
CANADA / JUDGMENT

T.A.O. v. D.J.M.

2021 BCSC 1724

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1724 T.A.O. v. D.J.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.A.O. v. D.J.M.,

2021 BCSC 1724

Date: 20210830

Docket: E56593

Registry: New Westminster

Between:

T.A.O.

Claimant

And

D.J.M.

Respondent

Corrected Judgement: The text of the judgement on the front page was corrected on September 24, 2021

Before: The Honourable Justice Shergill

Reasons for Judgment

Re: Application pursuant to s. 230(2) of the Family Law Act

Counsel for the Claimant:

M.H. Sobolewski

The Respondent, appearing in person:

D.J.M.

Place and Date of Hearing:

New Westminster, B.C.

July 16, 2021

Place and Date of Judgment:

New Westminster, B.C.

August 30, 2021

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I. Overview

- [1] This is an application filed in a high-conflict family law proceeding, for an order that the claimant pay \$5,000 to the respondent for her failure to comply with a court order, and special costs. Originally, the respondent also sought a finding of contempt and related relief. However, that matter was adjourned at the conclusion of the hearing following the claimant's agreement to comply with the court order.

- [2] This application is brought under s. 230(2) of the Family Law Act, [FLA] and relates to a consent order settling all the financial issues between the parties (the "Consent Order").
- [3] The Consent Order requires the claimant to pay some monies to the respondent as partial consideration for the respondent transferring his company shares to the claimant. At issue is whether the respondent intentionally breached the Consent Order, and if so, whether an order is warranted under s. 230(2).

II. Issues

- [4] The relief sought in the notice of application ("NOA"), is as follows:
 - 1) an order pursuant to s. 230(2) of the FLA that the claimant pay \$5,000 forthwith for failure to comply with the terms of the Consent Order;
 - 2) an order that the claimant immediately pay \$13,800 to the respondent as per the Consent Order;
 - 3) an order pursuant to Rule 21-7(15) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules] that further punishment for contempt be suspended until a specific deadline to allow the claimant time to purge her contempt; and
 - 4) special costs the respondent.
- [5] At the conclusion of the hearing, the claimant consented to the relief sought at clause 2, and the respondent adjourned the relief sought at clause 3.

III. Factual Background

- [6] Many of the key facts in this case are not in dispute.
- [7] The Consent Order was pronounced on January 22, 2021. It settled all the financial issues between the parties, including child support and division of family property. The parties entered into the Consent Order midway through their family law trial, where the main remaining issue was parenting of the parties' seven year old daughter, N.
- [8] At issue in the trial was the claimant's allegation that the respondent had sexually abused N. as well as N.'s half-sister. The trial concluded on March 12, 2021. On August 27, 2021 I released reasons for judgment in the trial, indexed at 2021 BCSC 1704 (the "Trial Reasons"). I preferred the evidence of the respondent, and found the claimant to be an unreliable witness and lacking in credibility: Trial Reasons, paras. 64 to 77. I concluded that the claimant's allegations of sexual abuse were unfounded: Trial Reasons at para. 304.
- [9] Clause 5 of the Consent Order requires the respondent to transfer his shares in a company ("DEL") to the claimant for her own use absolutely, in consideration of the claimant:
 - a) paying the respondent \$15,000 (the "Settlement Funds");
 - b) releasing the respondent from the DEL shareholder agreement;

- c) making best efforts to ensure that all other shareholders of DEL all release the respondent; and
- d) assuming and indemnifying the respondent for any debts or ongoing legal claims or obligations of DEL.

[10] I permitted the claimant to withhold \$1,200 from the Settlement Funds as the respondent's share of Dr. Elterman's costs for attendance for cross-examination at the trial. This left \$13,800 to be paid by the claimant to the respondent (the "Net Settlement Funds" or the "Payment") pursuant to the Consent Order.

[11] The evidentiary portion of the trial completed on January 29, 2021. The matter was set for continuation on March 11-12, 2021 for closing arguments.

[12] On February 2, 2021, the respondent sent an email to claimant's counsel, Jack Hittrich, asking when he could expect to receive the Net Settlement Funds.

[13] On February 18, 2021, Mr. Hittrich sent the following email to the respondent:

In response to your question of when you can expect payment pursuant to the Jan. 22, 2021 Consent Order, my client would like to obtain a ruling on costs against you first. Her claim for costs will certainly exceed the amount she currently owes you and given that you are not likely to be in a position to pay her, it is our considered opinion that it would be better to wait and have the current amount that she owes you stand as a credit against the amount you will owe in costs.

[14] The respondent disagreed with the position taken by the claimant. He replied to Mr. Hittrich on February 18, 2021, and advised him that he would be bringing an application for relief and a motion for contempt without further notice.

[15] Around 7:42 pm on February 18, 2021, Mr. Hittrich sent an email to the respondent, as follows:

No need to worry I would never give a dime to this pedophile without the guarantee that she gets all his shares in [DEL].

(the "Offending Email")

[16] The offending email was sent to the respondent, and copied to [T.G.] and Mark Sobolewski. Mr. Sobolewski is co-counsel on this file with Mr. Hittrich. It is my understanding that T.G. is the claimant, known also as T.A.O.

[17] On March 12, 2021, during closing arguments, the respondent advised the court that the claimant had refused to pay him the Net Settlement Funds. Mr. Hittrich stated that his client was withholding the Payment as security for costs of this proceeding, pending final judgment in the trial. I reminded Mr. Hittrich that his client's success in the family law proceeding was far from certain. I advised him that the claimant was obligated to comply with the Consent Order absent an order granting a stay. As no stay had been granted or sought, I directed the claimant to comply with the Consent Order forthwith.

[18] During his submissions on March 12, 2021, the respondent also advised the court that Mr. Hittrich had sent him the Offending Email. Mr. Hittrich apologized for the Offending Email to the respondent, but did not offer any rationale for why he thought it was appropriate to write such an email.

[19] On March 13, 2021, Mr. Hittrich sent a letter to the respondent providing an unreserved apology for the Offending Email. He explained that the Offending Email was "intended to be a private response to a question from someone on the '[claimant's] Team'" and had been sent to the respondent in error. Mr. Hittrich went on to say that:

my client's obligations pursuant the Consent Order are not dependent in anyway on the sexual abuse allegations. I regret using the language I used in the email that you inadvertently received but the recipients were not third parties. It was to be a private email in response to a question as to how to handle the payment and the share transfer.

[20] In the same letter, Mr. Hittrich advised the respondent that he had spoken to his client about borrowing money to pay the Net Settlement Funds. He explained that the respondent would be required to execute some share transfer documents which would be held in trust on an undertaking not to make use of them until the respondent had been provided with the trust cheque for \$13,800.

[21] The respondent sent an email to Mr. Hittrich on March 14, 2021, giving the claimant a deadline of March 17, 2021 to provide him with the documentation to effect the share transfer, as well as a money order for the Payment. He also asked Mr. Hittrich to provide him with names of the persons who had received the Offending Email.

[22] On March 15, 2021, Mr. Hittrich sent an email to the respondent enclosing certain documents that he said the respondent was required to sign to effect the share transfer (the "Share Transfer Documents"). The Share Transfer Documents included:

- a) A comprehensive share purchase agreement (the "comprehensive SPA");
- b) A director's resolution tendering the respondent's resignation as a Director of DEL (the "Resolution");
- c) A broadly worded release of all claims releasing the claimant and DEL from all actions and liability up to the date of signing the release (the "Release"); and
- d) An instrument of transfer assigning and transferring the respondent's common shares in the company to the claimant (the "IOT").

[23] The parties exchanged a series of emails between March 15 and March 17, 2021, regarding their respective positions about whether or not the respondent was required to sign the Share Transfer Documents as a term of the Consent Order.

- [24] On March 17, 2021, Mr. Hittrich sent an email stating that his client did not yet have enough funds to pay the respondent, but hoped to have the money by March 19, 2021. On March 19, 2021 he sent a follow up email telling the respondent that his client still did not have money to make the Payment, but was hopeful she would have it by the following week. In the same email he told the respondent that the only persons that had been sent the Offending Email were his client and co-counsel.
- [25] The NOA was filed on March 26, 2021. On March 29, 2021, the respondent attended at Mr. Hittrich's law office and met with Mr. Hittrich's colleague, Ken Craig. Mr. Craig insisted that the respondent sign the Share Transfer Documents prior to receiving the Bank Draft. The respondent refused to sign anything, and left.
- [26] Due to scheduling reasons, the application was not heard until July 16, 2021.

IV. Positions of the Parties

- [27] There is no issue raised about the claimant's compliance with clauses 5(b), (c), and (d) of the Consent Order. The only issue before me is compliance with respect to clause 5(a). To that end, the parties differ on what is required of the respondent in order to receive the monies contemplated at clause 5(a).
- [28] The respondent argues that the claimant was trying to renegotiate or unilaterally vary the terms of the Consent Order by requiring him to sign all of the Share Transfer Documents. He characterizes the position taken by the claimant as a "collateral attack" on the Consent Order. He points out that none of the Share Transfer Documents were stipulated in the Consent Order. Nevertheless, the respondent concedes that the Consent Order contemplates him signing some form of an instrument of transfer, and has no issue with being required to sign an IOT prior to receiving the Payment. However, he submits that he is not obligated by the Consent Order to sign the Release, Resolution, and comprehensive SPA (collectively referred to as the "additional Share Transfer Documents").
- [29] The respondent also submits that as further evidence of her breach of court orders, the claimant was video-recording him during the parenting time exchanges. This was alleged to be in direct contravention of clause 2 of the order of Master Caldwell (as he then was) pronounced on November 8, 2019 (the "Caldwell Order").
- [30] The claimant submits that the Share Transfer Documents are standard documents that are prepared in circumstances similar to the one at bar. In support, she relies on a letter from Brian Kaminski, dated April 7, 2021 (the "Kaminski letter") which was addressed to Mr. Hittrich. Mr. Kaminski was corporate counsel for the claimant, and prepared the documents in question. In his letter, Mr. Kaminski sets out his opinion that the Share Transfer Documents are standard documents prepared in such transactions. He also provides his opinion regarding the minimum documentation required to effect a "valid and legal" transfer of shares. The claimant relies on the Kaminski letter to support her position that she was acting on legal advice when she required the respondent to execute the additional

Share Transfer Documents before paying him the Net Settlement Funds.

- [31] The claimant also takes the position that she was acting on legal advice when she instructed her counsel to withhold the Payment as security for costs. In her Affidavit #30 made May 18, 2021 (the "claimant's Affidavit #30"), she avers that when the court directed her to comply with the Court Order, she started taking steps to come up with the Payment. On March 23, 2021, she provided a bank draft to Mr. Hittrich's office representing the full amount of the Payment. However, the money was not provided to the respondent because he was not prepared to sign the additional Share Transfer Documents.
- [32] In her Affidavit #31 made May 31, 2021 (the "claimant's Affidavit #31"), the claimant addresses the issue related to the Caldwell Order. The claimant does not deny that she has been video-recording the respondent. Rather, she justifies this behaviour by stating that it was in response to a March 27, 2021 incident which caused her to believe that "if there is no video record, I will be accused of something false again or I could be threatened or harmed in some way." (claimant's Affidavit #31, para. 11). She goes on to say that the Caldwell Order has "now" been brought to her attention, asserting that she had been under the mistaken impression that "the recording prohibition was only with respect to third party surreptitious recordings and not direct recordings where the Respondent would be aware that he is being recorded." (claimant's Affidavit #31, para. 12).
- [33] The parties provide competing versions of the March 27, 2021 incident.
- [34] According to the claimant, the parties met on March 27, 2021, so that the respondent could take the child for his parenting time. Also present was the respondent's girlfriend S.N., who was supervising the parenting time visit pursuant to a court order. The respondent and S.N. walked up to her car after the child had gotten out. The respondent grabbed the front door handle of the claimant's car. The claimant quickly locked it and told him not to open her car door. He then grabbed the back door handle of her car, and opened it and threw some court documents on the back seat of the claimant's car. It is common ground that the documents referred to are in relation to this application. The claimant avers that she was frightened by the respondent's actions. She states that the child witnessed the incident and was visibly upset.
- [35] The claimant's version of events is contradicted by the affidavit evidence of the respondent and S.N. The respondent states in his Affidavit #31 made May 20, 2021 (the "respondent's Affidavit #31"), that he was personally serving the respondent with the court documents in relation to this application. As the claimant was refusing to accept service, he left the papers in the back seat of her car. It is his evidence that the child was with S.N. and did not witness this exchange. The respondent's evidence is corroborated by S.N. in her Affidavit #2 made May 20, 2021.

[36] The claimant's evidence that there was "no need to have me personally served or for the Respondent to open my car door", is contradicted by her counsel's email to the respondent, dated March 17, 2021. In it, Mr. Hittrich tells the respondent that:

Should you still intend to proceed with your contempt application, please also note my client will have to be personally served by you and she needs to be given 7 clear days prior to the contempt hearing.

[37] Given the inconsistencies in the claimant's evidence, and my concerns about her overall credibility, I reject her version of events regarding the March 27, 2021, incident, and prefer the evidence of the respondent.

V. The Hearing

[38] During the course of submissions, counsel for the claimant advised the court that his client had brought with her a bank draft representing the Net Settlement Funds. He further stated that in the event that the court was ordering her to pay the Net Settlements Funds on receipt of a signed IOT, she was prepared to provide the bank draft immediately to the respondent. However, on advice of her legal counsel, it was her preference that the respondent also sign a "simple" SPA. The simple SPA is referenced in Mr. Kaminsky's letter, as follows:

At a "bare minimum the documentation that [the respondent] would need to sign to affect the share transfer to [the claimant] would include:

- (a) a simple share purchase agreement confirming that [the respondent] is (1) a resident of Canada; (2) the shares are not encumbered in any way; (3) [the respondent] is the legal and beneficial owner of the shares; and (4) confirming the purchase price paid for the shares so their ACB can be set for taxation purposes; and
- (b) an instrument of transfer which would formally transfer the shares to [the claimant].

[39] The Kaminski letter is attached to the claimant's affidavit. There is no dispute that the Kaminski letter constitutes hearsay evidence, and that Mr. Kaminski is not qualified to provide an expert opinion. At the conclusion of the hearing, I advised the parties that I was unable to place any weight on Mr. Kaminski's opinion, and as such, there was no basis for me to order the respondent to sign a simple SPA prior to receiving the Payment.

[40] After some discussion between the parties and the court, the respondent agreed to obtain legal advice about whether a simple SPA was necessary to effect the share transfer. The matter was partially resolved on July 16, 2021, on the following terms:

- 1) Clause 3 of the NOA is adjourned generally;
- 2) Clause 2 of the NOA is ordered by consent;
- 3) In the event that a share purchase agreement is required to transfer the respondent's shares in DEL to the claimant, the respondent agrees to sign a simple SPA confirming the following:

- a. that he is a resident of Canada;
 - b. that he is the legal and beneficial owner of the shares in DEL;
 - c. that the shares are not encumbered in any way; and
 - d. the purchase price paid for the shares.
- 4) The respondent will execute the simple SPA and return it to claimant's counsel within seven days of it being presented to him for signature; and
- 5) The respondent is not obligated to sign an SPA that contains additional clauses to those referenced at paragraph (c) above.

[41] Following the pronouncement of the above orders, the respondent provided an executed copy of an instrument of transfer, and the claimant provided him with a bank draft for \$13,800. As the claimant had brought herself into compliance of the Consent Order, the respondent agreed to adjourn the relief sought in relation to contempt of court.

[42] I reserved judgment with respect to clauses 1 and 4 of the NOA. This is my ruling on those matters.

VI. Legal Framework

[43] Section 230 of the FLA provides as follows:

230 (1) Subject to section 188 [enforcing orders respecting protection], an order under this section may be made only if no other provision of this Act applies for the purposes of enforcing an order made under this Act.

- (2) For the purposes of enforcing an order made under this Act, the court on application by a party may make an order to do one or more of the following:
- (a) require a party to give security in any form the court directs;
 - (b) require a 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.

[44] The court may provide relief under s. 230 where no other provision of the FLA provides an effective remedy to enforce a court order. The court may order the payment of a fine not exceeding \$5,000, to ensure compliance of a court order: *Kanta v. Kanta*, 2017 BCSC 2321 at para. 19.

- [45] Section 230 of the FLA is designed to enforce and secure a party's future compliance with court orders made under the FLA: Kanta at para. 19. Other provisions in the FLA related to enforcement of orders include s. 213 (orders respecting disclosure) and s. 228 (orders respecting conduct). Both these provisions permit the court to grant substantially the same relief as s. 230(2), upon a finding of a failure to comply.
- [46] Orders under ss. 228 and 230 may be necessary to impart on one or both parties that they are bound by the FLA and must comply with court orders: A.J.F. v N.L.S., 2020 BCSC 26 at para. 85, citing B.G.M.S. v. J.E.B., 2018 BCSC 1628 at para. 177. Justice Skolrood went on to say at para. 86 of A.J.F., as follows:
- [86] Although compliance with the FLA and related court orders is critical, the FLA mandates a more holistic approach to resolving family disputes that minimizes delay, formality and conflict between the parties: s. 199(1). The remedies available under ss. 228 and 230 empower the court to provide progressively more serious responses as a particular case may dictate. More importantly, a court's objective should be to fashion a remedy that ensures compliance while addressing the specific situation before the court: J.R.B. v. J.H.F., 2015 BCPC 70 at para. 26.

VII. Analysis

- [47] The parties did not argue, nor do I find, that there is any other provision in the FLA that provides an effective remedy to enforce the court order. Thus, the threshold required for granting a remedy under s. 230 is met in this case.
- [48] In order to establish a breach of a court order, the respondent must show that: (1) the order was clear and unequivocal regarding what should or should not be done; (2) the claimant had actual notice of the order; and (3) the breach was intentional. These are the same elements required for a finding of contempt, except that in the case of contempt, the standard of proof is proof beyond a reasonable doubt: Carey v. Laiken, 2015 SCC 17 at paras. 33-35.
- [49] For the purposes of s. 230, the breach of a court order must be established on the balance of probability: Reehal v. Reehal, 2020 BCSC 1635 at paras. 75-76.

A. Was the Order Clear and Unequivocal

- [50] I find that the Consent Order was clear and unequivocal regarding what should be done to effect the share transfer to the claimant.
- [51] Clause 5 of the Consent Order requires the respondent to transfer his shares in DEL to the claimant for her own use absolutely, in consideration of the claimant paying, amongst other things, the Net Settlement Funds. This provision contemplates that the respondent will be required to sign some form of an instrument of transfer to effect the share transfer. There is nothing in the wording of clause 5 that requires the respondent to sign the additional Share Transfer Documents that the claimant was insisting on receiving before she would pay him

the Net Settlement Funds. While clause 5(b) references a release, the release is to be provided by the claimant to the respondent and not the other way around. The Consent Order also does not require the respondent to resign as a director of DEL, or to enter into a comprehensive SPA, or any SPA for that matter.

- [52] While I do not doubt that the claimant's corporate counsel advised her to obtain signatures on the additional Share Transfer Documents before making the Payment, the respondent was not obliged to sign these documents under the terms of the Consent Order. In my view, the claimant's insistence that the respondent sign the additional Share Transfer Documents was an attempt at renegotiating or unilaterally varying the terms of the Consent Order after it had been entered.
- [53] The claimant's actions do not constitute a "collateral attack" as that term is commonly understood and used. A collateral attack is made in proceedings other than those whose specific object is to reverse, vary, or nullify the order or judgment: *M.K. v. British Columbia (Attorney General)*, 2020 BCCA 261 at para. 33, citing *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599. Here the claimant has not commenced any proceedings.
- [54] However, I agree with the respondent that the requirement that he sign the additional Share Transfer Documents, was not supported by a plain reading of the Consent Order, and went beyond the terms that the parties had negotiated. The claimant was bound by the Consent Order and could not unilaterally add in additional terms. When parties enter into a negotiated settlement of disputed issues, and have them pronounced as a Consent Order, they are no less bound by its terms than if an order had been made by the court after a hearing.

B. Did the Claimant Have Notice of the Order

- [55] I find that the claimant had actual notice of the Consent Order. She negotiated its terms through her counsel, and was present in court when her counsel spoke to it.

C. Was the Claimant's Breach Intentional

- [56] When the parties entered into the Consent Order, they were still in the middle of the trial and their energy was focussed elsewhere. When the trial broke on January 29, 2021, it is reasonable to expect that the claimant would need some time to come up with the settlement funds and necessary paperwork to effect the transfer of shares.
- [57] On February 18, 2021, Mr. Hittrich told the respondent that his client would not be paying him the Net Settlement Funds until after the court had rendered its judgment in the trial. The reason given was that she was withholding the money as security for costs. According to the claimant, she took this step because she mistakenly believed that she could delay the Payment until there was a ruling on costs. She states that she was advised by her counsel that if she was successful in the family trial, her costs claim against the respondent would be substantially higher than the amount she owed him under the Consent Order (claimant's

Affidavit #30, para. 8). She asserts that it was not until they appeared before me on March 12, 2021, and the Court made it clear that the amount had to be paid, that she realized that she did not "have the option of waiting until there was a cost ruling" (claimant's Affidavit #30, para. 9).

- [58] I reject the claimant's argument that she did not know that she was in breach of a court order by unilaterally withholding the Payment until she had a costs ruling following judgment. At all material times, the claimant was being represented by senior legal counsel who was experienced in the practice of family law. It stretches incredulity that Mr. Hittrich would not have known or told the claimant that she was required to abide by the Consent Order, and that she had no legal authority to withhold the Net Settlement Funds as security for costs without a court order permitting her to do so.
- [59] Whether the claimant was acting on legal advice and breached the court order, or whether she was acting against legal advice and breached the court order, the end result is the same. She knew what the court required of her, and chose not to comply with the court order because it did not suit her. My conclusion that the claimant's breach was intentional, is further supported by the fact that the claimant did not pay the Net Settlement Funds even after the court's direction on March 12, 2021. Rather, she simply came up with another excuse for why the Payment could not be made.
- [60] I also reject the claimant's argument that her ongoing refusal to comply with the court order was due to financial constraints and not a refusal to comply with a court order. The claimant had the funds by March 23, 2021, as evidenced by the bank draft that she provided to her counsel on that date. Yet she did not pay the respondent this money until the parties attended court for the hearing, almost four months later.
- [61] The claimant's assertion that her counsel had advised her that the respondent would have to sign the additional Share Transfer Documents in order to effect the transfer of shares to her, is not supported by the evidence. Even if I was to put full weight on Mr. Kaminski's letter, it only supports the requirement for the IOT and a simple SPA. It does not support the claimant's assertion that the respondent was required to execute the Release and the comprehensive SPA in order for the share transfer to be valid.
- [62] In my view, the claimant was employing every possible tactic she could find, to try to frustrate the respondent's ability to collect on the monies owed to him under the Consent Order. She first tried to convince the respondent that could withhold the Payment as security for costs. When that failed, and the court directed her to make the Payment, she asserted that she needed time to come up with the funds. When the funds were in her possession, she told the respondent that she would only pay him if he signed the additional Share Transfer Documents, even though they were not required by the Consent Order.

[63] On the whole of the evidence before me, I conclude that the claimant was in breach of the Consent Order. The Consent Order was clear and unequivocal, the claimant had knowledge of what it required of her, and her breach was deliberate and intentional.

VIII. Remedy

[64] The claimant breached paragraph 5(a) of the Consent Order. Her breach was wilful, sustained, and continuing at the time of the hearing.

[65] Section 230 is designed to enforce and secure a party's future compliance with orders made under the FLA. While the claimant "cured" her breach of the Consent Order by bringing herself into compliance, this did not occur until the conclusion of the hearing. The respondent was required to commence this application and take numerous steps to have this application heard in order to secure the claimant's compliance with the court order.

[66] There is clear evidence that in addition to the Consent Order, the claimant also breached the Caldwell Order by video-recording the respondent during the parenting time exchanges.

- a) The Caldwell Order was clear and unequivocal. It prohibited the claimant from recording the respondent.
- b) The claimant was aware of the terms of the Caldwell Order. She had legal counsel acting for her when the Caldwell Order was pronounced, and there is no evidence that her counsel did not advise her of its terms after the Caldwell Order was pronounced.
- c) The claimant's breach of the Caldwell Order was deliberate. Her excuse that she was under the mistaken belief that the recording prohibition was only with respect to third party surreptitious recordings, and did not apply to direct recordings "where the Respondent would be aware that he is being recorded", is simply not believable. There is nothing on the face of the Caldwell Order that would indicate that such a narrow interpretation was intended.

[67] I consider the claimant's justification for breaching the Caldwell Order as another effort to try to absolve herself of responsibility for her actions by deflecting blame onto others. Her breach continued until at least the end of May, 2021, and may still be ongoing. The claimant's Affidavit #31 does not state that she has actually stopped making recordings of the respondent, only that she would like permission to continue to record him.

[68] There are a number of court orders currently in place which will govern the parties for the foreseeable future. These include parenting orders in relation to N., as well as conduct orders intended to regulate the claimant's behaviour: Trial Reasons, paras. 343-350. The best interests of N. mandate that the parties comply with the court orders.

[69] Given the claimant's history of non-compliance with court orders, I consider it necessary and appropriate to impose a fine on the claimant, in order to condemn her behaviour and ensure her compliance.

- [70] I conclude that the claimant should be required to pay the respondent a fine of \$4,000, within 30 days of the making of this order. This amount is reasonable given the nature of the non-compliance and the financial circumstances of each of the parties.

IX. The Offending Email

- [71] I cannot conclude these reasons for judgment without commenting on the Offending Email. The respondent was extremely upset by Mr. Hittrich's email calling him a pedophile. Rightfully so. The language used in the email was appalling and inexcusable. While Mr. Hittrich unreservedly apologized to the respondent, the apology was sent almost one month after the Offending Email was sent, and only after the parties appeared in court and I chastised Mr. Hittrich for using such offensive and inflammatory language.
- [72] The March 13, 2021 letter exhibits no remorse for calling the respondent a pedophile and sharing this email with others. The only remorse that Mr. Hittrich appears to express is for the respondent inadvertently receiving his ill-advised communication.
- [73] Even more concerning, is that the Offending Email does not seem to be an isolated incident. In March 2021, the parties were communicating with Supreme Court Scheduling regarding the scheduling of the hearing. Mr. Hittrich's colleague, Mr. Craig, had temporarily assumed conduct of the file. Attached as an exhibit to the claimant's Affidavit #30 is a copy of an email sent by Mr. Craig to Supreme Court Scheduling. In the email, Mr. Craig complains about the lack of merit in the respondent's application. In the course of the email, he alleges that the respondent "stole" their client's company. As with the "pedophile" allegation, the allegation of theft was one that the claimant made against the respondent during the trial. There is no evidence to support either of these allegations: Trial Reasons, paras. 304 and 310.
- [74] Both Mr. Hittrich's and Mr. Craig's allegations against the respondent are unfounded. Their decision to memorialize their personal opinions of the respondent, communicate these opinions to others, all while in the course of performing their professional obligations, is ill-conceived and improper. In so doing, they fall far short of what is expected of them. Such conduct is unbecoming and must be condemned.
- [75] More than in any other area of the law, there is a risk in family law disputes that counsel may lose their objectivity and begin to align emotionally with their client's cause. This is particularly so in high conflict proceedings such as this one. Counsel must ensure that they maintain their objectivity and professionalism throughout. Counsel are expected to encourage their clients to take steps that will help diffuse the hostility and tension between the parties, and not to further inflame them. Their duty to their client, duty to the court, and duty to the administration of justice, demands nothing less.

X. Costs

- [76] Rule 16-1(7) states that, subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders. In this case the respondent was successful and is entitled to his costs.
- [77] It is well established that a party who is not represented by counsel is still entitled to their costs of a proceeding, including consideration for special costs: *McKnight v. Hutchison*, 2014 BCCA 472 at para. 39.
- [78] One of the purposes of a costs award, "is to encourage conduct that reduces the duration and expense of litigation, and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.) at para. 208.
- [79] As noted by Mr. Justice Walker in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 8, special costs are awarded to a litigant where the other party has engaged in reprehensible conduct; they are punitive in nature and encompass an element of deterrence.
- [80] Reprehensible conduct can include "milder forms of misconduct deserving of reproof or rebuke" to "scandalous or outrageous conduct": *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17.
- [81] The conduct of the claimant is conduct that would ordinarily result in a special costs award. However, because this court may consider conduct exhibited during a proceeding when assessing the imposition of the fine pursuant to s. 230 of the FLA, there is a risk of double counting if special costs are awarded for that same conduct. Such is the case here. As I have already considered the claimant's conduct in relation to the fine, doing so for the purposes of a special costs award would be unfair and unjust. As such, an order for special costs of this application is not warranted.
- [82] However, the circumstances of this case do lend themselves to a fixed costs award. Given the almost six months that the respondent had to wait in order to receive the Net Settlement Funds from the claimant, it is reasonable to assume that he may run into further difficulty in securing the claimant's cooperation in resolving the costs award. As such, it is appropriate to require the claimant to pay fixed costs to the respondent within a specified period of time. This will obviate the need for the parties to attend before a registrar to obtain finality on the costs issue. Such a step would only add to the delays and costs incurred thus far.
- [83] The hearing lasted one half day. Under tariff item 4 of Appendix B to the Rules, a party is entitled to \$1,000 for each half day of attendance at a contested application. This figure also includes preparation for the application, but does not include disbursements or taxes. After accounting for taxes and disbursements likely to have been incurred, such as court filing fees, I conclude that \$1,700 is a reasonable figure to reimburse the respondent for his costs of this hearing.

[84] I therefore award the respondent \$1,700 in fixed costs of this application, inclusive of disbursements and taxes (the "costs award"). The claimant is required to pay the respondent the costs award, within 14 days of the date of these reasons.

"Shergill J."

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