

CANADA / JUDGMENT

O.K. v. I.C.M.

2023 BCSC 1893

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1893 O.K. v. I.C.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

O.K. v. I.C.M.,

2023 BCSC 1893

Date: 20231030

Docket: E59382

Registry: Kamloops

Between:

O.K.

Claimant

And

I.C.M., Augustin Nertan and Igor Bibko

Respondents

Before: The Honourable Madam Justice Sharma

Supplemental Reasons for Judgment

Counsel for the Claimant:

C. Soll

Counsel for the Respondent I.C.M.:

M. Chiu

Place and Date of Trial/Hearing:

Kamloops, B.C.

October 5, 2023, 2022

Place and Date of Judgment:

Kamloops, B.C.

October 30, 2023

Table of Contents

I. Overview... 3

II. Error and Omission.. 5

A. Mathematical Error 5

B. Passport 6

III. Adjustments to Amounts Awarded.. 6

A. Adjustment to Lump Sum Payment 7

1. Relying on Assessed Value. 9

2. Insufficient Notice. 9

B. Section 7 Expenses. 10

IV. Special Costs.. 10

A. Reprehensible Conduct Deserving of Rebuke. 13

1. Pursuing Claims without a foundation. 13

2. Allegations of Fraud and Dishonesty. 16

3. Making the Litigation More Difficult 17

4. Party Litigating to Financially Punish Opposing Party. 19

B. Analysis. 20

V. ADDITIONAL ORDERS.. 21

A. Conduct of Sale of Property 2. 21

B. Conduct Order 22

C. Legal Costs under the Consent Order 25

VI. FURTHER SUBMISSIONS.. 27

I. Overview

- [1] These reasons address some issues that have arisen after judgement was issued in this matter on August 24, 2023: O.K. v. I.C.M., 2023 BCSC 1469 ("RFJ").
- [2] I reproduce paragraphs 1 to 5 of the RFJ to briefly explain what that trial was about.
- [1] This action was resolved by a consent order entered on November 5, 2020 (the "Consent Order"). The respondent I.C.M. now seeks to set aside the Consent Order. The Consent Order was a final order, so his application to set it aside was heard by way of conventional trial.
- [2] The Consent Order resolved matters in this litigation relating to parenting, property division, child support, and spousal support. Both parties were represented by counsel during the negotiations and finalization of the Consent Order.
- [3] The respondent seeks to set aside the Consent Order, in whole or in part, on the basis of duress, unconscionability, and/or lack of authority of his counsel to agree to the terms. His pleadings also refer to fraud, illegality, and lack of financial disclosure.
- [4] As set out in this judgment, I conclude that The respondent has failed to establish, on either an evidentiary or a legal basis, any ground for setting aside the Consent Order. I find the allegations he has made in this respect are not supported by the evidence adduced at trial. He also raised numerous superfluous issues that obfuscate the actual legal issues at play.
- [5] Credibility was a key issue at trial. Both parties testified. For reasons explained in this judgment, I place minimal or no weight on The respondent's version of events absent corroboration from other credible and reliable sources of evidence, as I find both his credibility and reliability were severely diminished due to numerous contradictions in his evidence and changes in his positions. By contrast, I generally find the claimant, O.K., to be a reliable and credible witness. Based on the entirety of the record--including The respondent's testimony, and the "evolution" of his pleadings and positions on certain issues--I dismiss his application.
- [3] I will use in this judgment the same defined terms as used in the RFJ.
- [4] In the RFJ, I gave leave for the parties to request a brief hearing before me, if necessary, to address two potential issues: (i) whether adjustments should be made to amounts awarded based on the passage of time (RFJ at para. 181), and (ii) costs (RFJ at para. 184). That request was made and a hearing was held on October 5, 2023.
- [5] Since delivery of the RFJ, the respondent has filed a notice of intention to act in person in this Court; he has also appealed the RFJ and retained new counsel for the appeal. However, counsel who represented him at trial (but no longer represents him) did appear at the October 5, 2023 hearing for the purpose of speaking to issues arising from the RFJ, given his obligation to settle the order.

- [6] The claimant filed an affidavit on October 4, 2023. It is 43 pages long, but 39 of those constitute the exhibits, consisting of:
- a) a one-page letter dated August 17, 2023, sent to the respondent from the claimant's lawyer;
 - b) about 25 pages of email correspondence between the claimant and the respondent;
 - c) a two-page BC Assessment Notice of one of the properties the respondent retained after the parties' separation; and
 - d) 11 pages of information the claimant received from Family Maintenance Enforcement Program ("FMEP").
- [7] The claimant sought the following orders:
- a) Correcting what she says is an error contained in RFJ at paras. 176(c) and 178(c);
 - b) Granting an order sought at trial, but left unaddressed in the RFJ;
 - c) Pursuant to para. 181 of the RFJ, adjusting two amounts ordered to be paid by the respondent to the claimant;
 - d) Special costs;
 - e) Granting her sole conduct of sale of a property;
 - f) An order preventing the respondent from filing any application without first obtaining leave of the court.
- [8] There were two common themes to the respondent's position about the orders sought by the claimant. The first is his position that no order should be granted if it represents any change to the RFJ because he has launched an appeal.
- [9] There is no stay in place, and I am unaware of any application for a stay being brought. I also note, at para. 178, I ordered the respondent to pay amounts owing "forthwith". It is my understanding he has made no payment, including payments for child support.
- [10] For those reasons, I do not find the fact the respondent has launched an appeal to be a basis upon which I should refuse any orders sought by the claimant
- [11] The second concern was whether sufficient notice was given about some of the orders sought by the claimant, which I will address below.

II. Error and Omission

- [12] I first address the error and omission the claimant says should be corrected. I begin by noting the slip-rule, which is Supreme Court Family Rules, R. 15-1(18):

Correction of orders

- [18] The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter that should have been but was not adjudicated on.

A. Mathematical Error

- [13] The claimant submits that the amount in paras. 176(c) and 178(c) of the RFJ is wrong. She contends that the amount represents what was owing at trial for future spousal support, in addition to arrears for spousal support. The RFJ state the amount is \$34,747.94, but the claimant deposed it should be \$35,747.94, suggesting there was a mathematical error. In support, she attached a print-out from FMEP, which is consistent with her evidence. Her counsel confirmed that he believed there was a mathematical error in the RFJ.
- [14] I agree the amount in in paras. 176(c) and 178(c) is incorrect due to my inadvertent error when calculating the amount. The fact that the respondent has appealed does not prevent me from correcting that error, and that is the appropriate thing to do. I rely on R. 15-1(18) to make that correction. Accordingly, it is appropriate to substitute in paras. 176(c) and 178(c) of the RFJ \$35,747.94 for 34, 747.94.

B. Passport

- [15] The claimant also pointed out that the RFJ neglected to address an issue raised at trial regarding the child's passport.
- [16] Paragraph 10 of the Consent Order stated that neither parent shall apply for the child's passport "without the written consent of the other party". The problem is there are other parties to the litigation (who did not appear at trial), who are not related to the child. Unfortunately, it appears government officials will not issue a passport without all parties' consent.
- [17] The failure to address this issue was an inadvertent omission.
- [18] I agree that an order be granted to change the wording of para. 10 of the Consent Order to read that neither the respondent nor the claimant will apply for the child's passport without either the written consent of the other person or court order.

III. Adjustments to Amounts Awarded

- [19] The second group of issues arise from para. 181 of the RFJ which states:
- [181] I will add that given the regrettable passage of time from trial to these reasons, it may be that further adjustments to the amounts owing are appropriate. The parties have leave to bring those adjustment to my attention. To do so, they must make that request within 14 days of this judgment.

[20] My reference to the "regrettable passage of time" is explained at para.185:

[185] I end by expressing regret that this judgment was significantly delayed by my having to take medical leave.

[21] The phrase "amounts owing" in para. 181 is a reference to para. 178 of the RFJ:

[178] Accordingly, I declare that at trial, Mr. M. owed, under the Consent Order, \$693,628.35 and that amount is payable forthwith. It is comprised of:

- a) \$370,620.87 being an amount up to the date of trial equivalent to half the equity in the Property 2;
- b) \$75,652.47 in arrears of support with interest;
- c) \$34,747.94 lump sum for future spousal support;
- d) \$206,760.96 lump sum for future child support; and
- e) \$4,846.11 arrears for s. 7 expenses.

A. Adjustment to Lump Sum Payment

[22] The claimant submits there should be an adjustment to the amount identified in para. 178(a). At trial, she submits the lump sum payment the parties agreed to in the Consent Order should be adjusted to reflect the value, at trial, of her equal share of the equity of Property 2. Her position was and remains that the respondent's failure to pay the lump sum in the Consent Order has deprived her of the ability to earn income by investing that money.

[23] While the whole of the RFJ should be read to understand the orders granted, the following passages from the RFJ are particularly relevant to this issue:

[92] With regard to [Ms. Spelliscy's] handling of the litigation and specifically, the Consent Order, I find:

- l) Mr. M. explained to her that the cash payment in the Consent Order (originally \$230,000) was in lieu of a previously proposed term to sell the Property 2 and split the proceeds equally. Ms. Spelliscy specifically confirmed with Mr. M. that the amount to which the parties had agreed increased to \$255,000 at the end of their negotiations.

[98] For all those reasons, I find Ms. Spelliscy was a highly credible and reliable witness. I am satisfied that she provided truthful evidence. I place great weight on her evidence.

[99] Mr. M.'s testimony contradicted Ms. Spelliscy's version of their interactions in several respects, both in tone and content. Given my concerns about Mr. M.'s credibility, I place minimal or no weight on Mr. M.'s version of events about his interactions with Ms. Spelliscy.

[176] [The claimant] also contends certain adjustments need to be made in light of Mr. M.'s failure to comply with the Consent Order since its entry. In addition, given the disparity between the income reported on his taxes and what I have found to be his likely income, she submits it would be difficult for her to seek the assistance of the Family Maintenance Enforcement Program to procure monthly payments. For those reasons, she submits the following:

- a) The agreed-upon sum in the Consent Order of \$255,000 represented half of the equity in the Property 2 at the time the Consent Order was made. By not complying with that payment, she has lost the opportunity to invest those funds, and there is a strong likelihood the property has increased in value. Mr. M.'s Form F8 Financial Statement filed at trial noted equity in the Property 2 to be approximately \$741,241.75. At trial, Ms. K.'s seeks payment of one half of that in the amount of \$370,620.87.

[177] Given my analysis and conclusions in this judgment, particularly about the status of Mr. M.'s financial disclosure and likely illegal sources of income I find the preceding terms are warranted and reasonable.

[178] Accordingly, I declare that at trial, Mr. M owed, under the Consent Order, \$693,628.35 and that amount is payable forthwith. It is comprised of:

- a) \$370,620.87 being an amount up to the date of trial equivalent to half the equity in the Property 2;

[24] I agree with the claimant's characterization of what the amount awarded in para. 178(a) are meant to be: payment in lieu of selling Property 2 and equally splitting the proceeds.

[25] Another factor is also relevant: the Consent Order required payment of the lump sum in 30 days, but in the RFJ I ordered the lump sum be paid "forthwith" (para. 182(f)).

[26] At trial, the claimant sought, and I granted, an adjustment to the amount of the lump sum payment in the Consent Order based on the passage of time, and what that payment was meant to represent. In her submissions as to the appropriate amount of that adjustment, she relied on the respondent's statements in his July 2022 F8 Financial Statement as to the value of Property 2 and balance owing on the mortgage. In that document, the respondent stated the value of Property 2 was \$1,031,000 and the mortgage was \$289,758.25, meaning the equity would be \$741,241.75, half of which (\$370,620.86) I awarded to the claimant.

[27] However, in her October 4, 2023 affidavit, the claimant attaches a document from BC Assessment showing a value of Property 2 as of July 1, 2022, of \$1,147,000. Relying on the amount of the mortgage in the respondent's July 2022 F8 Financial Statement, she submits the equity at trial was \$857,241. The claimant seeks to adjust the amount of para. 178(a) to one half of that, or \$428,620.88.

[28] The respondent submits no adjustment should be made for two reasons (in addition to the existence of the appeal). He says it is improper to rely on the assessed value as that is, as an attachment to an affidavit, an inadmissible opinion, and the Court should prefer an appraisal. He also submits the respondent had insufficient notice of this issue.

1. Relying on Assessed Value

[29] The respondent suggested an appraisal is the appropriate evidence for valuing property, but counsel had no instructions as to whether the respondent would agree to have one prepared. The respondent's primary point remained that no adjustment should be made based on his appeal, and late notice.

[30] I do not agree with the respondent that it is improper for the claimant to adduce and refer to the tax assessment. No appraisals for any property were introduced at trial, or obtained by the parties during the drafting of the Consent Order. More importantly, because the RFJ upheld the Consent Order, no issue arose about the value of any assets or debts or whether property division between the parties was appropriate.

2. Insufficient Notice

[31] The respondent has been aware since September 7, 2023 (the date counsel filed the request to appear), that the claimant intended to seek an adjustment to the amounts ordered in para. 178 of the RFJ.

[32] The respondent was represented by counsel at trial and now represents himself. I am not confident he ought to have known that the claimant would ask the Court to order an amount payable based on the BC Assessment value of Property 2 as of July 1, 2022, until he received the claimant's affidavit.

[33] For that reason, the respondent has leave to provide a response to para. 9 of the claimant's October 4, 2023 affidavit. I address below (see paras. 107-108) how he can do so.

B. Section 7 Expenses

[34] The claimant deposed in her October 4, 2023 affidavit that the respondent "has not paid any support or contributed to any of [the child's] special and extraordinary expenses since the date of trial". The claimant seeks an adjustment to the amount awarded at trial for s. 7 expenses.

[35] The Consent Order stated that the respondent would be responsible for 75 percent of s. 7 expenses starting October 1, 2020. Those expenses were defined in para. 21 of the Consent Order. Paragraph 22 of the Consent Order stated that where one party incurs the entire cost of an expense, they are to provide a bill or receipt to the other party and the other party shall pay their share within 30 days.

[36] The claimant seeks \$543.75 of further s. 7 expenses, and she attached the FMEP form she completed that is consistent with that amount.

[37] The respondent took no position on this issue.

[38] At para. 178(e) of the RFJ, the claimant was awarded \$4,846.11 as arrears for s. 7 expenses. I agree it is appropriate to adjust the amount awarded in para. 178(e) of the RFJ to account for the respondent's failure to contribute to s. 7 expenses since trial. By adding \$543.75, the amount now due is \$5,389.86, payable forthwith.

IV. Special Costs

[39] At para. 184 of the RFJ, I stated:

[184] Ms. K. is entitled to her costs of this proceeding after January 21, 2021. If the parties cannot come to an agreement of the amount of those costs, they may seek a brief hearing before me to address that so long as that request is made no later than 14 days from the date of this judgment. At that hearing, the parties can address whether special costs in a lump sum should be awarded.

[40] The parties did address costs at trial, and they made submissions regarding special costs sought by the claimant. I asked counsel to summarize those submissions at the October 5 hearing, which they did.

[41] The claimant seeks special costs from January 22, 2021 to the present. She acknowledges it may be preferable that those costs are assessed before the Registrar, and that to establish her claim, she may have to provide a waiver of solicitor-client privilege to some extent. For that reason, she submits that the assessment should not take place until after the appeal is completed, but she does seek a declaration as to her entitlement now.

[42] There is no dispute about the applicable law. Special costs are awarded when the court is satisfied that a party's conduct during the litigation is deserving of rebuke and is reprehensible. Although they referred to different case law, the principles relied on are the same as I outlined in *Hirji v. Owners Strata Corporation* VR44, 2016 BCSC 548:

[5] It is also recognized that an award of special costs should only be made in exceptional circumstances where the court concludes that an element of deterrence or punishment is necessary because of the reprehensible conduct. In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, Madam Justice Gropper summarized the jurisprudence discussing the test for special costs as follows:

[73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:

- a) the court must exercise restraint in awarding specials costs;
 - b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
 - c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
 - d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
 - e) special costs can be ordered against parties and non-parties alike; and
 - f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.
- [6] Justice Walker also articulated a number of circumstances where special costs could be awarded in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11:
- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
 - (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
 - (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
 - (d) where a party made the resolution of an issue far more difficult than it should have been;
 - (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
 - (d) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
 - (e) where a party brings a proceeding for an improper motive;
 - (f) where a party maintains unfounded allegations of fraud or dishonesty; and
 - (g) where a party pursues claims frivolously or without foundation.
- [7] It is not enough to show that a party's allegations of bad faith or malice were not proven. The party seeking special costs must demonstrate that the opposing party acted improperly in bringing forward claims that were obviously unfounded: *Hung v. Gardiner*, 2003 BCSC 285 at para. 16. It should also be noted that the court is not limited to considering only the evidence that was adduced at trial: *Chutti v. Bisla*, 2012 BCSC 1456 at para. 9.

- [43] The claimant submits that she needs only establish one of the factors mentioned above from Mayer to be entitled to special costs. She submits the respondent's conduct meets more than one of those indicia; she takes the position that viewing the whole of the RFJ in light of the factors, there can be little doubt that the respondent's conduct throughout the litigation has been deserving of rebuke. She emphasizes the respondent's misleading the Court; and his past and continuing, deliberate withholding of, and failure to, disclose the full extent of his wealth. She submits he freely entered the Consent Order aided by legal counsel, and then reneged as a tactic to "grind her down" financially and emotionally. She emphasizes his failure to pay child support since January 2021, despite agreeing to pay \$2,000 per month in the Consent Order.
- [44] Counsel for the respondent acknowledges the credibility findings in the RFJ are not favourable to the respondent, and that a trial judge's findings on credibility are entitled to deference on appeal. However, he points out that the respondent is pursuing an appeal on the substantive issues. He submits the claims were properly brought.
- [45] A court's findings that a party's credibility and reliability were seriously diminished do not necessarily, on their own, support a special costs order. Nor does a conclusion, after analyzing all the evidence, that a party did not establish a factual or legal basis supporting their claim. The single most important factor is whether the court is satisfied the party's conduct within the litigation deserves rebuke because it was reprehensible.

A. Reprehensible Conduct Deserving of Rebuke

- [46] I find it convenient to analyze the issue by repeating the factors cited by Justice Walker in Mayer at para. 11.

1. Pursuing Claims without a foundation

- [47] The first category of factors from para. 11 of Mayer are the following:

- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
- (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- (g) where a party pursues claims frivolously or without foundation.

- [48] The claimant submits perhaps the best illustration of the respondent's recklessness with regard to the truth was his insistence until the final day of submissions that the parties were not spouses. For convenience I reproduce the most pertinent portions of the RFJ on this issue (in the RFJ the respondent is referred to as Mr. M., and the claimant was referred to as Ms. K.):

- [26] The first major set of discrepancies arises with regards to Mr. M.'s position on whether the parties were spouses. In his instructions to Ms. Spelliscy to start a notice of family claim in September 2020, he confirmed he was in a marriage-like relationship with Ms. K. This was

replicated in his initial response and counterclaim (filed April 15, 2021) both of which pleaded that the parties cohabitated from November 1, 2011, to March 12, 2020 (a duration that different from the duration pled in the notice of family claim by only seven months), Mr. M. amended his pleadings in November 2021 to plead the parties were never spouses.

- [27] Mr. M. maintained that position throughout his testimony and the remainder of the trial until final submissions, when his counsel stated that the Mr. M. "accepted that [the parties] functionally operated as spouses". His counsel suggested that Mr. M. experienced "legitimate confusion" on the issue, and having reviewed case law, Mr. M. was ready to withdraw his denial of the spousal relationship. I note both the original and amended versions of Mr. M.'s pleadings were prepared on his behalf by the same counsel who represented him at trial.
- [28] In my respectful view, Mr. M.'s reversal on the fundamental issue of whether Ms. K. was his spouse reduces his credibility and reliability as a witness while also undermining my faith in the legal arguments he adduced as a party.
- [29] With regard to this latter point, his assertion that the issue of whether they were spouses was "confusing" cannot be reconciled with the facts regarding his interactions with Ms. Spelliscy (see below paras. 74, 91-92) nor his acceptance of the parties' spousal relationship in his initial pleadings drafted by counsel. It is simply not believable that in his own mind, he was confused about whether the parties were spouses, coming to accept that fact only after looking at case law. Rather, I find that he changed his legal position on the issue twice for strategic reasons.
- [30] Regardless of those changes in his legal position, I find his testimony denying the relationship at times strained belief. The evidence was overwhelmingly clear that the parties lived together as spouses. His denial in the face of that evidence was not believable. Also, the lengths to which he would go to deny the relationship damages his credibility.
- [31] An illustrative example of this relates to pictures of their marriage ceremony, which took place at a Ukrainian Orthodox Church in Kamloops (see above para. 12(g)). Ms. K. does not claim the parties were ever legally married, but she submits they had a wedding ceremony, exchanged vows typical in an orthodox ceremony, and they exchanged wedding rings. She introduced pictures of the ceremony into trial.
- [32] In those pictures, Mr. M. and Ms. K. are dressed in formal wear consistent with their being a bride and a groom in a church with family members. I find that a reasonable person viewing the pictures, regardless of whether they knew the parties, would easily come to the conclusion that it probably depicts a wedding ceremony.

- [33] Mr. M. denied this, at first claiming it was merely "some kind" of celebration. He then offered as support for his denial of the pictures depicting any type of wedding that the church would not "allow" a marriage ceremony if it was not a legally sanctioned wedding. There is no evidence nor authority to buttress the claim that the church would not perform a ceremony without it being registered legally. Nor does this explanation do much to counter the photos themselves, which I find do, in fact, depict the parties' wedding ceremony.
- [34] When asked about another picture from that ceremony that is consistent with his placing a ring on Ms. K.'s finger, with a priest in the background, Mr. M. simply said one could not see the ring in the picture, without explaining what else could explain the positioning of their bodies, and hands.
- [35] Significantly, his evidence then changed to say they were "pretending" to get married for the benefit of Ms. K.'s parents. However, that contradicted his testimony that it was not a wedding ceremony, whether real or fake. His testimony about those photographs belies logic and credibility.
- [49] As noted above, I was unpersuaded at trial by the respondent's explanation for his last-minute reversal on the fundamental issue as to whether the parties were spouses; I held his position was strategic.
- [50] I also found evidence he gave regarding a pleading he signed in another matter to be "absurd" (RFJ at para. 43). Also relevant to this issue is the problematic nature of the respondent's testimony about emails (RFJ at paras. 36-39; reproduced below at para. 58). It bears repeating that the respondent introduced, during his own direct testimony, numerous emails between the parties and spoke at length about them in support of his case. However, upon being asked questions about those same emails in cross-examination, he said he did not recognize them or they had been altered by the claimant. In other words, when confronted with difficult questions about his own documents, he gave testimony that was manifestly false.
- [51] I am satisfied both circumstances meet the test of a litigant displaying a disregard for the truth, showing a reckless indifference to an unmeritorious claim (denial of the spousal relationship) and doing so without foundation.

2. Allegations of Fraud and Dishonesty

- [52] The next category comes from the following in para. 11 of Mayer:
- (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty
 - (f) where a party maintains unfounded allegations of fraud or dishonesty

- [53] The respondent pleaded fraud against the claimant. That claim was not withdrawn, and he made no attempt to substantiate it during final submissions. That tends to weigh in favour of a conclusion that it was improperly brought.
- [54] The following passages from the RFJ are relevant:
- [127] Mr. M.'s pleadings alleged fraud, but he did not address that allegation in his final submissions. He also pleaded that Ms. K.'s position was "inaccurate, largely a misrepresentation of the facts, and largely false". He maintained that position in his closing submissions.
- [128] As noted, after denying the parties were spouses in his amended pleadings and throughout his testimony, he conceded the point during final submissions. His change in position on that issue is not reflected in his written submissions. His original denial of the spousal relationship is the fulcrum upon which his allegations against Ms. K. of fraud, inaccuracies and misrepresentations are based. Because of that, it is virtually impossible to reconcile his concession that the parties were spouses with the rest of his submissions.
- [55] The last sentence in the preceding quote is particularly relevant. The respondent denied the parties were spouses during the entire trial. I found he did so purely to gain advantage in the litigation. However, that denial infiltrated not only his testimony, but it was a foundation upon which he asserted the claimant was not a truthful witness. As I stated at para. 29, the respondent "changed his legal position on the [spousal] issue twice for strategic reasons". The respondent's final submissions prevaricated as to the reasons he ultimately withdrew his denial the parties were spouses.
- [56] I find all of the foregoing could support a conclusion that the respondent's allegations of dishonesty against the claimant were unfounded.
3. Making the Litigation More Difficult
- [57] This factor arises from para. 11(d) of Mayer.
- [58] The respondent entered into a Consent Order with the benefit of legal counsel. I made the following conclusions about his allegations against that counsel:
- [60] Contrary to Mr. M.'s allegations, I find that the evidence overwhelmingly supports the conclusion that Ms. Spelliscy properly acted on Mr. M.'s clear instructions, and that he agreed to all the terms in the Consent Order. I find Ms. Spelliscy to be a highly credible and reliable witness, and therefore prefer her evidence to Mr. M.'s in this regard.

- [96] I find Ms. Spelliscy to be forthright, clear, and candid. She did not attempt to fill in any gaps in her notes or memory to her own advantage and easily admitted if she could not recall or did not know an answer to questions. She was careful to distinguish between specific recollections of what Mr. M. said from impressions or understanding she arrived at based on external information whether from her notes, information Mr. M. gave her, or correspondence from opposing counsel.
- [97] She was subjected to vigorous questioning, including some questions of dubious relevance. Despite this, she was not defensive nor evasive. This is notable given the allegations Mr. M. made against her regarding her fulfillment of her professional duties.
- [98] For all those reasons, I find Ms. Spelliscy was a highly credible and reliable witness. I am satisfied that she provided truthful evidence. I place great weight on her evidence.
- [99] Mr. M.'s testimony contradicted Ms. Spelliscy's version of their interactions in several respects, both in tone and content. Given my concerns about Mr. M.'s credibility, I place minimal or no weight on Mr. M.'s version of events about his interactions with Ms. Spelliscy.
- [125] Further, even if Mr. M. were under duress (a finding I do not make), based on my assessment of both Mr. M.'s and Ms. Spelliscy's credibility and reliability, I do not find the evidence adduced at trial to support a prima face case that Ms. Spelliscy failed to fulfill her legal or ethical obligations to Mr. M. in any way. I therefore reject Mr. M.'s allegations that Ms. Spelliscy ought to have been on notice that he felt pressure or was under duress at the time he negotiated or agreed to the terms in the Consent Order.
- [126] Based on the foregoing, I find the following:
- a) Mr. M. wanted to settle his disputes with Ms. K. without proceeding to court. He was in favour of a negotiated settlement.
 - b) Mr. M. negotiated directly with Ms. K. with regard to most of the terms.
 - c) Mr. M. specifically instructed Ms. Spelliscy as to the precise terms to be included in the Consent Order, including changes that appear between initial drafts and the final version.
 - d) Ms. Spelliscy had full lawful authority from Mr. M. to agree to each term contained in the Consent Order.
 - e) Mr. M. was not in a vulnerable position and did not agree to any term in the Consent Order because of stress, duress, or pressure.
- [59] During the trial before me, the respondent's changes in position about the spousal relationship clearly made the trial more difficult and longer than it needed to be. In addition, I found his testimony about certain emails to be problematic.

- [36] Another problematic aspect of Mr. M.'s evidence was when, during his direct examination, he testified about particular emails exchanged with Ms. K., and he explained the meaning of what he wrote. Several long emails were discussed, the details of which are not material to this analysis.
- [37] However, when confronted during cross-examination with other portions of the same emails, he claimed to have never seen the emails before. After being reminded that he had testified about their content during direct examination, he then claimed that the emails had been altered, and he disavowed sending them.
- [38] The following day, without being prompted, he explained that he had been confused about the emails the previous day because he was upset with the questions he had been asked. Later, again during cross-examination, he repeated the allegation that the emails had been altered.
- [39] His testimony about the emails was confused and unpersuasive and, at times, almost impossible to reconcile with the objective content of the emails themselves.
- [60] I agree these two topics demonstrate ways in which the respondent's positions and testimony could be said to have made the litigation more difficult, but I also point to the discussion and analysis of the issue of his denial that he operated several Grow-Ops (RFJ at paras. 147-153).

4. Party Litigating to Financially Punish Opposing Party

- [61] This topic comes from para. 11(e) of Mayer.
- [62] I agree with the claimant that the respondent has never fulfilled his obligation of complete financial disclosure. In the RFJ I made the following comments:
- [135] This is in stark contrast to Ms. K.'s submissions regarding Mr. M.'s fulfillment of his financial disclosure obligations regarding his assets and income. Specifically, she contends that he has never fully complied with detailed demands for disclosure of documents, discovery expectations, and court order for disclosure. I find there is a reasonable basis for her allegations. It is unnecessary at this point for me to make specific findings about the extent of his non-disclosure. I do agree with Ms. K. that it is more probable than not that Mr. M. has access to and/or control of more assets, funds and property than was revealed at trial. What is important is that I do not find anything about the status of the parties' financial disclosure to support any of the asserted legal bases to set aside the Consent Order. Specifically, given the probable incomplete disclosure by Mr. M., there is no basis upon which he could succeed in arguing the Consent Order was a marked departure from the presumed equal division under the FLA.
- [63] I also rely on my analysis and conclusions in paras. 144-153 regarding the respondent's operation of several Grow-Ops.

- [64] I am satisfied that it is more probable than not that the respondent's financial position is superior to the claimant's.
- [65] There is also a reasonable basis to conclude that his position in the litigation were motivated to a large degree to frustrate the claimant financially and emotionally. However, it is also clear that he was frustrated by the parenting disputes the parties had.
- [66] The claimant also points to the events surrounding the respondent's most recent court application in support of her position that one of his motivations is to wear her down financially in order to get what he wants (see below, paras. 83-94).
- [67] The respondent emphasizes that despite the court not accepting his version of events, the positions he took were reasonable, and he claims his positions were genuinely held.

B. Analysis

- [68] Based on the foregoing, I am satisfied that the respondent's conduct in the litigation is deserving of rebuke. In particular, I conclude that he was reckless with regard to the truth on more than one important topic. I find that his denial of the parties' spousal relationship was not because he did not believe the two were involved in a marriage-like relationship; it was purely to advance his position in the litigation to set aside the Consent Order. Not only was this a claim without foundation, it made the litigation considerably more difficult and it lengthened the trial.
- [69] I also find his claim of fraud was improperly brought, and ought to have been withdrawn before trial since there was no attempt to support it.
- [70] I find the above two factors are sufficient to entitle the claimant to special costs.
- [71] While I ultimately disagreed with the respondent's position that the claimant's testimony was largely not credible, I am unable to conclude his claims that she was dishonest were inappropriately brought. Despite my findings, I am unable to say he did not genuinely believe the claimant's testimony should not have been believed.
- [72] I also find I cannot conclude that his motivation in the litigation was only to impose financial burdens on the claimant, although I find the claimant's position on this has a reasonable foundation. I find he was genuinely concerned about parenting.
- [73] However, in combination with the preceding paragraphs, I find his position made the litigation more difficult.
- [74] For all those reasons, I award the claimant special costs. I emphasize I do not do so simply because I dismissed the respondent's positions and found his credibility to be minimal. An important feature of the respondent's conduct is the manner in which he changed his testimony, contradicted himself, reversed position (both on the stand on particular facts, and on legal issues), and at times, gave evidence that was virtually impossible to reconcile with objective documents and his own evidence. This is conduct deserving of rebuke and

reprehensible. It is disrespectful of the court process, put the claimant to increased expense, and heightened what was already a high conflict family case. I am satisfied his conduct falls into the category of rare cases where special costs is necessary.

- [75] The claimant seeks special costs from January 22, 2021, up to and including the October 5, 2023 hearing, and I so order.
- [76] I confirm that special costs are awarded to the claimant in relation to the respondent's application that was set to be heard on August 28, 2023, but adjourned. I address that issue below (paras. 83-94).

V. ADDITIONAL ORDERS

A. Conduct of Sale of Property 2

- [77] The claimant seeks an order that if the respondent fails to come into compliance with the order granted after trial within 30 days, she be liberty to have sole conduct of sale of Property 2. Her counsel submits the claimant is in dire need of financial relief because of the respondent's failure to abide by court orders. He states that FMEP is struggling to enforce payment against the respondent, which I infer that is because of how he earns income (see RFJ at paras. 144-153). This was consistent with the exhibits in the claimant's most recent affidavit attaching print-outs from FMEP.
- [78] The respondent submits no such order should be considered until after the appeal is resolved. He submits that transcripts had been ordered, and therefore this Court should have confidence that the appeal will proceed. If he ultimately succeeds on appeal, making such an order now would have had a detrimental impact on him.
- [79] As already noted, no stay is in place. The amounts in the RFJ were awarded to be paid "forthwith". The respondent has not paid child support since January 2021. Regardless of the validity of the Consent Order, he has a mandatory obligation to pay child support, and he has provided no explanation for why he has failed to do so. For all those reasons, I am not persuaded to adjourn this order.
- [80] However, I agree that the respondent has not had fair opportunity to respond to the order sought, and I give him leave to do so. I address later how and when he can do so (see below paras. 107-108).

B. Conduct Order

- [81] The claimant at trial sought a conduct order against the respondent, and that is addressed at para. 180 of RFJ:
- [180] Lastly, Ms. K. seeks an order, pursuant to s. 221, prohibiting The respondent from bringing any further applications in this matter without leave of the Court. I am not persuaded that is necessary at this point in time.

[82] Section 221 of the Family Law Act, S.B.C. 2011, c. 25, reads:

Misuse of court process

221(1) A court may make an order prohibiting a party from making further applications or continuing a proceeding without leave of the court if satisfied that the party

- (a) has made an application that is trivial,
 - (b) is conducting a proceeding in a manner that is a misuse of the court process, or
 - (c) is otherwise acting in a manner that frustrates or misuses the court process.
- (2) If an order is made under subsection (1), the court may do one or more of the following:
- (a) make the order apply
 - (i) for a specified period of time, or
 - (ii) until the party has complied with an order made under this Act;
 - (b) impose any terms and conditions respecting the granting of leave to make further applications or to continue a proceeding;
 - (c) require the party to pay
 - (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the party's actions, 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 party's actions, or
 - (iii) a fine not exceeding \$5,000.

[83] Counsel for the claimant submits recent events provide reasons why such a conduct order should be ordered. Specifically, he refers to the respondent's filing of an application on August 10, 2023. It was set to be heard August 28, 2023. In that application, the respondent sought changes to the parenting schedule that largely tracked the orders he sought at the trial. He also sought an order to have a Views of the Child report prepared, or, that he may arrange for the child to prepare an affidavit to address parenting arrangements.

[84] The claimant's counsel sent a letter to the respondent dated August 17, 2023, in which it was explained to him that his application was flawed because the orders sought were ones he sought at trial, and judgment, at that time, remained under reserve. He also stated that the application for an updated "Hear the Child Report" had already been heard and dismissed. Counsel enclosed in the letter a blank requisition allowing the respondent to adjourn his application generally. He also put the respondent on notice that he would seek costs against the respondent if the application were not withdrawn.

[85] The RFJ were issued on Thursday, August 24, 2023.

- [86] The respondent did not file the requisition to adjourn the hearing, and the matter was called in general chambers on August 28, 2023. Apparently, only on the eve of that hearing did the respondent agree to adjourn (not withdraw) his application given the issuance of the RFJ which addressed parenting.
- [87] The matter came on in general chambers before Justice Branch, who adjourned the application generally. The claimant sought costs thrown away, but Justice Branch directed that issue be heard at the same time as the hearing for costs from the trial.
- [88] The claimant's position is that the application was, from the outset, entirely frivolous, based not on the merits of the respondent's position, but on the basis that the orders he sought were the same orders he sought at trial.
- [89] The respondent submits that the Court should take into account that judgment had been delayed, and according to the respondent, he had been denied parenting time. Finally, the respondent points out the application was ultimately adjourned, so no costs should be awarded.
- [90] The claimant submits the denial of parenting time is a red herring. The application was not to enforce parenting time; instead it sought changes to parenting to align with what he sought at trial. She also submits that on August 28, 2023, the respondent stated in court that he had been denied parenting time, but on that day, the child was in his care. That fact is not in dispute, but the respondent's counsel stated it may be that the respondent (who represented himself in court that day) said or meant he had been denied parenting time in the past.
- [91] The respondent contends there is no need for a conduct order since he is now represented by counsel. However, as pointed out by the claimant, the respondent is not represented in this Court by counsel, although apparently, he has counsel for the appeal.
- [92] I do find the respondent's conduct with his recent application troubling. I make no finding on whether he lied to the Court on August 28, 2023, in saying he was denied parenting time because there is the possibility he meant he had been denied parenting time in the past (a matter on which I make no finding). However, the respondent was, at the very least, content to be ambiguous with the information he gave to the court.
- [93] Also, the facts asserted in his application were almost all facts led at trial. In other words, there was nothing new or different that he alluded to in making the application.
- [94] For those reasons, I am satisfied that the respondent was given adequate notice why his application had no merit and he had time to adjourn it. I am satisfied that the claimant is entitled to special costs with regard to the application.
- [95] However, the respondent did not get fair notice that the claimant was seeking a conduct order prohibiting him from bringing further applications. It is appropriate that he be given the chance to respond. I address below how he can do so (see paras. 107-108).

- [196] In the meantime, I am concerned about the possibility of applications in future, which could lead to uncertainty and disruptions to the child's schedule. The following paragraphs from the RFJ are relevant:
- [160] I agree with both parties that it is in the child's best interests to have a defined schedule for Mr. M.'s parenting time. I note it is regrettable that Mr. M. did not heed Ms. Spelliscy's advice to ensure the Consent Order included specific terms regarding his parenting time.
- [165] I also accept Ms. K.'s testimony that Mr. M. had a habit of not confirming his parenting times in a timely fashion and asking for changes at the last moment. He sometimes showed up late or returned the child early. These behaviours promoted instability in the child's care rather than stability.
- [97] Accordingly, pending resolution of the issue of whether a conduct order should be given in the terms sought by the claimant, I seize myself of all applications in this litigation regarding parenting.

C. Legal Costs under the Consent Order

- [98] The claimant also seeks an order clarifying the exact amount of legal costs the respondent must pay pursuant to para. 58 of the Consent Order. Paragraph 58 of the Consent Order stated:

Upon confirmation from the Claimant's counsel as to the amount of legal fees, disbursements and taxes, the Respondent will reimburse the Claimant for her legal fees, disbursements and taxes associated therewith in these proceedings.

- [99] That term was addressed in the RJF:

- [92] With regard to her handling of the litigation and specifically, the Consent Order, I find:

- h) The term requiring Mr. M. to pay all of Ms. K.'s legal costs was unusual, but it reflected the parties' genuine agreement.

- [100] Evidence at trial indicated after the Consent Order was signed, the claimant's counsel confirmed legal fees, disbursements, and taxes at the time amounted to \$12,600.04.

- [101] In the RFJ, costs are awarded to the claimant from January 21, 2021, forward. The claimant's counsel confirmed that the claimant did not incur additional legal costs between the time his providing notice of the amount due pursuant to para. 58 of the Consent Order and January 21, 2021. Accordingly, to promote clarity and certainty in this litigation, she seeks an order declaring that the amount of costs due pursuant to para. 58 of the Consent Order is \$12,600.04.

- [102] The claimant submits the costs are "contract costs". As such, there is no standard of reasonableness; therefore, the respondent has no basis upon which he can insist on seeing evidence justifying the amount.

- [103] The respondent submits the costs are "in the nature" of special costs and, therefore, he is entitled to see evidence justifying that amount, requiring waive of solicitor-client privilege. He submits the paragraph could not be contract costs, as that would be enforcing an "agreement to agree".
- [104] The wording of the Consent Order is clear. Once counsel "confirmed" the amount of legal fees, disbursements and taxes, the respondent was bound to reimburse the claimant. There is no "agreement to agree"; the respondent agreed to pay the amount as "confirmed" by counsel. I made a finding that the term, while unusual, accurately reflected the parties' genuine agreement. These are not special costs, nor are they in the nature of special costs. I find they are contract costs. As such, the respondent is not entitled to review any portion of the solicitor's file relating to them.
- [105] I add that as an officer of the court, and pursuant to his ethical duties, the claimant's counsel is bound to be honest about the amount of costs incurred. I have no reason to doubt his evidence and statements, nor should the respondent.
- [106] For all those reasons, and in the interest of promoting certainty with regard to the issues between the parties, I find it reasonable and appropriate to issue a declaration that the amount of legal costs the respondent owes the claimant pursuant to para. 58 of the Consent Order is \$12,600.04.

VI. FURTHER SUBMISSIONS

- [107] Given the claimant's affidavit was only provided to the respondent one day before the hearing, I give leave to the respondent to respond to the following:
- a) The claimant's seeking an adjustment to the amount awarded in RFJ at para. 178(a) (see above paras. 22-33);
 - b) The claimant's seeking an order allowing her to have sole conduct of sale of Property 2 in order to satisfy the outstanding amounts unpaid from the RFJ (see above paras. 77-80);
 - c) The claimant's seeking a conduct order prohibiting him from filing any applications without leave of the court (see above paras. 81-97).
- [108] The respondent's response must comply with the following conditions:
- a) He may file one brief affidavit, the narrative content of which is no longer than three pages. The only exhibits he can attach would be any official documentation regarding the value of Property 2 as of July 2022, and any other information, admissible as evidence, that he considers responsive to the information from FMEP attached to the claimant's October 4, 2023 affidavit.

b) He may file written submissions in response to the claimant's submissions about the preceding three issues (as outlined within this judgment), so long as those are no longer than three pages.

c) He must provide his affidavit and submissions to both the claimant's counsel and the Kamloops court registry no later than 14 days from the date of this judgment.

[109] The claimant has leave to provide a brief submission in reply to the respondent's submission, which shall be no longer than two pages. She does not have leave to file an affidavit, but she can include, in her response, a request to file further information if she believes any evidence filed by the respondent requires clarification.

"Sharma J."

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