CITATION: B.A. v. I.K., 2024 ONSC 2225
COURT FILE NO: FS-23-00035149-0000
DATE: 2024-04-16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
B.A.	)	*Michael Tweyman/Stephanie Paternak*, for the Applicant
Applicant	)	
	)	
– and –	)	
	)	
I.K.	)	*Self-Represented*
	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** January 11, 2024

RHINELANDER, J.

REASONS FOR DECISION

[1] The Applicant requests the Separation Agreement ("Agreement") be made a Final Order; the Order be retroactive to the date the Agreement was signed; findings the Respondent breached the Agreement/Order; imposition of financial penalties for breached terms of the Agreement; and costs.

[2] The Respondent filed a cross-motion seeking costs for this motion and for a 14B *ex-parte* motion filed by the Applicant last year.

Background

[3] The parties began living together in April 2010. They were married May 13, 2012, and separated April 1, 2022. The parties have three children who, at the time of this motion, range in age between 4 to 9 years old.

[4] A nesting order was in place for the first year of separation and ended March 28, 2023, when the Applicant filed an *ex-parte* 14B motion seeking exclusive possession of the matrimonial home, a restraining order, and an Order to address parenting issues. The Applicant left the matrimonial home with the children pending a decision on the motion. Justice Black did not grant the *ex-parte* motion and directed both parties to attend court. An urgent case conference was heard April 6, 2023, whereupon, it was agreed the Applicant would remain in the matrimonial home, and

the Respondent would stay elsewhere, with the children transitioning between the two separate households.

[5] The parties continued to negotiate towards a final settlement, which came to fruition on September 8, 2023. All issues were resolved, and the parties agreed to be bound by the Agreement.

[6] The Agreement includes terms specifically addressing communication between the parties. It sets out the who, what, when, where, why, and how, communication is to occur. It also includes ancillary terms requiring both parties not to disparage, harass, intimidate, or make inappropriate comments about the other parent in front of or within earshot of the children. These terms extend to all methods and means of communication between the parties and clearly states under the "ancillary terms" that it shall be strictly enforced and contemplates monetary or other penalties to be imposed or awarded by the parenting coordinator if prohibited behaviour as described in the Agreement occurs.

[7] The Agreement includes a clause for the parties to work cooperatively to have the Agreement converted to an Order. The Applicant bore the burden of drafting the consent Order and submitting it to the Court as a 14B motion and agreed to file for an uncontested divorce within thirty (30) days of the signing of the Agreement. The parties also agreed to cooperate to obtain a Ghet within the same timeline.

Issues

[8] The issues to be determined on this motion are:

i) Should a Final Order be issued as agreed?

ii) Should the Final Order be made *nunc pro tunc* to September 8, 2023, the date the Agreement was signed?

iii) Has the Respondent breached the Agreement/Order?

iv) If so, should financial penalties be imposed for the breached terms?

v) If the Court is not prepared to make findings that breaches have occurred, should an Order be made to enforce various terms of the Agreement?

vi) Costs for this motion.

vii) Can the Respondent seek costs for the 14B motion filed March 28, 2023?

Analysis

i) Should a Final Order be issued as agreed?

[9] It is clear the parties intended for the Agreement to be a Final Order on consent. There is no basis not to grant this request despite the Respondent's submissions that he now objects to anything being converted into an Order. His position directly contravenes a term of the Agreement

and would be a breach of the Agreement. He submitted a court Order would give the Applicant more control. A Final Order will provide finality and enforceability to both parties and should issue as previously agreed.

ii) Should the Order be made "nunc pro tunc"?

[10] The Applicant requests the consent final order be made "*nunc pro tunc"*, or retroactive to September 8, 2023, the date it was signed by the parties. The Applicant acknowledged this is a discretionary power of the Court.

[11] The Supreme Court of Canada, in *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 (para. 86) explained:

> The history of the courts' inherent jurisdiction to issue orders *nunc pro tunc* is intimately tied to the maxim *actus curiae neminem gravabit* (an act of the court shall prejudice no one). Originally, the need for this type of equitable relief arose when a party died after a court had heard his or her case but before judgment had been rendered. In civil suits, this situation caused problems because of the well-known common law rule that a personal cause of action is extinguished with the death of the claimant.

[12] Similarly, in circumstances where courts have made errors through an oversight or a "slip", orders have issued retroactively. These are not the only circumstances where the doctrine of *nunc pro tunc* may be applied but serve only as examples.

[13] Prior to courts exercising its inherent jurisdiction, the following factors must be considered: (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. This list is not meant to be exhaustive. (*Ibid*, para 90).

[14] For reasons set out below, I have declined to exercise my discretion to backdate the Order.

[15] There is no dispute the Order would have been granted had it been sought earlier. The parties agreed to cooperate to obtain a consent final order with the operative terms of the Agreement, excluding releases, incorporated into an Order. It was further agreed the Applicant would bear the responsibility for preparation of the Draft Order and a 14B motion to obtain it. This was not done.

[16] The Applicant argued had she been required to obtain a final order in this matter in advance of bringing this motion, it would have created additional delay. Her argument is premised on the timing of when she made the decision to bring this enforcement motion. The Applicant argued consent orders submitted by way of a 14B motion take a significant amount of time in Toronto and would have caused an administrative issue if this motion was brought in the interim.

[17] Contrary to the Applicant's submission, these types of motions are usually reviewed and issued within thirty (30) days of receipt of the materials in Toronto. Hence, the final order could have been issued as early as October 2023. If the Applicant had not heard back from the Court, in advance of filing her motion, an update regarding the status of the 14B motion could have been obtained. The steps and efforts made could have been included in the materials.

[18] The *Family Law Rules* clearly set out its objectives: enable courts to deal with cases justly. This includes ensuring the procedure is fair to all parties; saves expense and time; cases are dealt with appropriate to its importance and complexity; and giving appropriate court resources to the case while taking account of the need to give resources to other cases.

[19] After the decision to bring an enforcement motion was made, the most streamlined approach to meet the objectives of the rules was to request the court to incorporate the terms of the Agreement into a final order. I agree with the logic and reasoning for requesting the issuance of the order during this motion. However, the Applicant provided no explanation for why she failed to apply for a final order immediately, or shortly after, the Agreement was signed September 8, 2023. It does not appear anything was done to obtain a final order until this motion was filed.

[20] In cases where the doctrine of *nunc pro tunc* was applied, the courts considered the efforts of the parties and their diligence in pursuing recourse. There is no evidence before me regarding any effort or steps taken to have the Agreement made a final order prior to it being part of this motion. These actions do not lend itself to an interpretation of a mere irregularity. Under the circumstances, I am not able to find the timing of the request for the order was a mere irregularity nor that it was not intentional, and as set out above it clearly was not caused by any acts of the Court.

[21] Counsel for the Applicant argued backdating the order would facilitate access to justice for his client and permit her to enforce the terms of the Agreement under Rule 1(8) which were contemplated in the Agreement, including monetary penalties. If the Order was granted *nunc pro tunc*, it would provide strength to the Applicant's argument in pursuing penalties against the Respondent as he would have breached a court order. Violating or breaching court orders, in most cases, have more serious or significant repercussions than breach of contract. If this Order is made retroactive, it would create greater prejudice to the Respondent. Just as the remedies available to the Applicant would change, so to would the penalties for breaching an Order.

[22] The Applicant has made clear the purpose for which she has requested the court make findings that the Respondent breached terms of the Agreement/Order. At present, the Applicant seeks the imposition of financial penalties against the Respondent. It was argued, for this Order to have the "necessary teeth" and ensure compliance of the Respondent, it must have a financial impact. The Applicant argued, "threats from counsel and threats of a motion have not stopped the behaviour … The only effective tool at ensuring compliance are monetary penalties for breaches, as was specifically contemplated in the agreement."

[23] In addition to financial penalties, the Applicant has made clear her intention to bring a contempt of court motion in the future. Findings that the Respondent breached several terms of the Order will support an argument on a contempt motion which is a "remedy of last resort". The Applicant is cognizant of the groundwork needed for such a motion and anticipates the Respondent

will continue to breach terms of the Agreement and any court Order, thereby, filed this enforcement motion in advance of filing a further motion pursuant to Rule 1(8)(g).

iii) Has the Respondent breached the Agreement/Order?

[24] The Applicant seeks a finding that the Respondent breached terms of the Agreement relating to Communication (3.34, 3.35, 3.36, 3.37), Ancillary Terms (3.39, 3.40, 3.41, 3.42), Travel (3.47, 3.50), and use of the Parenting Coordinator (3.54, 3.56).

[25] I am satisfied the Respondent breached the Agreement regarding Communication and Ancillary Terms. I am not satisfied the Respondent breached the other terms alleged.

[26] I have set out below a summary of the alleged breaches as it relates to each of the categories.

Communication

[27] The purpose of the Agreement regarding communication is to minimize the necessity for the parties to have any interaction except to address issues directly related to the child(ren). The parties are required to primarily communicate through Our Family Wizard and be civil in their communications. If an emergency or time sensitive issue arises relating to the child(ren), the parties may communicate via Whats App. The parties committed to communicating only when necessary and it must be child focused.

[28] The Applicant provided excerpts of communications from the Respondent that go well beyond the parameters of the Agreement, are not child focused, not urgent or time sensitive, and clearly unnecessary. In some instances, where the communications were initially child-focused, the Respondent, unable to show any type of restraint, felt compelled to include personal digs and barbs, and shared his opinion of the Applicant's character and past behaviour. These excerpts and messages clearly violated the terms of the Agreement.

Ancillary Terms

[29] After the parties separated, the Respondent blamed the Applicant for the marital breakdown. Communications and messages included disparaging, intimidating, and harassing language. To ensure this behaviour ceased, ancillary terms were included in the Agreement to ensure neither party makes negative comments about the other party in the presence or earshot of the children or where the children may have access to the communications. Further, neither party shall send messages to the other parent about issues surrounding the marriage or tis breakdown, or any historical matter between the parties.

[30] Despite signing the Agreement and knowing its terms, the Respondent continues to finger point and blame the Applicant for the deterioration of the marriage. This behaviour was not limited to a single message but is a consistent theme throughout communications between the parties.

[31] On several occasions, the Respondent continues to revisit the events of March 2023 that led to the Applicant leaving the marital home with the children and the *ex-parte* application. As an example, on December 8, 2023, the Respondent referenced the event and ended with, "See you in court, for the next 10 years". The Respondent's comments, in breach of the Agreement, are not limited to communications solely between the two parties, but extend to third parties, and service providers. Rather than use restraint, the Respondent sees communications with others as an opportunity to express his contempt and anger regarding the Applicant.

[32] Lastly, the Respondent must be mindful of comments made in the presence of the children. Despite his bitterness about the breakdown of the marriage, he must hold his tongue in check in front of the children. There is absolutely no excuse to expose the children to the acrimony between the parties. The Respondent should heed the adage, "if you have nothing nice to say, say nothing at all."

Travel

[33] In terms of travel, the Agreement requires a party wishing to travel with the children to the United States, for under 72 hours, to advise the other party at least 7 days in advance and the non-travelling party shall, no less than 5 days in advance provide consent that should not be unreasonably withheld. The Agreement was not drafted to require the non-travelling party to respond within 48 hours of any request. Therefore, even if a party wishing to travel, provides 90 days notice, the non-travelling party, per the Agreement does not have to respond or provide consent until the 85th day. This is unfortunate as it is not ideal for planning purposes. It would have been more useful if timing for consent was tied to receiving the request as opposed to the travel.

[34] The Applicant advised the Respondent she wished to travel to the United States for New Years. She provided notice to the Respondent on December 8, 2023, well in advance of 7 days. The Respondent provided consent on December 20, 2023. The deadline per the Agreement for him to respond was December 26, 2023. Although the Respondent was not in breach of the Agreement regarding the timing of his response, he breached the communication term when he demanded to know who would be travelling with the Applicant and children prior to providing his consent.

[35] If a party wishes to travel outside of Canada, they must give thirty (30) days notice to the other party. The non-travelling party will provide written consent within fourteen (14) days of the request. The Applicant provided notice to the Respondent in November of a trip to Jamaica with the children in February. The specific date the request was sent was not provided, however, the Respondent consented on November 29, 2023.

[36] Although the Respondent followed the terms of the Agreement regarding travel, consent was only provided after urging from the parenting coordinator regarding the trip to Jamaica and counsel for the Applicant regarding the New Years travel. It is important for the Respondent to recognize the need to provide reassurance to his children. His delayed response, while still

complying with the Agreement, does not only impact the Applicant but directly impacts his children and their well-being.

Parenting Coordinator ("PC")

[37] The parties were required to sign a parenting agreement the same date the Agreement was signed. The parenting agreement was signed by the Respondent after he was advised the matter would be brought back to court if he failed to sign the agreement. It was effective November 6, 2023. No information was provided when it was signed by the Applicant.

[38] The messages filed as part of the Applicant's materials clearly show her requesting assistance from the PC but do not include any messages or follow up from the PC confirming the need for a meeting or efforts to schedule one with both parties. Nor was any evidence provided that demonstrate the Respondent failed to reply to the PC, missed any scheduled meetings, or refused to meet with the PC. One message sent from the Applicant requesting a meeting, resulted in a reply from the Respondent that he would not meet with the Applicant. This is not a refusal by the Respondent to engage the PC but demonstrated he will not meet jointly with the Applicant. Under the current circumstances, it may be better and more productive to have separate meetings.

[39] The PC confirmed via email, she is still prepared to work with the parties and that she was remiss in not following up to schedule a meeting with the Respondent regarding concerns raised by the Applicant in December.

[40] The PC also confirmed her role and jurisdiction in enforcing the parenting agreement. She reminded counsel and the Respondent,

> The goal of the PC process is to keep clients out of the court system, but it requires both parents to engage in the process. As I would have explained at our first meeting, when one or both parents bring an issue to the PC, the PC will then schedule a meeting to discuss the issues. If one parent tends to overuse the process, then it is in my jurisdiction to apportion costs. If one parent does not engage after signing the agreement, I can also move forward with the arbitration process without the involvement of that party. It is within my jurisdiction to determine whether there are issues or breaches after meeting the clients.

iv) Should financial penalties be imposed for the breached terms?

[41] The Applicant argued that if the Respondent was found to have breached terms of the Agreement, financial penalties should be imposed. She requested costs in the amount of $10,000 be awarded for the breached term. The Applicant acknowledged jurisprudence is unsettled whether monetary remedies can be ordered under Rule 1(8) of the *Family Law Rules*.

[42] Rule 1(8) provides remedies to the court for what orders can be made when a person fails to obey an order. It allows a court to deal with the failure by making any order that it considers necessary for a just determination of the matter. The enumerated orders set out in this rule are not

an exhaustive list, but include costs, dismissing a claim, striking portions of a claim/answer, refusal to admit evidence, need for permission from the court to file any motion(s), adjournment of proceedings, and on motion, a contempt order.

[43] In *Walton v Walton*, 2022 ONCJ 394, Justice Zisman found she had jurisdiction to enforce the separation agreement under Rule 1(8). In that case, the terms of the separation agreement regarding parenting time were made a court order on June 7, 2022, in advance of the motion, and despite the Order, the mother continued to breach terms of the parenting time.

[44] Unlike *Walton*, this Agreement contains a provision that the PC can award monetary or other penalties, deemed appropriate and proportionate in the event a party performs the prohibited behaviour in the Ancillary Terms. It is clear the PC has jurisdiction to move forward with arbitration and can impose a monetary penalty. The clause specifically contemplates the PC having this authority. It is unfortunate follow-up was not done and a request for the PC to make findings the Respondent breached terms of the Agreement. Despite this motion, this may be an avenue the Applicant chooses to pursue.

[45] The Court takes the breaches of the Agreement very seriously. Contrary to the Respondent's submissions, this matter is not frivolous. Having agreed to be bound by all terms of the Agreement, the Respondent's actions demonstrate his utter disregard for the process.

[46] Although I have found the Respondent has breached terms of the Agreement, he has not breached a court order as contemplated under Rule 1(8) as the Agreement was not made a final Order. Justice Pepall on behalf of the Court of Appeal, in *Mullin v Sherlock*, 2018 ONCA 1063 (para 44), confirmed, "before granting a remedy, the judge must be satisfied that there has been noncompliance with the **court order.**" [Emphasis added]. This does not preclude the Applicant from seeking remedies available at common law for breach of contract, such as specific performance and/or damages.

v) Should an Order be made to enforce various terms of the Agreement?

[47] Having found the Respondent has breached terms of the Agreement, the parties shall attend before me for further submissions regarding the necessity of a temporary Order and any terms to be included. A mutually available date shall be arranged with the Family Trial Office and shall be via Zoom and no later than May 7, 2024.

vi) Costs for this motion

[48] Both parties seek costs for this motion. I will hear submissions on costs at the above court appearance. Submissions shall not exceed ten minutes for each party, bill of costs and any offers exchanged shall be served and filed in advance and uploaded to CaseLines.

vii) Can the Respondent seek costs for the 14B motion filed March 28, 2023?

[49] The Respondent is not entitled to costs for the 14B motion filed March 28, 2023. This motion was filed *ex-parte* and was never litigated. Further, the Respondent signed the Agreement that included terms at 1.6(d), 16.7, and 17.12, that it is a final settlement of all claims made by (or could have been made by) either of them in Court File No. FS-23-35149-0000 in the Superior

Court of Justice; and is in full and final satisfaction of all claims that have been raised or could have been raised by either of them; and the parties will pay their own costs for the negotiation and preparation of this Agreement and the court proceedings.

Conclusions and Order

[50] The Applicant shall provide a word copy of the Draft Order for the Agreement to be made a Final Order to the Family Trial Office by Friday, April 19, 2024, directed to my attention.

[51] The Final Order shall be in effect immediately.

[52] The Respondent has breached terms of the Agreement.

[53] I will hear further submissions on any terms that should be included in a temporary order to ensure compliance with the Final Order.

[54] The parties shall attend before me before May 7, 2024, provided a mutually agreeable/ available date can be arranged.

[55] The parties are to serve and file a bill of costs and any offers exchanged in advance of the next court date. If the parties are unable to agree on costs, I will hear submissions, not to exceed ten minutes at that time.

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Rhinelander J.

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SUPERIOR COURT OF JUSTICE

BETWEEN:

B.A.

Applicant

– and –

I.K.

Respondent

REASONS FOR DECISION

Rhinelander J.

Released: April 16, 2024