IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Odgers v. Odgers,*
2014 BCSC 717

Date: 20140428
Docket: ED65634
Registry: Nanaimo

Between:

Shannon Louise Odgers

Claimant

And

Lee Warren Odgers

Respondent

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Claimant:	Karl J. Hauer
Counsel for the Respondent:	Stephen G. McPhee, Q.C.
Place and Date of Trial/Hearing:	Nanaimo, B.C. April 8, 2014
Place and Date of Judgment:	Nanaimo, B.C. April 28, 2014

INTRODUCTION

[1] This is an application for contempt filed by the respondent as a result of an alleged failure by the claimant to comply with a consent order dated July 5, 2012 (the "Order"), that provided, *inter alia*, for the appointment of a parenting coordinator. In addition, the respondent seeks an order regarding the terms of reference for the parenting coordinator and costs. The claimant opposes the contempt application and disputes some of the parenting coordinator's terms of reference, as proposed by the respondent, but consents to many of these terms and to the appointment of a parenting coordinator pursuant to the Order. At the conclusion of the hearing, I granted a consent order regarding an amendment to the Order that addressed the selection of a parenting coordinator, the terms of reference not in dispute and reserved on the contempt application and the disputed terms of reference.

[2] The parties separated in November 2011 after a lengthy marriage. They have two children: B.O., who is now 15 years old and D.O., who is 12 years old. When they first separated, the parties informally agreed to a shared custody arrangement with the children spending alternating weeks with each parent. This shared parenting arrangement became an issue for the parties subsequent to their separation because they had difficulty communicating with each other about the children. Their relationship was quite strained.

[3] On July 5, 2012, the parties attended a Judicial Case Conference ("JCC") with legal counsel and, as a result of their discussions, the parties agreed to the Order, which addressed interim child and spousal support, the retaining of a parenting coordinator, and the exchange of documents.

[4] Clause 2 of the Order, regarding the parenting coordinator, is the subject of this application and it provides as follows:

> The Claimant and the Respondent will retain a parenting coordinator to provide assistance in relation to issues involving the Children. The Claimant and the Respondent will agree on an individual to act as a parenting coordinator as well as how they will pay for the parenting coordinator's services.

MATERIAL FACTS

[5] Immediately after the JCC in July 2012, the parties' attention was focused on difficulties between the respondent and his daughter, B.O. As a result of certain incidents alleged to involve aggressive behaviour on the part of the respondent, B.O. began spending more time at her mother's residence. By September 2012, it appears that B.O. was spending most of her time at her mother's home and this was a cause for great concern to the respondent. The subject of a parenting coordinator was raised by the respondent as a means of addressing the situation with B.O. and with what was characterized by the claimant as behavioural problems exhibited by D.O. At that time, the claimant was not able to pay half the cost of a private parenting coordinator and rejected the two names proposed by the respondent.

[6] To address the cost issue, the claimant contacted the Family Justice Access Centre in September 2012 to inquire about parenting coordinators. During her discussions with the centre's representative, the claimant described the events that had been passed on to her by B.O. concerning the respondent's behaviour. The representative of the centre advised the claimant to contact the Ministry of Children and Family Development (the "Ministry") about B.O.'s allegations. The claimant reported the incidents to the Ministry and a social worker met with the parties separately and interviewed B.O. alone. At the conclusion of this process, the Ministry recommended that the parties enroll in the Living in Families with Teens ("LIFT") program, which would provide counselling services and fill the role of a parenting coordinator.

[7] Although the respondent denies that the LIFT program was a substitute for a parenting coordinator, the parties agreed to participate in the program in October 2012. Sheila Laughton was assigned to the parties as a counsellor with the LIFT program and she met separately with them in late October 2012. There were no joint meetings between the parties due to the claimant's fear of the respondent.

[8] In November 2012, the relationship between the parties became more difficult due to an alleged assault by the respondent when he attended the claimant's home.

This incident led to further restrictions on their communications regarding the children. In addition, the respondent advised the claimant that Ms. Laughton told him that she had resigned as their counsellor because the claimant had dropped out of the program. He again proposed the names of two private parenting coordinators. As a result of this correspondence from the respondent, the claimant contacted Ms. Laughton directly and she was advised that Ms. Laughton would continue to be their counsellor.

[9] The claimant deposes that she continued to seek the assistance of Ms. Laughton and met with her about parenting concerns regarding the children during November and December 2012 and between January and April 2013. The respondent does not deny that this occurred. However, he maintains that Ms. Laughton could not address the issues a parenting coordinator normally deals with. During this period, the respondent did not pursue retaining a private parenting coordinator with the claimant and attempted to work with Ms. Laughton. B.O. also met with Ms. Laughton separately.

[10] By the end of April 2013, after meeting with Ms. Laughton and a social worker employed by the Ministry, B.O. decided not to spend any time at her father's home. She has had no contact with the respondent since the spring of 2013. Returning to a shared parenting arrangement became the respondent's focus in discussions with Ms. Laughton and with the claimant. The parties' relationship became extremely strained as a result of this situation.

[11] Despite these difficulties, the parties participated in family mediation and on June 4, 2013, they entered into minutes of settlement that addressed the children and the parenting obligations of the parties. While the settlement acknowledged that B.O. was now living full time with her mother, the respondent was to be involved in all significant decisions regarding her upbringing. The settlement also provided a mechanism for addressing conflicts about the children. Clause 6 of the minutes of settlement provided that if the parties could not reach an agreement regarding any significant decision despite their best efforts, "the parties shall use the services of

Sheila Laughton, or such other person the parties agree." Further, Clause 7 permitted either party to seek an order from the Court if the dispute could not be resolved by Ms. Laughton after two weeks.

[12] The settlement agreement acknowledged that B.O.'s decision to live with her mother would be respected until she decided otherwise; however, the parties also agreed to work towards a resumption of their shared parenting arrangement. Clause 13 says:

> Specifically with respect to [B.O.] the parties acknowledge that she has stated her wishes to live solely with [the claimant], however both parties are committed to working towards a restoration of [B.O.'s] relationship with [the respondent], and are actively working with [B.O.'s] counsellors to find ways to return to a shared parenting relationship.

[13] Immediately after the settlement was reached, the respondent's counsel proposed that the parties send a joint letter to Ms. Laughton to ask if she would be willing to take on the role assigned to her under the agreement. The claimant's counsel responded that such a letter was inappropriate, as Ms. Laughton had already been provided with a copy of the minutes of settlement and should decide herself what assistance she could provide B.O. in terms of restoring her relationship with the respondent. Letters went back and forth between counsel regarding the proposed letter and nothing was settled. In late June 2013, the respondent's counsel sent the letter without the claimant's consent.

[14] On July 16, 2013, the respondent's counsel wrote to the claimant's counsel indicating that, although there had been some contact between the claimant and Ms. Laughton, he believed her file would be closed if communications did not resume. Counsel for the respondent was concerned that the claimant was not taking steps to help restore B.O.'s relationship with her father and he wanted clarification as to the claimant's views on Ms. Laughton's "role as a 'parenting coordinator' as well as her role with respect to facilitating some kind of relationship between [B.O.] and my client."

[15] On July 24, 2013, counsel for the respondent again corresponded with counsel for the claimant regarding many of the outstanding issues between their clients, including the children. The claimant's counsel had sent the respondent's counsel a letter dated July 19, 2013, addressing a variety of outstanding issues. In the July 24 letter, counsel for the respondent raised a concern that their respective clients had different information about whether Ms. Laughton was still involved with the family and he wanted this issue clarified. Counsel for the respondent requested that the lawyers have a joint telephone conference with Ms. Laughton. He reminded the claimant's counsel of the Order regarding a parenting coordinator and their agreement at mediation to use Ms. Laughton.

[16] On July 31, 2013, counsel for the claimant responded to the July 24 letter by outlining an incident that involved the respondent using D.O. to pass on a letter to B.O. on his behalf. Apparently this course of action was contrary to a recommendation by Ms. Laughton. While not addressing counsel's question regarding Ms. Laughton directly, the letter from the claimant's counsel clearly indicates that Ms. Laughton remained involved with the family and had offered to provide counselling for both children. Counsel for the respondent was not satisfied with this response and sent another letter on August 1, 2013, demanding another reply to his letter. On August 2, 2013, counsel for the claimant wrote again asking, among other things, to confirm whether Ms. Laughton could provide counselling for D.O. Having received no response to his August 2 letter, counsel for the claimant wrote again on August 19, 2013, asking whether D.O. could receive counselling through the claimant's employee assistance plan.

[17] On August 21, 2013, counsel for the respondent wrote to counsel for the claimant indicating that his response to their requests regarding Ms. Laughton was a demand to clarify with Ms. Laughton her involvement with the family and to appoint a parenting coordinator to deal with the issues about the children that had been raised by the claimant. This demand was repeated in a letter dated September 5, 2013; however, in this correspondence counsel says there must be a referral to another

parenting coordinator apart from Ms. Laughton. He also sought a clarification of her role with the parties in addition to the appointment of a parenting coordinator.

[18] On November 4, 2013, counsel for the respondent sent a letter to the claimant's counsel reminding him of the terms of the settlement agreement that required the parties to use the services of Ms. Laughton to resolve disputes about the children and to work towards restoring the respondent's relationship with B.O. In addition, counsel demanded that the claimant provide the names of three parenting coordinators that were acceptable to her by 5:00 p.m. on November 8, 2013. The respondent would then select one of the names. Lastly, counsel warned that a failure to comply with this demand would lead him to obtain instructions to apply for a contempt order against the claimant, the appointment of a parenting coordinator chosen by the respondent and special costs.

[19] On November 19, 2013, counsel for the claimant responded to the parenting coordinator issue indicating that the claimant wished to settle the terms of reference for this person before someone was retained. The claimant proposed several conditions including a limiting of the issues dealt with by the parenting coordinator to "issues of a significant nature affecting the well-being of the children"; she also proposed that issues related to parenting time with the children, access to B.O., and financial matters would not be within the parenting coordinator's jurisdiction. The parenting coordinator was not to be used to obtain information that could be secured from third parties and the parenting coordinator could not request that they meet together (claimant and respondent) or take counselling from the parenting coordinator. The payment arrangements for the parenting coordinator also had to be addressed before any appointment was finalized. The claimant stipulated that the respondent should bear the entire cost and that the parenting coordinator would be retained for six months and after this date either party could terminate her services.

[20] On November 20, 2013, counsel for the respondent replied to the conditions proposed by the claimant negatively. The respondent believed the strictures on the parenting coordinator's jurisdiction were contrary to the Order regarding the

appointment of a parenting coordinator and essentially would be no help to the parties. The respondent also rejected the claimant's proposal that he pay all of the costs of a parenting coordinator and countered that the costs be shared equally.

[21] On November 21, 2013, the respondent filed this application. It was set down for hearing in February 2014; however, the application was adjourned until April 8, 2014 because the claimant changed legal counsel.

CONTEMPT APPLICATION

[22] The respondent argues that the evidence establishes beyond a reasonable doubt that the claimant has failed to comply with the Order requiring the parties to retain a parenting coordinator. Further, the respondent says the claimant's actions were deliberate and wilful; she refused to engage in the process of appointing a parenting coordinator despite numerous requests and she was put on notice that her behaviour was contrary to the terms of the Order.

[23] The respondent acknowledges that the onus of proof for civil contempt is proof beyond a reasonable doubt. The Order must be clear and concise. There must be evidence of wilful disobedience but it is not necessary to show intent to breach the Order or an intention to bring the administration of justice into disrepute: *Topgro Greenhouses Ltd. v. Houweling*, 2003 BCCA 355; *Frith v. Frith*, 2008 BCCA 2. It is not sufficient that the offending party have a "good excuse" for non-compliance.

[24] The respondent acknowledges that the Order does not contain any terms of reference for the parenting coordinator; however, he argues that it is reasonable to assume the parties would come to an agreement regarding standard terms.

[25] The claimant argues that she cannot be found in contempt because the Order lacks essential terms and is ambiguous. The claimant says it is impermissible to look outside the Order to imply terms in a contempt proceeding as the Order must show the parties precisely what is expected of them: *Gurtins v. Goyert*, 2008 BCCA 196. In particular, the claimant points to the lack of any terms of reference in the Order and to the lack of any definition of a parenting coordinator. At the time of the Order,

the *Family Relations Act*, R.S.B.C. 1996, c. 128, did not refer to parenting coordinators. There was at that time no consensus as to what a parenting coordinator's mandate might include, despite the fact that the court could order that a parenting coordinator be appointed under its *parens patriae* jurisdiction: *Hunter v. Hunter*, 2008 BCSC 403. The provisions of Part 2, Division 3 of the *Family Law Act*, S.B.C. 2011, c. 25, which establishes the legislative authority of parenting coordinators, was not in force when the parties consented to the Order: *M.H. v. C.S.*, 2013 BCSC 2232.

[26] In addition, the claimant argues that in the fall of 2012 and throughout 2013, she made efforts to engage with Ms. Laughton as a parenting coordinator and as a counsellor for the children. The parties also agreed in mediation to use Ms. Laughton as a parenting coordinator. The claimant argues the respondent led her to believe that Ms. Laughton was acceptable as a parenting coordinator. Lastly, she argues that the terms that she proposed were reasonable in light of the changes in B.O.'s living arrangements since the Order and an equal sharing of the costs of a parenting coordinator, as proposed by the respondent, was not acceptable in light of the differences in their respective incomes.

[27] The respondent bears the onus of proof as he is alleging civil contempt. The standard of proof is beyond a reasonable doubt. To establish contempt, the evidence must show deliberate conduct that has the effect of contravening the Order; there is no requirement to show an intention to bring the administration of justice into disrepute: *Topgro Greenhouses* at para. 6. An excuse, even a good one, is not a defence to an application for civil contempt.

[28] Before the claimant may be found in contempt, there must be evidence establishing beyond a reasonable doubt that the Order is clear and unambiguous and within its terms identifies precisely what is necessary to be done by the parties. In this regard, the alleged contemnor is entitled to the most favourable construction of the Order: *Gurtins* at para. 14.

[29] In *Gurtins*, Frankel J.A. summarizes the applicable principles of interpretation in contempt proceedings at para. 16, citing with approval para. 68 of *R. (Mark Dean Harris) v. The Official Solicitor to the Supreme Court,* [2001] EWHC Admin 798 (Q.B.D.):

> (i) No order will be enforced by committal unless it is expressed in clear, certain and unambiguous language. So far as this is possible, the person affected should know with complete precision what it is that he is required to do or to abstain from doing.
>
> (ii) It is impossible to read implied terms into an injunction.
>
> (iii) An order should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. Looking only at the order the party enjoined must be able to find out from the four walls of it exactly what it is that he must not do.
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> (iv) It follows from this that, as Jenkins J said in *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 LT 387 at p 390,
>
> > a Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question.
>
> [Original emphasis.]

[30] In my view, the claimant cannot be found in contempt of Clause 2 of the Order because it is ambiguous and does not include the terms necessary to render it enforceable against either party. First, the Order does not set time limits for the retention of a parenting coordinator. The Court cannot imply that a reasonable time would be allotted to the parties for the selection of a parenting coordinator in a contempt proceeding. Nor does the Order stipulate the term or duration of the appointment.

[31] Second, the Order does not define "parenting coordinator" and does not identify the terms of reference beyond indicating that he or she is to "provide assistance in relation to issues involving the children." At the time of the Order, the governing legislation (viz. *Family Relations Act*) did not provide a definition of this term or establish the usual or customary terms of reference. Most significantly, the Order did not address whether the parenting coordinator can bind the parties by their decisions subject to review by the Court or whether the parenting coordinator may

only make recommendations. An examination of the numerous terms of reference proposed by the respondent in this application clearly shows that identifying the parenting coordinator's jurisdiction or mandate is a complicated matter and requires the parties to address their minds to a large number of issues. The respondent implicitly acknowledged that settling the parenting coordinator's terms of reference was a necessity in his counsel's response to the claimant's proposed terms of reference (letter of November 20, 2013). Moreover, in this letter the respondent clearly indicated that the terms of reference were hotly disputed.

[32] Third, the requirement to retain a parenting coordinator was also subject to two conditions that required the agreement of the parties. The parties had to agree upon a particular parenting coordinator and upon the payment arrangements for the parenting coordinator. While the respondent argues the claimant ignored his efforts to select a parenting coordinator, the costs of the parenting coordinator remained outstanding despite the parties' efforts to come to a consensus on this issue. The respondent insisted that the costs be borne equally and the claimant proposed that the respondent pay all of the costs. It was only when this matter came on for hearing on April 8, 2014, that the parties agreed to share the costs in proportion to their respective guidelines incomes. In my view, the claimant cannot be found in contempt of an order that was subject to preconditions that were not satisfied.

[33] For these reasons, I dismiss the respondent's application for a contempt order.

DISPUTED TERMS OF REFERENCE

[34] Turning to the disputed terms of reference, on April 8, 2014, I issued a consent order regarding the parenting coordinator's conditions of appointment subject to a ruling on the terms that were in dispute. The disputed terms were identified at the hearing as follows:

1. The inclusion of issues regarding B.O. within the parameters of the parenting coordinator's jurisdiction;
2. The authority of the parenting coordinator to direct that the respondent and the claimant meet together during sessions;

3. The authority of the parenting coordinator to order the parties and their children to participate in coaching to improve communication between the parties; and
4. The authority of the parenting coordinator to order the parties and their children to attend counselling with a counsellor.

[35] The respondent argues that ordering counselling and coaching are standard terms of reference for a parenting coordinator and were adopted from *Sukul v. Sukul*, 2011 BCSC 507 at para. 44. Further, the respondent argues that a parenting coordinator is skilled in addressing family violence and thus there is no risk in regard to "in person" meetings with the parties. Regarding coaching and counselling, the respondent says these are key means by which the parties' communications can be improved. Lastly, the respondent argues that excluding B.O. from the parenting coordinator's authority is contrary to the terms of the Order and the settlement agreement signed by the parties in June 2013.

[36] The claimant argues that counselling and coaching is beyond the scope of the parenting coordinator's jurisdiction as defined by the *Family Law Act.* Further, the claimant maintains that due to her fear of the respondent and his attempts to intimidate her, she should not be forced to meet with him in person. She can appear by telephone at meetings called by the parenting coordinator. Lastly, the claimant says that since the Order of July 5, 2012, there has been a change in circumstances regarding B.O. There have been allegations of inappropriate touching by the respondent and B.O. does not wish to have contact with her father. As a consequence, there is no need for a parenting coordinator to address problems the parties are experiencing with the shared parenting of B.O. In addition, the claimant argues that counselling is not a proper role for a parenting coordinator.

[37] Sections 17 and 18 of the *Family Law Act* describe the authority of a parenting coordinator appointed pursuant to an order of the Court or by the agreement of the parties:

> **Assistance from parenting coordinators**
>
> 17 A parenting coordinator may assist the parties in the following manner:

(a) by building consensus between the parties, including by

(i) creating guidelines respecting how an agreement or order will be implemented,

(ii) creating guidelines respecting communication between the parties,

(iii) identifying, and creating strategies for resolving, conflicts between the parties, and

(iv) providing information respecting resources available to the parties for the purposes of improving communication or parenting skills;

(b) by making determinations respecting the matters prescribed for the purposes of section 18 [*determinations by parenting coordinators*].

Determinations by parenting coordinators

18 (1) A parenting coordinator

(a) may make determinations respecting prescribed matters only, subject to any limits or conditions set out in the regulations,

(b) must not make a determination respecting any matter excluded by the parenting coordination agreement or order, even if the matter is a prescribed matter, and

(c) must not make a determination that would affect the division or possession of property, or the division of family debt.

(2) In making a determination respecting parenting arrangements or contact with a child, a parenting coordinator must consider the best interests of the child only, as set out in section 37 [*best interests of child*].

(3) A parenting coordinator may make a determination at any time.

(4) A parenting coordinator may make an oral determination, but must put the determination into writing and sign it as soon as practicable after the oral determination is made.

(5) Subject to section 19 [*confirming, changing or setting aside determinations*], a determination

(a) is binding on the parties, effective on the date the determination is made or on a later date specified by the parenting coordinator, and

(b) if filed in the court, is enforceable under this Act as if it were an order of the court.

[38] The legislative intention behind these provisions is to limit the authority of the parenting coordinator to the prescribed matters unless the parties agree to a broader scope of authority. Where the agreement is silent on the issue, or contains terms that are consistent with the *Family Law Act,* I find that the scope of the parenting coordinator's mandate is essentially determined by ss. 17 and 18 of the Act.

[39] Addressing the specific areas of disagreement between the parties, the claimant argues that B.O. and any issue surrounding her parenting should be excluded from the parenting coordinator's authority because there is currently no shared parenting regime regarding this child. While the claimant argues there has been a change of circumstances since the Order was made on July 5, 2012, there is no application before me to vary the terms of this Order regarding the application of Clause 2 to both children. The Order clearly applies to B.O. and D.O. Moreover, in June 2013, after the events giving rise to the strained relationship between B.O. and her father had occurred, the parties re-affirmed their goal of restoring a shared parenting regime with B.O. Moreover, one of the prescribed functions of a parenting coordinator, in ss. 17 and 18 of the Act, is to make determinations about parenting arrangements and contact with the children. Thus I am satisfied that it is appropriate that the parenting coordinator have jurisdiction to consider issues and make determinations surrounding B.O.

[40] I am also satisfied that the authority granted to a parenting coordinator under ss. 17 and 18 of the Act is sufficiently broad to include establishing guidelines and making determinations about coaching and counselling. If the parenting coordinator determines that coaching and/or counselling is required to resolve conflicts between the parties and their children, it is reasonable that they have authority to direct the parties to engage in these processes. If either party is dissatisfied with a determination by the parenting coordinator, they may apply to vary or set aside the direction under s. 19 of the Act. Where the cost of these services is an issue, a parenting coordinator is expected to take this factor into account when considering whether such a direction is necessary and advisable in the circumstances.

[41] Lastly, turning to the authority of the parenting coordinator to compel the parties to meet together, it is without question that where there is a power imbalance between the parties, any form of mediation process creates a risk for the weaker party. If one party can be intimidated into consenting to matters or if one party is afraid of the other party, there is a risk that settlements reached do not reflect a true consensus. This risk can be minimized where the parenting coordinator is trained to

identify issues surrounding family violence and aggressive behaviour; however, a party who fears contact with his or her spouse will always be reluctant to participate fully in a process that requires face to face meetings. In my view, a compromise that reflects the intention of the Legislature in the enactment of Part 2, Division 3 of the *Family Law Act*, is one that permits the parties to choose how they attend meetings called by the parenting coordinator in response to disputes regarding matters within their mandate unless their choice is unreasonable in the circumstances. The parenting coordinator must be given ancillary authority to determine whether the choice of a party is unreasonable and make determinations as to their attendance at meetings to ensure the process is not frustrated.

[42] Thus for the foregoing reasons, I order as follows:

1. The parenting coordinator shall have authority to address issues with regard to both B.O. and D.O. equally, provided the issues are within their mandate.

2. The parenting coordinator may direct the parties and their children to attend counselling or coaching regarding matters that fall within the coordinator's mandate; however, the parenting coordinator must have regard to the cost of these services and the financial impact of this cost on the parties prior to making such a determination.

3. The parenting coordinator has the authority to require the parties to meet with him or her; however, the parties may choose how they appear before the parenting coordinator, provided the manner in which a party intends to appear before the parenting coordinator is not unreasonable in all of the circumstances. The parenting coordinator has authority to determine whether a party is acting unreasonably, and in such case, the parenting coordinator may direct the party as to the method of appearing before him or her.

[43] Lastly, in light of the parties' divided success in this application, I order that each party bear their own costs.

"Bruce J."