

CANADA / JUDGMENT

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

2023 BCSC 2221

COURT

Supreme Court of British Columbia

DECIDED

18 December 2023

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2023 BCSC 2221 O.K. v. I.C.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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

2023 BCSC 2221

Date: 20231218

Docket: E59382

Registry: Kamloops

Between:

O.K.

Claimant

And

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

Respondents

Before: The Honourable Madam Justice Sharma

Further 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

Written Submissions Received from the Respondent:

November 14, 2023

Written Submissions Received from the Claimant:

November 27, 2023

Place and Date of Judgment:

Kamloops, B.C.

December 18, 2023

- [1] This judgment addresses written submissions of the parties, as directed in supplemental reasons for judgement issued in this matter on October 30, 2023, indexed at 2023 BCSC 1893 ("Supp. RFJ").
- [2] To put this judgment into context, I repeat paras. 1-4 of the Supp. RFJ, which discuss the circumstances of the Supp. RFJ, as well as the trial judgment issued on August 24, 2023, indexed at 2023 BCSC 1469 ("RFJ"):
- [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.
- [3] As noted in the Supp. RFJ at para. 6, the claimant filed an affidavit on October 4, 2023, to support her submissions at the hearing of October 5, 2023. At that hearing, the respondent raised a concern that he had not been provided with sufficient notice of facts and documents contained in the claimant's affidavit of October 4, 2023.
- [4] With regard to three of the orders sought by the claimant, in the Supp. RFJ, I agreed that insufficient notice had been provided to the respondent and set out instructions for the parties to address those issues:
- [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.

[5] Both parties provided materials in response to those directions.

[6] Before turning to the analysis, I note that several paragraphs of the respondent's November 14, 2023 affidavit contain inadmissible content including argument, opinion, and irrelevant facts. It also contains a recitation of matters repeating or supplementing facts adduced at trial, which is contrary to the direction given in para. 108(a) of the Supp. RFJ. Rather than ignoring that content, I have accepted the inadmissible and extraneous paragraphs (with one exception noted below) in the respondent's affidavit as forming part of his submissions.

[7] The exception is an email and documents attached to the respondent's affidavit as exhibit B, but mistakenly referred to in the body of the affidavit as Exhibit A. The respondent claims the attachment is a "report from a professional realtor" showing the value of a property. The respondent relies on that exhibit as evidence of the value of that property. However, that exhibit is not a business record and constitutes inadmissible hearsay and opinion. I have not taken that evidence into account as it would be improper to do so.

Adjustment to Lump-Sum Payment

[8] I rely on, but will not repeat, the analysis and conclusions regarding the claimant's application to make an adjustment to a lump-sum payment contained in the Supp. RFJ at paras. 22-33. Particularly important is para. 24 in which I explicitly agree with the claimant's characterization of the lump-sum payment.

[9] That payment is addressed in the RFJ, and some of the portions of that judgment relevant to that issue are reproduced at para. 23 of the Supp. RFJ. As indicated in those passages, the lump sum awarded in the RFJ was in lieu of selling property and equally splitting the proceeds.

[10] In his affidavit, the respondent disagrees with my conclusion on this issue as to the characterization of the lump-sum payment. I assume that is one of the issues to be pursued at the appeal. For my purposes, that finding is *res judicata*.

- [11] The respondent has also raised what he claims to be his difficult financial position. He combines that with his contention that there is no finding in the RFJ about the illegal source of his income. His position is that absent a conclusive finding that "[the respondent] is a criminal in the sense of engaging in illegal activity", there is no justification to apportion property in favour of the claimant given the presumption of equal division under the legislation.
- [12] With respect, the respondent has misconstrued the issues addressed at trial. The parties had negotiations while represented by legal counsel and came to a comprehensive agreement, including settlement of property issues. The only issue at trial was whether that agreement should be set aside. The presumption of equal division does not come into play.
- [13] Regardless of that, there was no requirement for me to make a finding about whether the respondent was a "criminal". Instead, I agree with the claimant's submission that at several points in the RFJ, it is clear that I found the claimant had established on the civil standard of proof that the respondent earned his income primarily from illegal marijuana grow-ops: RFJ at paras. 151-153.
- [14] Nevertheless, what is determinative on this issue is my conclusion that the respondent never made adequate financial disclosure (RFJ at para. 135). To my knowledge, that remains true. Accordingly, I am unconvinced that the respondent faced or faces financial difficulties.
- [15] Although the respondent objects to any adjustment to the lump sum being made, he also submits evidence from which I infer he puts forward an alternative position that if an adjustment is made, the one proposed by the claimant is unreasonable.
- [16] In the Supp. RFJ at para. 27, I addressed the claimant's position:
- [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.
- [17] The respondent attaches to his affidavit the tax assessment dated July 1, 2021, and relies on the value stated in that document to suggest the claimant's position was erroneous. The respondent refers to what is listed on the document as the "2022 taxable value". However, it is clear from that document that the 2022 taxable value is the value as of July 2021, on which the 2022 tax payment is based. Accordingly, I do not agree that the claimant's evidence is inaccurate.

- [18] At both the October 5, 2023 hearing and in their written submissions, the parties address the propriety of a court relying on property tax assessments. With regard to the evidentiary value of property tax assessments, both parties referred to *O'Connor v. Mills*, 2023 BCSC 1886 at paras. 138-143. The respondent submits it is inappropriate to rely on tax assessments, and expert evidence is required.
- [19] I did not accept the respondent's submission that it was improper to rely on the assessed value (Supp. RFJ at paras. 29-30).
- [20] In his November 14, 2023 affidavit, the respondent also deposed that at trial he did not agree to use tax assessments as valuation for the property. The claimant points out that this assertion is contrary to his sworn F8 financial statements dated June 25, 2021, and July 26, 2022. Her position is that the respondent's position is inherently inconsistent on this issue. I agree.
- [21] Furthermore, at both the October 5, 2023 hearing and in her written submissions, the claimant agrees that expert evidence is preferable, but submits the cost of obtaining that evidence should be borne by the respondent. She proposed a specific property appraisal firm be retained. The respondent has not agreed to do so, nor offered an alternative appraisal firm. That being the case, there is no other evidence before the Court regarding the value of the relevant property.
- [22] For those reasons, I confirm it is appropriate on these facts to make an adjustment to para. 178(a) of the RFJ resulting in payment by the respondent to the claimant of \$428,620.88.

Sole Conduct of Sale of Property 2

- [23] At paras. 77-80 of the Supp. RFJ, I address the claimant's submission that she should be granted sole conduct of sale of Property 2 (as defined in the RFJ at para. 10):
- [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).
- [24] In his November 14, 2023 affidavit, the respondent addresses the claimant's position that she be given sole conduct of sale of Property 2. He gives two reasons for opposing that order. First, he submits she "brought zero participation to purchasing and maintaining [the] property". Even if that statement is true (which I do not accept), it is irrelevant. The sole issue at trial was whether to set aside the Consent Order entered into by the parties.
- [25] Second, he asserts that granting the sale of Property 2 is contrary to the child's best interests. In support of that, he claims the child has expressed not only a desire to live permanently with the respondent but to do so at Property 2.
- [26] It is improper for the respondent to directly implicate the child into the dispute. In any event, I accept it is in the child's best interests to spend time with the respondent, but that conclusion does not rest on where the respondent lives.
- [27] Lastly, with regard to both statements, I approach the respondent's evidence with caution given my conclusions regarding the respondent's credibility and reliability as a witness (RFJ at paras. 23-50).
- [28] As far as I am aware, the respondent has made no effort to satisfy his financial obligations flowing from the Consent Order or the RFJ. I also understand he is in significant arrears with respect to child support. In the absence of a stay of the RFJ, I agree the claimant's seeking sole conduct of sale is a reasonable request, and it is granted in the standard terms.
- [29] Should the parties be unable to come to agreement on those terms, the claimant has leave to submit a draft order to my attention ensuring she has first sent it to the respondent for comment, and she forward with the draft order, any comments made by the respondent.

Conduct Order

- [30] The respondent's position is that a conduct order prohibiting him from filing any further applications without leave of the court would be contrary to the best interests of the child. He does not explain or clarify why that would be the case, except to assert it is a restriction on his rights.

- [31] As noted in the Supp. RFJ at paras. 83-92, there had been troubling conduct by the respondent around the time the RFJ was released. Nevertheless, it is my understanding there have been no further court applications except as directed by me.
- [32] I am not persuaded that the grounds exist to grant a conduct order at this time. However, this conclusion should in no way be interpreted as suggesting that the claimant is barred in the future from seeking such an order in the appropriate circumstances.
- [33] This resolves the issue of whether a conduct order should be granted, and therefore I am no longer seized of any aspect of this litigation.

"Sharma J."

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