NOVA SCOTIA COURT OF APPEAL
Citation: ***Soper v. Gaudet***, 2011 NSCA 11

Date: 20110125
Docket: CA 316071
Registry: Halifax

Between:

Glenn Soper and Gail Soper

Appellants

v.

Sabrina Gaudet

Respondent

Revised Decision:	The numbering of the paragraphs has been corrected on August 7, 2012 so that paragraph 5 is properly numbered. This decision replaces the previously released decision.
Judges:	Hamilton, Beveridge and Farrar, JJ.A.
Appeal Heard:	September 15, 2010, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Farrar, J.A.; Hamilton and Beveridge, JJ.A. concurring.
Counsel:	appellants in person respondent in person

Reasons for judgment:

Background

[1] This appeal arises out of a contempt order of the Honourable Justice Beryl MacDonald dated July 21, 2009, wherein the appellants were found in contempt of a Consent Order dated October 15, 2008.

[2] The appellant, Gail Soper, is the mother of the respondent, Sabrina Gaudet. The appellant Glenn Soper is Gail Soper's husband.

[3] Ms. Gaudet is the mother of twin boys whose custody was the subject of the proceeding before Justice O'Neil. At the time of the contempt hearing the children were 13 years of age. They are now 15 years old.

[4] The issues and proceedings between these parties have been going on for a number of years. However, for the purposes of this appeal the history begins with the Consent Order. It places the children in the primary care of Ms. Gaudet with access, every third weekend, with the Sopers from 9:00 a.m. Saturday to 1:00 p.m. on Sunday.

The incident which gave rise to the contempt application arose on Friday, July 3rd, 2009. The children went to the Sopers' residence without informing their mother. On learning that the children were at the Sopers, Ms. Gaudet telephoned the police and made a complaint. As a result of that complaint, Constable Brian Underhill attended at the Soper residence on Sunday morning, July 5, 2009 to inquire about the children's well being. The children remained at the Sopers following Constable Underhill's visit.

[6] On July 7, 2009, Ms. Gaudet made an *ex parte* application for leave to apply for a contempt order against the Sopers. Leave was granted and the contempt application was scheduled for July 21, 2009. In the interim, the children remained with the Sopers.

[7] Mr. Soper was present and unrepresented at the hearing on July 21, 2009, however, he explained that, because of illness, Mrs. Soper was not able to attend.

The Chambers judge accepted that Mrs. Soper had a legitimate excuse for not attending.

[8] Constable Underhill was the only party to give oral testimony at the contempt hearing. He testified that he spoke to the children and they informed him they did not wish to return home as they had fears of being hit. Mr. Soper offered to allow the officer to take the children but Constable Underhill saw no reason to take them at that time. At the time of the officer's visit the children were lawfully in the care of the Sopers under the terms of the Consent Order.

[9] Constable Underhill made it clear in giving his evidence that he did not attend at the Soper's residence to enforce the Consent Order.

[10] In addition to the evidence of Constable Underhill, the only other evidence in support of the application was the affidavit of Ms. Gaudet which I will discuss in more detail later.

[11] Mr. Soper was not sworn at the hearing. His position was put forward through his submissions. He argued to the Chambers judge that the children did not want to leave his home. He said that he had tried everything he could to get them to leave the house including offering to allow them to go with the police.

[12] Mr. Soper told the Chambers judge that it was his understanding that he was not permitted to use physical force on the children to require them to leave his home.

[13] After hearing evidence from Constable Underhill and Mr. Soper's submissions, the Chambers judge recessed for a short period of time. She then issued her oral decision, finding both of the appellants in contempt for failure to return the children to their mother and ordered that Glenn Soper was to be imprisoned for a period of 30 days if the children were not returned to the care of their mother on or before 1:00 p.m. the following day, Wednesday, July 22, 2009.

[14] She also ordered that all access between the children and the appellants be suspended until further order of the court on hearing a variation application.

[15] The children were returned by the appointed time and, therefore, Mr. Soper was not imprisoned. However, the provision of the Consent Order suspending access remained in place.

[16] The Sopers applied to vary the Order on March 26, 2010 before the Honourable Justice Leslie Dellapinna. The application was dismissed on the basis that there had been no change in circumstances since the granting of the Order of Justice MacDonald.

[17] The appellants appeal from the finding of contempt and, alternatively, if the contempt is upheld, from the provision in the Order suspending their access to the children.

[18] For the reasons I will develop, I would allow the appeal and set aside the finding of contempt.

Issues

[19] As with many self-represented litigants, the Sopers have not set out their grounds of appeal in clear and concise language. However, from the notice of appeal and the oral arguments, the issues on this appeal may be summarized as follows:

1. whether the Chambers judge erred in finding that they were in contempt of the Consent Order dated October 15, 2008;

2. whether the Chambers judge erred in refusing to allow them to present evidence at the hearing;

3. whether the Chambers judge erred in failing to grant an adjournment to allow the Sopers an opportunity to retain counsel; and

4. if they were in contempt, the Chambers judge erred in terminating their access.

[20] As I am satisfied that the appeal should be allowed on the first ground of appeal I will not address grounds two and three. I will, however, discuss ground four and offer some general comments on contempt hearings.

Standard of Review

[21] The appropriate standard of review on contempt matters was set out by the Alberta Court of Appeal in **Metropolitan Life Insurance Co. v. Hover**, 1999 ABCA 123, at ¶ 10:

> 10 The decision to find a party in contempt is within the chamber judge's discretion: *Labour Relations Board v. Daschuk Lumber*, [1976] 5 W.W.R. 562 (Sask. C.A.) at 565, as is the remedy and manner in which it is imposed. The standard of review is reasonableness: *Russell Food Equipment (Calgary) Limited v. Valleyfield Investment Ltd.* (1962), 40 W.W.R. 292 (Alta. T.D.). A reviewing court may not substitute its own discretion unless it finds that the chambers judge did not give sufficient weight to relevant considerations; proceeded arbitrarily, on wrong principles or on an erroneous view of the facts; or there is likely to be a failure of justice (at 295).

[22] The Chambers judge's decision will be reviewed on this standard.

Analysis

Issue I Whether the Chambers judge erred in finding that the Sopers were in contempt of the Order of Justice O'Neil dated October 15, 2008

[23] In **Brown v. Bezanson**, 2002 SKQB 148, Justice Ryan-Froslie stated the fundamentals of a contempt proceeding at ¶ 12-14:

> 12 A proceeding for civil contempt is available to redress a private wrong by forcing compliance with an order for the benefit of the party in whose favour the order was made. Sanctions for civil contempt are thus mainly coercive in nature. Their aim is to force compliance with the order. They may also be punitive where the circumstances warrant it.
>
> 13 The burden of proof in contempt applications is beyond a reasonable doubt and rests with the party alleging the contempt.

> 14 In a civil contempt proceeding the following elements must be proven beyond a reasonable doubt:
>
> 1. The terms of the order must be clear and unambiguous;
>
> 2. Proper notice must be given to the contemnor of the terms of the order;
>
> 3. Clear proof must exist that the terms of the order have been broken by the contemnor;
>
> 4. The appropriate *mens rea* must be present.

[24] I will address each of these four elements individually.

Elements of Contempt

1. The terms of the order must be clear and unambiguous

[25] The Consent Order was issued on October 15, 2008. The Order provides, in part:

> IT IS HEREBY ORDERED:
>
> **1. Access**
>
> Gail and Glenn Soper shall have access with the two grandchildren [S.A.G.] and [J.S.G.,] which may be exercised in their home. Access shall be
>
> (a) every third Saturday from 9:00 a.m. to 1:00 p.m. the next day. ...

[26] There are no other provisions of the Consent Order at issue in this proceeding.

[27] The interlocutory notice filed by Mrs. Gaudet does not indicate the basis upon which the contempt is sought. It simply indicates that an application was being made by Ms. Gaudet for a contempt order under **Civil Procedure Rule** 55 against her mother and stepfather.

[28] The affidavit filed in support of the application in paragraph 4 states as follows:

> 4. There is a court order in effect by Justice Lawrence O'Neil stating that the respondents may have access every third weekend and that the children are to be returned on Sunday, no later than 1 p.m.

[29] The affidavit overstates the provisions of the Consent Order. It simply provides that Gail and Glenn Soper may have access to the two grandchildren every third Saturday from 9:00 a.m. to 1:00 p.m. the following day.

[30] The Consent Order is silent as to how and who is responsible for transporting the children from one home to the other. It does not require that the Sopers are responsible for ensuring the children are at Ms. Gaudet's residence by 1:00 p.m. on Sunday.

[31] Not only is the Consent Order silent as to how the children were to be transported, i.e., was Ms. Gaudet supposed to pick them up, were the Sopers supposed to deliver them; there was nothing in evidence before the Chambers judge about the practice between the parties as to how the children were returned to their mother.

[32] The only comment by the Chambers judge on the issue of the act of contempt is at the commencement of the hearing. As a preliminary matter the Chambers judge stated:

> The leave application was based on material provided that indicated that order was not complied with and that the children were not returned as contemplated in the order to the primary care of their mother.

[33] Nowhere else in the transcript or in the oral decision of the Chambers judge is there any mention of the alleged act of contempt. In the contempt order the act of contempt is identified as follows:

> **AND UPON** it appearing to the satisfaction of this Court that Glenn Soper and Gail Soper are guilty of contempt of court because the children have not been returned to the primary care of Sabrina Gaudet and there is no justifiable reason for the failure of the return of these children to Sabrina Gaudet's primary care;

[34] The Chambers judge then goes on to set out the penalty for contempt as previously set out.

[35] In her oral decision, the Chambers judge concluded:

> Ms. Gaudet has satisfied me, and indeed there is an acknowledgement by Mr. Glenn Soper, who has appeared today, that the children have not been returned to her primary care. Mr. Soper is well aware of the details of the order and the requirement that they be returned to her primary care and his reason for their not having been returned is, They won't go.

[36] From this passage in the decision, it appears that the Chambers judge is concluding that the failure of the children to be returned to the primary care of the mother is due to a breach of the Consent Order by the Soper's. However, the provision of the Consent Order that has been breached by the Sopers is not identified.

[37] The only evidence at the hearing of the attempts of Ms. Gaudet to have the children returned to her was a visit by Constable Underhill when the children were lawfully in the care of the Sopers. There was no evidence that Mr. Soper or his wife did anything to encourage the children to stay or to prevent them from leaving. The evidence was to the contrary, Mr. Soper offered to have the children leave with the police officer.

[38] There is no evidence that Ms. Gaudet called the Sopers, tried to pick up the children or otherwise attempted to have the children come home after the grandparents' access period ended.

[39] The Consent Order is silent on the issue of how the children were to be returned to the custodial parent, and as will be discussed in more detail later, no action was identified by the Chambers judge as what act of the Sopers was in breach of the Consent Order. Without more, the mere fact the children were not at home by 1:00 p.m. on Sunday is insufficient to conclude that the Consent Order was breached by the Sopers. In so finding the Chambers judge erred in principle. On this basis alone I would allow the appeal and set aside the order for contempt. However, I will address the other elements from **Brown, supra**.

2. The proper notice must be given to the contemnor of the terms of the order

[40] There is no issue with respect to this element and it does not need to be discussed further.

3. Clear proof must exist that the terms of the order have been broken by the contemnor

[41] As stated previously, it is unclear from the record and decision what act is alleged to have been committed by the Sopers in breach of the Consent Order. There was no evidence that the Sopers prevented the children from leaving or, indeed, prevented anyone from coming and taking the children. There was no finding that the Sopers did not take reasonable efforts to have the children comply with the Consent Order. During discussion with Mr. Soper at the hearing, the Chambers judge said the following:

> I'm on a contempt application and I'm trying to decide how to enforce the terms of this order because I do not accept, it's an excuse, that the children just won't go. I don't accept that as a justifiable juristic reason to not find Mr. Soper and Ms. Gail Soper, because she's part of that order, in contempt. So you're in contempt.

[42] With all due respect to the Chambers judge, that is not an analysis of the elements of contempt. The Chambers judge, in this passage of the transcript, finds that it was not a justifiable excuse that the children did not want to go home. She then jumps to the conclusion that, because that was not a reasonable excuse, the Sopers were in contempt without identifying the actions of the Sopers which constitutes a breach of the Consent Order. In essence, she found that failure of the children to be in the custody of their mother in accordance with the Consent Order equated to contempt on the part of the Sopers. Again, with respect, this is an error in principle and is not sufficient for a finding of contempt.

[43] In **MacKenzie v. MacKenzie** (1984), 65 N.S.R. (2d) 52 (N.S.S.C.A.D.), the father alleged contempt where the mother failed to transport the children from their home in Wabasca to the Edmonton Airport (about 480 kilometres from their home) so they could travel to Halifax so that the father could exercise his access to the children. This Court found that the order for access in Nova Scotia could not be

interpreted as requiring the mother to transport the children to the airport. At ¶ 10 Macdonald, J.A. wrote:

> [10] ... she certainly made it difficult for [the father], but as I view it her conduct did not reach the point where it could be said that she was in contempt of the access order. In other words, the material before this court does not establish, in my opinion, beyond reasonable doubt a wilful refusal by Mrs. MacKenzie to give up access to the two children to the appellant.

[44] Similarly, there was no evidence before the Chambers judge that there was a wilful refusal or any refusal by the Sopers to give up access of the two children to the appellant. Further, the Chambers judge made no such finding. Again, the submissions of Mr. Soper and the evidence of Constable Underhill were that the Sopers were prepared to give up access.

[45] In **Brooks v. Brooks**, [1999] 141 Man. R. (2d) 25 (Man. Q.B.F.D.), the court held:

> 43. ... Evidence of contempt in family matters should be "clear and unequivocal". Restraint is appropriate in making such findings. If a custodial parent can show that she acted at all times in the best interests of the child and not with the intention of disobeying the court's order out of self interest, the courts have been reluctant to make findings of contempt ...

[46] The evidence of the contempt in this matter is far from clear and unequivocal. If the Sopers had failed to do something or, did something, to influence the children to stay, it was incumbent on the Chambers judge to identify the act. She failed to do so and, thereby, erred in law.

[47] I would also allow the appeal on the basis that Ms. Gaudet has failed to prove this element of contempt beyond a reasonable doubt.

4. The appropriate *mens rea* must be present

[48] In **TG Industries Ltd. v. Williams**, 2001 NSCA 105, Cromwell, J.A. (as he then was) addressed the issue of intention in a helpful way, making three particular points:

1. "civil contempt may be found in the absence of proof that the alleged contemnor intended to disobey the order" [at para. 11];

2. "The core element of civil contempt is failure to obey a court order of which the alleged contemnor is aware" [para. 13]; and

3. "The core elements of civil contempt are knowledge of the order and the intentional commission of an act which is in fact prohibited by it. The required intention relates to the act itself, not to the disobedience; in other words, the intention to disobey, in the sense of desiring or knowingly choosing to obey the order, is not an essential element of civil contempt." [para. 17, emphasis added]

[49] As Justice Cromwell made clear at paragraph 19: "There is a long line of authority for the view that intention to disobey is not an element of civil contempt." Although it is not necessary to prove the intention to disobey, there still has to be evidence of a failure to obey the court order. That evidence is not present in this case.

[50] As set out previously, the Chambers judge does not identify the "intentional commission of an act which is, in fact, prohibited" by the Consent Order. Her conclusion, on the evidence before her, is flawed and cannot stand.

[51] I would allow the appeal and set aside the finding of contempt.

The Remedy

Suspension of Access

[52] I have already found that the contempt finding ought to be set aside. However, I am going to comment on the suspension of access ordered by the Chambers judge.

[53] There is no analysis in the Chambers judge's decision as to why it was necessary or appropriate to suspend access to the Sopers. The Chambers judge failed to consider whether suspending access to the grandparents was in the best interests of the children. By failing to do so she committed a reversible error of law.

[54] In **Korwin v. Potworowski** (2006), 31 R.F.L. (6th) 164 (Ont. S.C.J.), the mother had prevented the father from having access to the children. The mother had already been held in contempt once before, resulting in access to one of the children being suspended for a period of time (see ¶ 160). Upon holding the mother in contempt, Gauthier, J. turned her attention to formulating the appropriate sanction for the contemptuous conduct and declined to sentence the contemnor to a period of incarceration, as it would have been harmful to the emotional well-being of the children.

[55] The Chambers judge ultimately ordered the mother to pay $5,000 into the children's RESP, and to pay $5,000 into court as security against any further contempt (at ¶ 204). The father had suggested — as a possible sanction — a three-month suspension of access, followed by nine months of restricted and supervised access. Gauthier, J. explicitly rejected this proposed sanction (at ¶ 201):

> I am not convinced that such sanction would serve the children's best interests. In a sense, it would be punishing them for the actions of their mother. Therefore, I am not prepared to suspend the wife's access.

[56] In **Hagen v. Muir**, 2000 BCSC 575, the father was granted unsupervised access to the child. Under the terms of the access order, the father was not to discuss the nature of the access order with or around the child. However, the father told the child that the access order was unfair to him and he made derogatory comments about the mother in front of the child. The mother brought a successful application to have the father's unsupervised access suspended and replaced with supervised access. Although the parties had initially suggested that a temporary suspension of all access by the father might be an appropriate remedy, the court held as follows, at ¶ 16:

> 16 Counsel for both parties initially suggested that an appropriate penalty for the plaintiff's contempt would be an order suspending access for some period of time to bring home to him the consequences of his actions. While such a penalty might have the desired effect, I am concerned that it would in fact be penalizing [the daughter] Micara for the plaintiff's actions. The right of access is a child's right and it seems to me to be inappropriate to punish an offender by removing an innocent party's right.

[57] It was inappropriate to punish the Sopers by removing the children's access rights (even if the Sopers could be considered to be offenders), unless the

Chambers judge determined that it would be in the best interest of the children to do so. There was no such consideration or finding here.

[58] Even if I were inclined to agree with the Chambers judge on the finding of contempt, I would have set aside the order with respect to the suspension of access.

Miscellaneous

[59] The hearing in this matter was very brief but raised a number of issues. I do not intend to address all of those issues in detail, however, I am going to highlight them, here, as guidance for Chambers judges hearing these types of applications. In this case:

> Mr. Soper attended at the hearing unrepresented;
>
> Mr. Soper was neither granted nor informed of his right to cross-examine the respondent on her affidavit;
>
> Mr. Soper was not given an opportunity to make submissions on the issue of the finding of contempt;
>
> the Chambers judge made her conclusion clear that he was in contempt before asking for submissions;
>
> Mr. Soper was not told he had the right to retain counsel or even asked if he wished to do so;
>
> the Chambers judge accepted the evidence of Mr. Soper that Mrs. Soper was too ill to attend court, yet proceeded to find Mrs. Soper in contempt without giving her an opportunity to he heard.

[60] Although each of these circumstances considered in isolation may not be fatal to a finding of contempt, it is important to recognize that contempt is a criminal or quasi-criminal proceeding that has to be treated with the seriousness that comes with such a proceeding.

[61] I recognize it is important that these matters be resolved quickly and efficiently. I am also aware that, with busy dockets, court time is a very valuable commodity. However, respectfully, that does not innoculate the Chambers judge from considering the necessary elements of the offence and ensuring the parties know their rights and are heard before a decision is made. Where the sanctions are a potential period of incarceration and a loss of access to children, judges have to ensure that the rights of all parties are considered and protected.

Conclusion

[62] For these reasons, the appeal is allowed, the contempt order dated July 21st, 2009, is set aside and the access provisions in the Order of Justice Lawrence O'Neil dated October 15, 2008, are reinstated.

[63] There shall be no costs to any party on the appeal.

Farrar, J.A.

Concurred in:

Hamilton, J.A.

Beveridge, J.A.