
CANADA / JUDGMENT

O.T.L. v. J.T.L.

2021 BCSC 2222

COURT

Supreme Court of British Columbia

DECIDED

17 November 2021

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2021 BCSC 2222 O.T.L. v. J.T.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

O.T.L. v. J.T.L.,

2021 BCSC 2222

Date: 20211117

Docket: E15353

Registry: Chilliwack

Between:

O.T.L.

Claimant

And

J.T.L.

Respondent

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Claimant:

G. Pugh

Counsel for the Respondent:

A. Briscoe

Place and Date of Hearing:

New Westminster, B.C.

November 3, 2021

Place and Date of Judgment:

Chilliwack, B.C.

November 17, 2021

Introduction

- [1] The parties were married in 2003 and separated in February 2018. They have two children, now ages 11 and 10.
- [2] On August 1, 2019, Justice Crawford made a protection order ("PO") against the claimant. The claimant seeks a declaration that the PO expired on August 1, 2020, and ceased to be in effect from that date forward, *nunc pro tunc*.
- [3] In the alternative, the claimant sought an order that the PO be cancelled and replaced with conduct orders. At the initiation of the hearing of this application, counsel advised that the parties agreed to mutual conduct orders and those were made by consent.
- [4] The respondent agrees that the PO may be cancelled, but argues that it continues to be in force until further order of the court, and that it did not expire on August 1, 2020.
- [5] Thus, the sole issue is whether the PO already expired on August 1, 2020, or whether it should be cancelled as of the date of these reasons.
- [6] The respondent did not file any materials in response to the application. However, her counsel appeared and with the consent of claimant's counsel, made submissions.

The September 23, 2021 event

- [7] The significance of the declaration sought is that on September 23, 2021, the claimant attended a Parent Advisory Council ("PAC") meeting at the school of the parties' children. I only have the claimant's evidence of that event since the respondent did not file an affidavit.
- [8] The claimant states that upon taking his seat, he noticed that the respondent was present approximately 20 metres from where he was seated. The respondent took out her phone and started filming him. The respondent then texted him and asked him to leave, stating that he was in breach of the PO. The claimant texted that he did not believe he was in breach of the PO.

- [9] The respondent then stood and pointed the camera at the claimant. The claimant believes the respondent was filming him as she was leaving the room and then returning. This interrupted the PAC meeting and one attendee asked who the respondent was and why they were being filmed. The claimant apologized to the people attending the meeting and it continued.
- [10] The claimant then texted the respondent and asked her permission to remain in the meeting. The respondent did not reply to his request but continued to text that he was in breach of the PO. As a result, the claimant left the meeting. The respondent continued to film him as he left and was in his vehicle.
- [11] The claimant states that at no point was he within 10 metres of the respondent, he did not know the respondent was going to be at the PAC meeting, and it was his understanding that they were both free to attend at the school.
- [12] Ten days before, on September 13, 2021, the parties had entered into a consent order which included terms that: both parties share all parental responsibilities under s. 41 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], which I note includes education; the parties will jointly register the children at a certain elementary school commencing September 2021; and they each have the right to obtain information concerning their children from third parties including teachers.
- [13] The respondent decided to make a complaint to the police. As a result, at 10:00 pm on the night of the PAC meeting, the police attended the claimant's home and arrested and handcuffed him for breach of the PO. The claimant entered into an undertaking. Counsel advise that it is not yet known if the Crown will proceed with charges, but there is a court date in early December 2021.

History of litigation and the PO

- [14] On June 17, 2019, the respondent obtained short leave to bring an application for a PO. The matter came for hearing before Justice Crawford on June 21, 2019. Justice Crawford was seized of the claimant's then existing application for parenting time, which had been scheduled for continuation on that date. On June 21, 2019, Crawford J. made a protection order which was to remain in place until he issued written reasons for judgment.
- [15] On August 1, 2019, Justice Crawford issued written reasons for judgment on the parenting issues and made the PO. The terms of the entered PO are:
1. Pursuant to section 183(3)(a) of the Family Law Act, [O.T.L. DOB] shall not have contact or communicate directly or indirectly with [J.T.L. DOB] except [O.T.L.] may have contact with [J.T.L.] by way of text message or email solely for the purpose of arranging and facilitating parenting time with the Children []

2. Pursuant to section 183(3)(a) of the Family Law Act, [O.T.L.] shall not attend at, enter or be found within 100 metres of the residence, place of employment, place of education, or place of worship of [J.T.L.], even if he is an owner or has a right to possess or enter such a place, except:
 - a. [O.T.L.] may be exempt, subject to the written permission of [J.T.L.], for special events of the Children such as school or athletic events, or for emergencies at the hospital, provided that during these exemptions O.T.L. shall remain at least 10 metres away from J.T.L. at all times.
3. Pursuant to section 183(3)(a) of the Family Law Act, [O.T.L.] shall remain at least 10 metres away from [J.T.L.] during exchanges of the Children.
4. This Order is effective until further order of the court.

[Emphasis added.]

Claimant's position

[16] Claimant's counsel argues that given the absence of any explicit provision to the contrary in the reasons for judgment, and looking to the context in which the application was heard and decided, the one-year default expiry date imposed by s. 183(4) of the FLA applies. That subsection states:

Unless the court provides otherwise, an order under this section expires one year after the date it is made.

[17] Counsel refers to *Yu v. Jordan*, 2012 BCCA 367, where the Court stated:

[53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

[18] The claimant further submits that any ambiguity as to the duration of the PO ought to be decided in his favour. The context of the PO also points to it only being intended to be an interim order that expired at the latest one year later. These are:

- a) At the time the application was made, the parties had a trial date in December, 2019, four months away.

- b) The respondent's notice of application for the PO was not brought under Rule 11-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009 respecting summary trials and was stated to be within the jurisdiction of a Master. Further, the notice of application did not seek a non-expiring or final protection order, nor did the respondent indicate during her submissions in court that she was seeking a non-expiring or final protection order.
 - c) At the time the application was made, the respondent's pleadings did not seek a protection order.
 - d) At the time of the application, the parties were awaiting a s. 211 report from Dr. Koopman and Justice Crawford's other orders on parenting were only to the end of August 2020, at which time the parties had expected to receive Dr. Koopman's report.
 - e) A protection order is quasi-criminal in nature. It restricts the liberty of the person subject to the order, and the consequences for non-compliance may include criminal sanction. Counsel submits that the principles applicable to an application for contempt of court should be applicable to interpreting uncertainty in the PO; that is, if the order is ambiguous, the alleged contemnor is entitled to the most favourable construction of the order: *Jackson v. Honey*, 2009 BCCA 112 at para. 12 [Jackson].
- [19] The claimant's notice of application also refers to events subsequent to the PO, which in my view cannot be relevant to the intention at the time the PO was made, but are relevant to whether the PO should be set aside nunc pro tunc:
- a) On August 26, 2019, Dr. Koopman completed a second updated s. 211 report. With respect to the PO, she recommends:

[J.T.L.'s] felt need for the protection order to remain in place because of her fear that without it [O.T.L.] will overrun her parenting and control of the children to an unhealthy extent, remains. [J.T.L.] logs, records and videos [O.T.L.'s] behaviour in an attempt to provide her strongly held belief that her fears are well-founded, and as a means to ensure that the protection order remains in place.

As in the first s. 211 report, the writer does not believe that [O.T.L.] presents any risk for physical harm to [J.T.L.]. For example [O.T.L.] and [J.T.L.'s] discussions about where and how he must park and [J.T.L.'s] extreme reaction to his closeness because he may present danger, are not supported by any evidence. When this issue was discussed with [O.T.L.'s] therapist, no one believed him to present any risk for aggression towards [J.T.L.] or the children.

- b) The next day, on August 27, 2019, the claimant sought to schedule an appearance before Justice Crawford to seek clarification with respect to, among other things, the duration of the PO and whether the PO "is to last beyond the presumptive period of one year". The request to appear was copied to the respondent who was then self-represented. The trial registry informed claimant's counsel that Justice Crawford was unable to hear the matter due to his retirement.

- c) Neither the claimant nor the respondent pursued the application before Justice Crawford. The claimant states that there have been multiple interim applications since with respect to parenting arrangements and while he wished to clarify the terms of the PO, he instead chose to focus his time and limited financial resources on dealing with ongoing parenting issues. Given the children were previously taught at home, there were very few times that he and the respondent encountered one another.
- d) The December 2019 trial date was adjourned by consent. Another trial date for February 2020 was set, but it too was adjourned. The trial of this action is presently set for February 2022.
- e) In February 2020, the claimant made an application to vary parenting time, but the COVID-19 pandemic intervened and the application was set for hearing several times. On September 17, 2020 the parties attended before Master Keighley. The claimant's counsel made the submission that the PO had expired. The respondent's counsel disagreed. As the issue was not raised in the notice of application, the issue was not resolved.
- f) On September 13, 2011, Justice Branch pronounced the consent order referred to above with respect to guardianship, parental responsibilities and the enrollment of the children in public school.
- g) On September 23, 2011, both parties attended the PAC meeting.
- h) On October 24, 2011, Dr. Koopman produced a detailed s. 211 report. With respect to the PO, she recommends:

The writer sees no indication [J.T.L.] is at physical risk from [O.T.L.] and the Protection Order is not seen as important for her safety. [O.T.L.] should be strictly advised to not harass [J.T.L.] in any form including, intrusion into her personal life, emails, and texts, when and if the Court decides to lift the Protection Order.

Respondent's position

- [20] Respondent's counsel argues that the PO is clear on its face, there is no need to resort to the surrounding circumstances, and the PO is in force until there is a further court order.

Analysis

- [21] The materials support that it is appropriate that the PO be terminated pursuant to s. 187(1) of the FLA. I have reviewed Dr. Koopman's detailed updated report, the claimant's affidavits and the steps he has taken since Dr. Koopman's first report, and the factors in s. 184 of the FLA. Given the parties agree that the PO should be terminated, I do not find it necessary to detail the factors. They are discussed in Dr. Koopman's report. The conduct orders to which the parties have agreed are appropriate.

- [22] I agree with claimant's counsel that the factors cited by him all point to the PO being an interim and not final order. At the time of the PO, the s. 211 report was pending and expected shortly, and the trial date was four months away. It would have been reasonably anticipated that the PO would be addressed again following Dr. Koopman's s. 211 report or at the trial. Unfortunately, the trial was adjourned, Justice Crawford retired, and the parties never attended before another judge to address the issue.
- [23] However, despite finding that the PO is interim, in my view it clearly states that it is in force "until further order of the court". As the court had provided otherwise, the default provision in s. 183(4) does not apply.
- [24] I acknowledge the claimant's argument that if there is ambiguity in the PO, the respondent is entitled to the most favourable construction. The principles in Jackson are not in dispute. However, this application does not concern whether the claimant was in breach of the PO. If the Crown proceeds with criminal charges, there may be issues regarding the interpretation of the PO (whether its terms other than its duration are ambiguous, whether its terms prohibited the claimant from attending the PAC meeting, and if so whether the claimant was in breach of it). However, I do not find the term regarding duration is ambiguous.
- [25] Counsel did not provide me with any case authorities on how a nunc pro tunc order may come within s. 187 of the FLA, or on the inherent jurisdiction of the Court to make such an order. I have reviewed two cases where a court was asked to make a nunc pro tunc order setting aside a protection order. In *K.(J.) v. K.(G.)*, 2015 BCPC 117, the Court terminated a without notice protection order nunc pro tunc where the order was found to have been made without jurisdiction as the person bound by the order was not a family member: at paras. 23-25. In *Denis v. Palmer*, 2016 ABQB 54, the Court declined to set aside a without notice emergency protection order ("EPO") nunc pro tunc, but did revoke the order. The Court conducted a statutory review based on a more complete factual matrix than was available to the judge who had issued the order, and found that there was no current risk of family violence and terminated the EPO on that basis. The Court noted that this "did not equate to a finding that the Provincial Court Judge erred in granting the EPO at the first instance and did not justify setting the EPO aside nunc pro tunc.": at para. 17.
- [26] The Court has inherent jurisdiction to make a nunc pro tunc order. In *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 (in a case which is factually very different), the majority provided a non-exhaustive list of factors to guide courts in determining whether to exercise the inherent jurisdiction:
- [90] (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice .

- [27] None of the factors is determinative. A court should not exercise its inherent jurisdiction where it would undermine the purpose of legislation: at para. 93. In my view, a similar analysis is whether making a nunc pro tunc order would undermine the purpose of the PO.
- [28] In this case, I have considered that: an order nunc pro tunc would likely affect the potential criminal matter; given Dr. Koopman's August 26, 2020 s. 211 report, if the claimant had made an application, the Court may have at that time decided to terminate the order, but that is not known; the term of the PO is not an irregularity; the claimant had attempted to have the matter clarified by filing a request to appear the day after Dr. Koopman's report, but this was abandoned as Crawford J. had retired; and the parties have had other interim applications where the PO could have been addressed.
- [29] Most importantly, I find that granting a nunc pro tunc order would undermine the PO. It would effectively render uncertain the PO and be contrary to the objective of finality, and would sanction a route around an existing order when an application for a further order is the appropriate method to address the PO. The claimant was aware that he and the respondent had different interpretations of the PO before the event at the PAC, although he may have thought otherwise after the September 13, 2021 order of Justice Branch, but that is not the issue before me and I make no determination regarding it.
- [30] In conclusion, I do not find any ambiguity with respect to the specific term of the PO regarding its duration. I make no comment on the other terms. I conclude that in the circumstances of this case, a nunc pro tunc order retroactive to August 1, 2020 is not appropriate and I exercise my discretion not to grant such an order. However, I order that the PO is terminated.

"Norell J."

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