contravened para. 8 of Bernt P.C.J.'s order.
- [40] R.G. denies the evidence against him but again has failed to file an affidavit doing so. He submits that being a self-represented litigant, he did not appreciate that he needed to do so. The Court is thus left with a serious allegation against R.G. being unaddressed in affidavits from R.G. who, before this Court, denies the allegations.
- [41] I decline to accept R.G.'s in-court statements and give them weight as a matter of evidence in the absence of affidavit evidence from him about such matters. However, for reasons similar to those expressed in respect of my disposition about para. 1 of the notice of application, given that an allegation of a breach of a court order is very serious, I find that this part of the application also should be adjourned in order that R.G. be permitted to file an affidavit responding to this part of the application, so that it can be properly determined by the court.
- [42] However, in granting an adjournment, I will expand the conduct orders previously granted, adding an additional conduct order which I regard as in the best interests of the children. The new conduct order which I make under s. 227 of the Act is: "The parties will not blame, criticize, or disparage the other parent to the children." At the hearing of this application, R.G. advised that he would consent to such an order.

Orders Made

- 1) The hearing of the relief sought at paras. 1 and 6 of the notice of application is adjourned generally and may be reset to a date and time after ten days from the date of this order.

- 2) The respondent shall be granted leave to file an affidavit containing his evidence in response to the allegation he breached Associate Judge Harper's exclusive occupancy order, and in response to the allegation he breached para. 8 of Bernt P.C.J.'s order dated March 31, 2023, within ten days of this order or such further time period as may be ordered by the Court.
- 3) Pursuant to s. 227 of the Family Law Act, the Court orders that the parties will not blame, criticize, or disparage the other parent to the children.
- [43] I add that I am not seized of this application.
- [44] Finally, I should ask that -- I will ask, Ms. Reid, for you to prepare the order from this, but at this point, I would just ask if there are any submissions on costs.
- [45] R.G., you can see I am giving you ten days to file an affidavit. You understand that, do you?
- [46] R.G.: Yes, Your Honour, is that ten business days or ten calendar days?
- [47] THE COURT: It is ten days.
- [48] R.G.: I just wanted to be [inaudible].
- [49] THE COURT: I am not certain if it falls on a Sunday.
- [50] R.G.: It does, Your Honour.
- [51] THE COURT: Then I will amend my order to make it 11 days, so that it expires on the Monday.
- [52] R.G.: Thank you, Your Honour.
- [53] THE COURT: So there will be just a correction in my order that instead of -- in para. 1, instead of ten days from the date of the order, it will be 11 days, and then in para. 2, the time period for R.G. to file an affidavit will be within 11 days of this order or such further time period that the Court may order.
- [54] May I have submissions on costs, Ms. Reid, hearing from you first, please.
- [55] CNSL J. REID: Yes, Mr. Justice, may I also have an order waiving Mr. -- the requirement for R.G.'s signature on the order?
- [56] THE COURT: All right. R.G., I am inclined to make that order.
- [57] R.G.: I have no objection to that one, Your Honour.
- [58] THE COURT: Ms. Reid, I grant that order. So, I will add in an order -- an additional order is that -- I believe Judge Kirchner did as well, if I am not mistaken.
- [59] CNSL J. REID: In addition, Mr. Justice, in the event that R.G. prepares an affidavit with contents that -- where it could be in conflict with anything else, I certainly would be -- that does not preclude us from filing a further affidavit in response, I gather?

- [60] THE COURT: Nothing in my order would preclude that. It would be -- so there is nothing that precludes it or permits it. It would be up to the chambers judge if there were an objection to that, the chambers judge hearing the application, but nothing in my order precludes that.
- [61] R.G.: Would I then be able to --
- [62] CNSL J. REID: Fair enough.
- [63] R.G.: -- [indiscernible] time to respond to theirs?
- [64] THE COURT: That again, R.G., would be up to the chambers judge hearing that I am giving you an opportunity to respond within ten days
- [65] R.G.: Yes, Your Honour.
- [66] THE COURT: And I am ordering that the application be reset -- 11 days -- and resetting it after that. If there are further affidavits that are exchanged between the parties and there are objections, it will be up to the chambers judge to -- I do not wish to make an order binding on the chambers judge about how that is --
- [67] R.G.: Your Honour, for the sake of saving the Court's time, is it possible to actually seize you for that?
- [68] THE COURT: Well, I am -- I have directed I am not seized of this application.
- [69] I would like to hear submissions on costs of this application.
- [SUBMISSIONS ON COSTS]
- [70] THE COURT: I can make an order on costs now.
- [71] Ms. Reid, I will say at the outset, I do not regard myself to be -- I do not regard to be before me the matter of costs of earlier, I am not satisfied that has been set down before me. What I am satisfied that I can address is costs of this appearance and I take it that you are seeking costs thrown away from this appearance, which I believe you contend has been unnecessary because it has had to be adjourned, as I have said. I have considered your submissions and R.G.'s submissions.
- [72] I am going to make an order and, Court Clerk, it will be an additional order that the costs of this appearance of March 6 and 7, 2024, on this application, that is, on the hearing of the application, the notice of application filed September 13, 2023, paras. 1 and 6, costs of this appearance, March 6 and 7, shall be at the discretion of the judge hearing this application on its merits. That is my order.
- [73] R.G.: I'm sorry, Your Honour [inaudible/overlapping speakers] --
- [74] CNSL J. REID: [Indiscernible] Mr. Justice --
- [75] R.G.: -- than that to [indiscernible] --

- [76] THE COURT: No, I am saying it will be for the judge hearing this application when it comes back for hearing to decide costs.
- [77] R.G.: Understood, sorry, Your Honour.
- [78] THE COURT: Ms. Reid had asked me a question, yes?
- [79] CNSL J. REID: Yes, Mr. Justice, so this application on the last date was adjourned to November, and the issue of costs wasn't dealt with, with respect to the two days in October and November when we were before the Court in relation to this application. So, the Court's not willing to entertain that at this point?
- [80] THE COURT: Well, I just do not think it is before me. I do not -- I am not aware of what -- how that would be before me.
- [81] CNSL J. REID: Okay, then I will make sure that I include that going forward.
- [82] THE COURT: Yes, and that -- but however, for the next judge hearing this, I have made an order that is before that judge, but I am not aware of any similar order putting that before me --
- [83] R.G.: My apologies, Your Honour.
- [84] THE COURT: -- to me, so I am not denying that, Ms. Reid, I am just saying it is not something I consider to be before me right now.
- [85] CNSL J. REID: And -- yeah, okay, fair enough, and I have no doctor's note. I have never seen a doctor's note in relation to this. There's a letter from one -- from the plastic surgeon that has nothing to do with that particular week. Other than that, there's no doctor's note.
- [86] THE COURT: All right. I just wanted, before we move on, Court Clerk, this is Judge Stephens, can you hear me?
- [87] THE CLERK: Yes, I can, Justice.
- [88] THE COURT: I just want to make sure that you have the orders that I have made, and just so that it is clear, this was in reference to the notice of application filed September 13, 2023, it was the hearing of paras. 1 and 6 of that. Did you want me to repeat the order or do you have that?
- [89] THE CLERK: I have them. The only thing I would like to clarify, is it paras. 1 through 6 or 1 and 6.
- [90] THE COURT: One and six.
- [91] THE CLERK: Thank you, Justice, I have the rest of the order.

- [92] THE COURT: And just for clarity and the abundance of caution, because I did change the date, the first order I made is that the hearing of the relief of paras. 1 and 6 of the notice of application is adjourned generally and may be reset to a date and time after 11 days from the date of this order. Do you have that? That is now 11 days.
- [93] THE CLERK: Yes.
- [94] THE COURT: The second order, I -- the order that R.G. should be granted leave to file an affidavit containing his evidence in response to the allegation he breached Associate Judge Harper's exclusive occupancy order and his response to the allegation of breach of para. 8 of Judge Bernt's order made on March 31, 2023, within 11 days of the date of this order, or such further time period as ordered by the Court. Do you have that?
- [95] THE CLERK: Yes, Justice.
- [96] THE COURT: All right, very well. And then I made order number 3, which was the conduct order, the parties will not blame, criticize, or disparage the other parent to the children; and number 4, I ordered that I am not seized of this application; number 5, I requested that Ms. Reid prepare the order emanating from these reasons; and number 6, I directed that R.G.'s signature on the form of order be dispensed with.
- [97] THE CLERK: Justice, I -- I did miss one in there. You said you are seized of this application?
- [98] THE COURT: Am not.
- [99] THE CLERK: Thank you.
- [100] THE COURT: And then I made the costs order.
- "Stephens J."

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Prepared on 26 October 2026 · Esheria