COURT FILE NO.: FS-14-19713
DATE: 20150420

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Shelley Elisabeth Kathleen Pett, Applicant

AND:

Kevin Gregory Pett, Respondent

BEFORE: Kiteley J.

COUNSEL: *Shmuel Z. Stern*, for the Applicant

James S. Marks, for the Respondent

HEARD: March 31, 2015

ENDORSEMENT

[1] The Respondent brought a motion, part of which I heard on February 17, 2015. The endorsement I released dated February 23, 2015 provides much of the background for this motion and will not be repeated here.

[2] On March 31, 2015 I heard submissions on Respondent's request for the following:

(a) an order setting aside the restraining order of Paisley J. dated September 26, 2014 as amended on October 7, 2014, October 21, 2014 and February 23, 2015;

(b) an order sealing the affidavit of Kevin Pett sworn March 4, 2015 and all exhibits;

(c) an order that the Applicant not be provided with copies of the Respondent's clinical notes and records and, if they are already in the Applicant's possession, that she destroy them and not retain a copy;

(d) an order that upon sale of the matrimonial home the sum of $35,000 be held in trust;

(e) costs.

[3] The Applicant had brought her own motion which was adjourned on consent to June 11, 2015, a date after the settlement conference which is scheduled for May 11, 2015 at 3:30.

Analysis

A. Restraining order dated September 26, 2014 as amended on October 7, October 21 and February 23

[4] As indicated in the February 23 endorsement, the initial *ex parte* restraining order pursuant to s. 35 of the *Children's Law Reform Act* and s. 46 of the *Family Law Act* prohibited the Respondent from contacting or communicating with the Applicant and all four of the children and prohibited him from coming within 500 metres of the former matrimonial home.

[5] On October 7, 2014, I modified the order to delete the names of the three youngest children but continued the order that a family member would arrange the pick-up and return of the children to facilitate visits with their father.

[6] On October 21, 2014, I modified the order to delete the name of the oldest daughter, leaving the geographical restriction and the restraining order only with respect to the Applicant.

[7] On November 24, 2014 I modified the order to enable the parties to meet with the mediator.

[8] On February 23, 2015 I modified the order to enable the Respondent to attend on the street in front of the former matrimonial home for purposes of picking up and returning the youngest two children.

[9] What remains is a restraining order pursuant to s. 46 prohibiting the Respondent from contacting or communicating directly or indirectly with the Applicant and prohibiting him from coming within 500 metres of the matrimonial home except for purposes of picking up or returning Laura (born August 14, 2001) and Andrew (born July 26, 2004) which order requires him to park on the street in front of the house, not get out of the car, not communicate in any way with the Applicant while he is in the car and upon arrival, text one or both of the children with the message only that he has arrived.

B. Setting aside the restraining order

[10] Counsel for the Respondent takes the position that the restraining order was obtained on the basis of material misrepresentations and material omissions in her affidavit sworn September 26, 2014 and, had the court had the benefit of all the objective evidence that is now before the court, the restraining order would not have been granted.

[11] Counsel for the Applicant takes the position that there has been no material change in circumstances since the order was made on September 26, 2014; that any issues that have arisen have been caused by the terms of the Respondent's recognizance which terms were changed in March, 2015; and that the motion is an abuse of process.

[12] Pursuant to rules 25(19)(d) and 1(7) of the *Family Law Rules*, the court may set aside an order that was made without notice. As indicated at paragraph 3(b) of the endorsement dated February 23, at the first opportunity on September 30, 2014, Mr. Pett challenged the continuation of the restraining order. As the chronology in that endorsement indicates, the hearing on March

31 was the first opportunity for him to do so with a comprehensive record. It is the case that in the February 23 endorsement I reviewed the chronology of orders that had been made but that was primarily for purposes of deciding the access motion. The hearing on March 31st focused on the merits of the restraining order when granted and whether it should be set aside.

[13] The Respondent in a motion to set aside an *ex parte* order such as this does not have to establish a material change in circumstances. The Respondent is obliged to provide an evidentiary record on which the court can consider the motion. The record before me starts with the affidavit of the Applicant sworn September 26, 2014 and includes affidavits filed since then but primarily the affidavits of the Respondent sworn March 4, 5,19 and 24 and the affidavit of the Applicant sworn March 19.

[14] The evidence is voluminous. Indeed, counsel for the Applicant takes the position that the affidavits disclose vastly different versions of events that have transpired and require findings of credibility and for that reason, ought to be adjourned to the trial.

[15] It is the case that the Applicant and Respondent disagree on many historical events. However, for purposes of arriving at a decision on this motion, I need not resolve those differences. There is sufficient consensus about the facts that are critical to the outcome or the record is sufficiently comprehensive that I can draw inferences and need not make findings of credibility.

[16] The factors relevant to my decision are these:

(a) The affidavit sworn September 26, 2014 is a 3 page handwritten document which refers to circumstances in 2007 and 2012 and then focused on events beginning August 4, 2014. When the order was made on September 26, 2014, that evidence before the court justified a restraining order preventing the Respondent having contact with the Applicant and the four children.

(b) The Respondent's motion to set aside is based on the allegation that in her affidavit sworn September 26, 2014, the Applicant failed to make appropriate disclosure and made material misrepresentations.

Counsel for the Respondent has pointed out differences in what the Respondent alleges were the facts and the evidence in the September 26, 2014 affidavit. Counsel for the Applicant has responded albeit in not as much detail. It is the case that the Applicant's affidavit sworn September 26 left out the details of the Respondent's mental health issues including his treatment and medication; did not make it clear that on three occasions between September 23 and 25 the police had attended at the matrimonial home at her instigation and on each occasion the police had left without taking any action; did not explain the reason why the Respondent was bugging the phone and was following her; exaggerated the self-harming episode; and did not attach copies of the allegedly aggressive text messages.

I agree with counsel for the Respondent that those were material omissions and the Applicant failed to make the disclosure required in an *ex parte* motion. However, on

this record, I am not prepared to find that the Applicant did so with the intent to mislead the court. A trial judge may make that finding but I decline to do so.

(c) In my endorsement dated October 21, 2014 I indicated that given the Respondent's conduct the preceding weekend, the restraining order had to continue vis-à-vis the Applicant. Now that I have had the benefit of the evidence of the Respondent, I would not have continued the order.

(d) Since the orders were made on September 26 and October 21, the Respondent has provided considerable medical evidence as well as other evidence from which I easily conclude that the Respondent does not pose a threat to himself or to the Applicant.

(e) As counsel for the Respondent pointed out, in her affidavit sworn in opposition to this motion, the Applicant does not indicate that she is still fearful for her safety and her life.

(f) Because of the restraining order, on November 2, 2014, the Respondent was charged with communicate by harassment pursuant to s. 264(2)(b) and disobey lawful order pursuant to s. 127(1) of the *Criminal Code*. The terms of his recognizance of bail meant that he was under house arrest at the home of his mother and was not permitted to leave unless in the presence of either of his sureties or his sister or brothers, and not be within 500 metres of any place that the Applicant might be except pursuant to a family court order made after that date.

(g) The Applicant has called the police on several occasions. Once a restraining order is made, I infer that the police are particularly responsive to such calls. Furthermore, once the recognizance of bail was issued, there were possibilities of conflict between the terms of the restraining order and the recognizance of bail. Indeed, after I made the amendment in the endorsement dated February 23, the Respondent was unable to exercise access in accordance with my endorsement until he succeeded in having the recognizance of bail amended on March 19 so it was consistent. That conflict gave rise to additional police intervention.

(h) The frequent police involvement, largely at the request of the Applicant, has had two consequences. The first is that, because of the restraining order and then the charges arising from the allegation of breaches of the restraining order, the police have been unnecessarily involved in what has been essentially issues of access. The second is that the children have observed on too many occasions that the police have been involved in reaction to what their father has done in trying to see them.

(i) As demonstrated by paragraph 104 of his affidavit sworn March 4, 2015, the Respondent has been deprived of anything resembling a normal relationship with Ryan and Laura and Andrew and there is a likelihood that that will continue if the restraining order continues. More importantly, the children have been deprived of a normal relationship with their father.

(j) The amendment that I made in paragraph 54(d) of the February 23 endorsement has established a regime for the Respondent attending at the matrimonial home for access

with Laura and Andrew. But it does not solve the dilemma if both parties are in the same volleyball court or school auditorium or anywhere else that is within 500 metres of the Applicant. As the summer activities and sports unfold, these children ought to have the benefit of seeing both of their parents and ought not to be deprived of one parent, which, since September has typically been their father. The Respondent has had a very supportive family, each of whom has at one point or another become frustrated by the circumstances. It is not fair to them for the court to expect that they will continue in their volunteer oversight role.

(k) The Office of Children's Lawyer has accepted the referral and is conducting an investigation with respect to the two youngest children. The Respondent should have more normal arrangements with his children while the investigation is ongoing.

(l) The pick-up and return logistics (as well as his recently terminated house arrest) have impeded overnight visits between the Respondent and Laura and Andrew. Subject to the outcome of the OCL investigation, it is well beyond the time when such overnight visits should occur and the challenges raised by the restraining order in making such arrangements should not impede such a step.

(m) The restraining order has created serious obstacles in financial transactions between the Applicant and the Respondent and has led to the involvement of family members of the Respondent and more recently, the lawyers, just to arrange for bills to be paid. That has created considerable stress amongst family members (some of whom have been stalwart in their attempts to assist) and has added unnecessary legal expenses to the parties.

[17] As a result of the failure to disclose and the material omissions in the evidence before the court in the granting of the restraining order and the challenges the restraining order, independently and in conjunction with the recognizance of bail, have created which are not in the best interests of the children, and in the absence of evidence that the Applicant has a current fear for her safety, the restraining order must be set aside. This motion was not an abuse of process.

[18] I will not make the order effective until it is signed and entered. Given the history and the relationship between the restraining order and the recognizance of bail, it is important that the order I make is formally released and I expect counsel for the parties to co-operate to do so as quickly as possible.

[19] I also expect that the parties will address the new state of affairs with maturity and appreciate that it is in the best interests of the parties and the four children that they move forward in a manner that does not provoke controversy. I encourage the parties to return to Mediate 393 for purposes of exploring how to significantly alter their interactions.

C. Sealing order

[20] The Respondent seeks an order pursuant to s. 137(2) of the *Courts of Justice Act* that the affidavit of the Respondent sworn March 4, 2015 and all exhibits be sealed. Counsel for the Respondent takes the position that the Applicant had improperly obtained the restraining order and the Respondent had to respond with evidence of his mental health records. The Respondent

asserts that given the sensitive information contained in his mental health records, dissemination could have significantly deleterious effects on the Respondent and on his recovery and that should take precedence over the open court principle.

[21] As indicated above, the Respondent filed an extensive affidavit outlining the evidence upon which he asked for the restraining order to be set aside including a psychological intake assessment (Exhibit C), a letter from Dr. Chan dated February 5, 2015 (Exhibit D), progress notes from Dr. Chan (Exhibit E), letters from Dr. Chan dated October 1, 2014, December 12, 2014 and February 5, 2015 (Exhibit F), letter from Dr. Chan dated February 26, 2015 (Exhibit G), report from Dr. Rudolph (Exhibit H), report of Dr. Nguyen (Exhibit I), progress note dated November 17, 2014 by Dr. Rudolph (Exhibit J), and letter dated February 26, 2015 from Dr. Nguyen (Exhibit K).

[22] Having found that the restraining order must be set aside, I agree with counsel for the Respondent that the open courts principle ought not to take priority over the Respondent's right to privacy. My concern however, is that the request is overbroad. In addition to those exhibits mentioned above, there are many other exhibits (21 in total) to which no privacy interest attaches that needs to be balanced against the open courts principle. Indeed, the *affidavit* contains considerable evidence, all of which must remain in the public domain. Furthermore, some of the exhibits referred to above have been attached to other affidavits and, based on their content, may have been provided to the Ontario Court of Justice and, if so, they may be in the public domain in that court.

[23] I cannot finalize the list of exhibits that should be sealed so I will give direction to counsel as to how to arrive at the order as to which of Exhibits C to K should be sealed.

[24] As indicated above in paragraph 2(c), the Respondent also asks that I make an order that the Applicant not be provided with copies of the Respondent's clinical notes and records and, if they are already in the Applicant's possession, that she destroy them and not retain a copy.

[25] I have listed above the exhibits that relate to the Respondent's mental health issues. None are called "clinical notes and records". Exhibit E is Dr. Chan's progress notes which, based on my review, might be within that category. Most of the other exhibits appear to have been written for purposes of courts proceedings and are not "clinical notes and records". Accordingly, I have difficulty identifying those of the exhibits that are the subject of this request.

[26] I do not agree with the request in any event. The Respondent is entitled to review and have possession of any documents relied on in any aspect of this proceeding. It may be that the implied undertaking contained in rule 30.1.01 of the *Rules of Civil Procedure* does not apply to documents attached to an affidavit filed in support of a motion. But it would not be in the interests of the Applicant to disseminate any part of such exhibits. Rather, it is in her interest and in the best interests of the children that the Respondent return to full time employment as soon as possible and have a normal parent-child relationship with all of his children. I assume that the Applicant will act in such a fashion as to maximize her best interest and that of her children and will not disseminate such exhibits but I make no order.

D. Funds held in trust

[27] As indicated in paragraphs 19 to 24 of the endorsement dated February 23, 2015, I declined to make an order that $35,000 be held in trust from the proceeds of sale of the matrimonial home. Counsel for the Applicant advises that his client now consents to such an order and accordingly I will make it.

E. Costs

[28] At paragraph 66 of the endorsement dated February 23, 2015, I reserved the costs of the hearing on February 17 to the hearing of the remainder of the motions. The Applicant's motion has been adjourned to June 11, 2015 but I will not hear it so I must reserve costs of the motion heard February 17 and March 31 to me.

ORDER TO GO AS FOLLOWS:

[29] The restraining order of Paisley J. dated September 26, 2014 as amended on October 7, October 21, 2014 and February 23, 2015 is terminated as of the date this order is signed and entered.

[30] Counsel for the Respondent shall forthwith:

(a) forward an approved draft order consistent with paragraph 29 to my attention;

(f) on receipt of the signed and entered order, take such steps as are necessary to ensure that the order terminating the restraining order is recorded where required, including with the Metropolitan Toronto Police Services and, through MTPS, with CPIC.

[31] Counsel for the Applicant shall approve the draft order referred to in paragraph 30 within 96 hours of receipt of the draft.

[32] With respect to the motion to seal part of the court file, counsel for the Applicant and the Respondent shall do the following:

(a) ascertain whether any or all of Exhibits C to K attached to the affidavit of the Respondent sworn March 4, 2015 have not been filed previously in the Superior Court or in the Ontario Court;

(b) prepare an order that those of Exhibits C to K which have not been filed previously in the Superior Court or in the Ontario Court shall be removed from the copy of the affidavit of the Respondent sworn March 4, 2015 in the court file and retained in the possession of James S. Marks indefinitely and not filed in the court file without order from a judge of the Superior Court of Justice;

(c) forward the draft order approved as to form and content by Shmuel Z. Stern to my attention for signing;

(d) ensure that the court staff remove the Exhibits that are the subject of this order from the copy of the affidavit filed with the court and are retained in the possession of James S. Marks in accordance with that order.

[33] From the net proceeds of sale of the former matrimonial home, the sum of $35,000 shall be held in trust pending agreement by the parties or court order as to the entitlement of Violet Pett to any or all of such funds.

[34] Costs of the motion heard February 17 and March 31 are reserved to me. At the settlement conference scheduled for May 11, 2015 I will establish a timetable for counsel to make written submissions.

Kiteley J.

Date: April 20, 2015