

COURT OF APPEAL FOR ONTARIO

CITATION: Rodriguez v. Vella, 2022 ONCA 870

DATE: 20221215

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Paciocco, George and Favreau JJ.A.

BETWEEN

Elizabet Galves Rodriguez

Applicant (Respondent)

and

James Michael Vella

Respondent (Appellant)

Amit Dror and David Rappaport, for the appellant

Diana Vasilescu, for the respondent

Heard: November 10, 2022

On appeal from the order of Justice R. Sonya Jain of the Superior Court of Justice, dated November 23, 2021.

REASONS FOR DECISION

[1] The appellant father and respondent mother were married in 2010 and separated in 2017. They have one child, 12-year-old J.M.G. On August 6, 2019, the parties consented to an order which had the child in the appellant's care every Sunday from 10:30 a.m. until 6:30 p.m. The order also directed the completion of a s. 30 assessment in relation to decision-making responsibility and parenting time. If an agreement could not be reached on an assessor, it was to be decided by way

of motion. Between the time this order was made and the order under appeal, three different assessors withdrew after initially agreeing to conduct the assessment.

[2] The last assessor to withdraw, Diana Polak, was not agreed upon but ordered by Christie J. This order, made on February 26, 2021, provided that the appellant “shall forthwith complete his intake form, retainer agreement and pay his retainer”. After Ms. Polak withdrew, the respondent sought to have the appellant found in contempt of various court orders, including the one made on February 26, 2021. We note also that before the respondent’s contempt motion was heard, she had unilaterally suspended the appellant’s parenting time on the basis that the child was returning from his time with the appellant “unsettled” and that the child had told her that he no longer wanted to spend time with the appellant. At the time of the order under appeal the appellant had exercised only one 30-minute visit with the child over the course of the previous four months.

[3] On November 23, 2021, the motion judge found the appellant to be in contempt of Christie J.’s order. She further ordered, *inter alia*, that: 1) the appellant bring no further motions without prior written consent of the court; 2) the appellant’s parenting time with the child immediately recommence; 3) the respondent have sole decision-making responsibility in relation to the child; 4) the respondent may proceed with treatment or therapy for the child (without the appellant’s consent or signature if necessary) as recommended by the Simcoe Muskoka Child, Youth and Family Services and/or the clinical assessor and/or another professional involved

in the child's life; and 5) she varied earlier orders in respect of the assessment by granting to the respondent the sole authority to choose an assessor and to, if necessary, proceed with the assessment without the appellant's consent or signature.

[4] The appellant appeals the motion judge's order claiming that she erred: 1) by finding him in contempt; 2) by prohibiting him from filing further motions without leave; 3) by giving to the respondent sole decision-making responsibility; and 4) by delegating treatment authority to the assessor.

[5] The appellant submits that a contempt finding was not available to the motion judge as the order did not prohibit him from suggesting amendments to the assessor's retainer. For two reasons, this argument must fail. First, it ignores the direction that the appellant sign the assessor's retainer "forthwith"; and second, it invites us to revisit the motion judge's finding that his proposed changes were not minor, which is to be afforded a high degree of deference. The motion judge identified the elements of the test for contempt, and in the end found that the order clearly and unequivocally set out what should and should not be done; that the appellant had actual knowledge of the order; and that he intentionally failed to do what the order compelled him to do. In her view, the February 26, 2021 order was clear and unequivocal and its terms clear, concise and easy to follow.

[6] We agree. The appellant made his execution of Ms. Polak's retainer conditional upon her agreeing to changes that he demanded, including that she: inquire into whether the respondent had dementia, request information and documents from any shelter or government subsidized housing accessed by the respondent, investigate and identify who referred the respondent to an "abused women group", review all communications between a previously appointed assessor and counsel, and have the respondent tell the assessor who advised her to deny the appellant access to the child.

[7] These were not "minor" requests. This was the appellant attempting to significantly expand the scope of the assessor's work, which stands in stark contrast to the direction he was given, which was to complete and sign the intake form and retainer forthwith. The trial judge addressed the appellant's argument in her reasons, at para. 36:

I find the Respondent's submission that he signed the retainer agreement after making "minor amendments" is not an acceptable excuse. I do not find that the behaviour or requests were "minor". I do not accept the Respondent's argument that "there is no Order stating that I had to accept the terms of Ms. Polak's contract without seeking any modifications at all". It is especially unacceptable since this was a court ordered assessor and the Respondent had been previously warned and cautioned by the court to discontinue this type of conduct.

[8] The motion judge rejected the appellant's argument that the order permitted him to alter Ms. Polak's retainer prior to signing. We agree with the motion judge,

as the appellant's position defies any reasonable interpretation of the February 26 order. In our view, the motion judge's finding of contempt was reasonably arrived at and amply supported by the evidence. We also accept that the motion judge considered whether the respondent's contempt motion was a "last resort". There was before her clear evidence that the appellant had willfully frustrated and consistently interfered with the assessment process, and that prior attempts to secure his cooperation were unsuccessful.

[9] Further, we see no error in the motion judge's decision to give the respondent full decision-making responsibility in respect of the child, nor in her decision to permit the respondent to proceed with treatment (without the appellant's consent or signature) as recommended by the local child protection agency, the assessor, or another professional involved in the child's life. Granting to the mother temporary sole decision-making authority was a justified response to the father's ongoing attempts to frustrate and delay the assessment.

[10] Further, it is a mischaracterization of the motion judge's order to say that she delegated decisions about the child's treatment to third parties. The order simply allows the mother to employ a variety of therapeutic options, so long as they are recommended by a professional involved with the child. The motion judge's reasons make it clear that she made this decision with a view to achieving the child's best interests and not, as the appellant seems to suggest, to punish him for his litigation conduct.

[11] We do, however, agree with the appellant that the motion judge's decision to prohibit him from filing further motions without leave, was, in the circumstances, overreach. To start, this type of prohibition is typically reserved for vexatious litigants and those found to have abused the court's process. While it has been difficult to secure the appellant's cooperation in respect of the assessment process, his conduct in this litigation has not been found to be vexatious or an abuse of the court's process. We observe that the appellant did not commence this litigation; and he served, within the time allowed, an Answer in response to the respondent's claims. In addition, there are no unpaid cost orders nor has the appellant sought multiple appeals.

[12] More importantly, this was not an appropriate term given the respondent's earlier decision to unilaterally withhold the child from the appellant during his court ordered parenting time (which made it reasonable to expect that there would be future enforcement issues). All this term does is impose an added, and unnecessary, layer of complexity to the appellant's ability to enforce his court ordered parenting time. We accept that in some circumstances such a term may be proper, but here the motion judge provides no reasons for its inclusion and there is otherwise no support in the record for it.

[13] To the extent the appellant's ability to impede the assessment process needed to be addressed, it is sufficiently achieved in the order's other terms, including the mother's ability to select the assessor, her ability to choose service

providers, and the requirement that the appellant pay \$12,000 towards the assessor's retainer forthwith. These terms are narrowly focused and directly address the issue of the appellant's non-compliance with the assessment process. We would therefore give effect to this ground of appeal.

[14] For these reasons the appeal is allowed in part. Paragraph 8 of the motion judge's November 23, 2021 order is set aside. The balance of the appeal is dismissed.

[15] Costs to the respondent in the all-inclusive amount of \$7,500.

"David M. Paciocco J.A."

"J. George J.A."

"L. Favreau J.A."