

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA

Citation: *Mattatall v. Nickerson*, 2009 NSFC 10

Date: 20090415

Docket: FNGMCA47506

Registry: Pictou

BETWEEN:

AUBREY MATTATALL

Applicant

- and -

BRENDA NICKERSON

Respondent

DECISION

HEARD BEFORE THE HONOURABLE JUDGE JAMES C. WILSON,
Judge of the Family Court for the Province of Nova Scotia

HEARING DATES: April 1st, 2009

DECISION DATE: April 15, 2009

PRESENT: Timothy G. Daley for the Applicant

Jill Graham-Scanlan for the Respondent

[1] This is an application for a finding of contempt against the respondent. The applicant alleges that the respondent was in contempt of the existing Family Court

order in that she did not allow the applicant to exercise access with his daughter on Thursday, December 4th, 2008.

BACKGROUND

[2] The parties were in a common-law relationship from November '95 until 2006. They never married. One child was born during their relationship, Samantha Dawn Mattatall born [...], 2003. Subsequent to the parties' separation, it was determined that Mr. Mattatall was not the biological father of the child. The parties have engaged in extensive litigation since that time. Following a hearing before another Family Court Judge, an order dated October 14th, 2008 was issued.

The relevant terms of that order include:

1. Aubrey Mattatall ("the father") and Brenda Mattatall ("the mother") shall have joint, shared custody of Samantha Dawn Mattatall, born [...], 2003 ("Samantha").
2. The Father shall have reasonable access with Samantha, upon reasonable notice to the Mother, at reasonable times including, but not limited to, the following:
 - a. Every second weekend from after-school on Thursday afternoon until the Father takes Samantha to school on Monday morning. If the Monday following the Father's access weekend is a holiday then the father shall have Samantha with him for Monday and take her to school on Tuesday morning.
 - b. During the week that the Father will not have Samantha for weekend access, he shall have Samantha from after-school on Wednesday until he takes her to school on Thursday morning.
5. The parties shall share holidays and special occasions by dividing each equally and

alternating each on an annual basis including, but not limited to, the following schedule:

- a. For Christmas, one parent shall have Samantha from 8 a.m. on Christmas Eve to 2 p.m. on Christmas Day and the other parent shall have Samantha from 2:00 pm on Christmas Day to 6 pm on Boxing Day. This schedule shall alternate between the parents each year with the Mother having Samantha commencing Christmas Eve on even numbered years and the Father on odd numbered years. The parties shall divide the balance of Christmas holiday access with Samantha between them on an equitable basis.
- b. For Easter, one party shall have Samantha from Easter Saturday at 6 pm to Easter Sunday at 1 pm. The other parent shall have Samantha from Easter Sunday at 1 pm to Easter Monday at 6 pm. This schedule shall alternate between the parents each year with the Father having Samantha commencing Easter Saturday on even numbered years and the Mother on odd numbered years.
- c. For Samantha's birthday, she shall remain with the parent who has her according to the normal schedule and the other parent may make arrangements for celebration when Samantha is with that parent according to the normal schedule.
- d. For Mother's Day and Father's Day, the Mother shall have Samantha with her for Mother's Day from 8 am to 5 pm and the Father shall have Samantha with him on Father's Day from 8am to 5 pm.

6. For summer vacation, each party will be entitled to have up to two weeks of block access each summer with Samantha. During the time that Samantha is with one parent for this block access, the other parent shall be entitled to some access with Samantha as agreed between the parties so long as this block access is spent in Nova Scotia.

The parties shall exchange summer access schedules in writing by May 1st of each year and, where there is conflict, the priority given to each schedule shall rotate each year, with the Father's schedule having priority in even numbered years the Mother in odd numbered years.

[3] Following the issuing of the above noted order, the first "holiday" was Monday, November 10th, a school in-service preceding the statutory holiday of November 11th. Because the school in-service followed Mr. Mattatall's regular weekend access, he kept the child with him until she was returned to her mother the

morning of Tuesday, November 11th. Mrs. Nickerson had previously requested the child be with her on that date so she could attend a Remembrance Day service with a family member. The applicant did not object.

[4] On Wednesday, December 3rd the applicant received a telephone call from the respondent's husband. Normally, Mr. Mattatall's access would begin on Thursday, December 4th after-school. At that time the respondent's husband advised that according to the respondent's understanding of the order, because Samantha had been with her father on the in-service day (holiday) of November 10th, the respondent was entitled to keep her for the in-service day of December 5th. As a result, it was the respondent's position that Mr. Mattatall's access would not begin as usual on Thursday afternoon but would begin on Friday after-school. The respondent kept the child until Friday afternoon.

[5] The issue for the court to determine is whether the actions of the respondent constitute civil contempt.

THE LAW:

[6] In *Younger v. Younger* [2008] O.J. No. 5290, (Ont. Sup. Ct.) C. J. Horkins J.

noted at paragraph 10 and 11:

10 Before a court can make a finding of contempt it must be satisfied beyond a reasonable doubt that:

1. the order that was breached clearly and unequivocally states what should and should not be done; and
2. the party deliberately and willfully disobeyed the order.

11 This test was set out in *Prescott-Russell Services for Children and Adults v. G. (N)*, (2007) 82 O.R. (3d) 686 at para. 27 (C.A.) and *Hobs v. Hobbs*, [2008] O.J. No. 3312 (C.A.).

[7] Our Court of Appeal in *TG Industries Limited.v. Clarke Inc.et al* [2001] N.S.J. No. 241 (N.S.C.A.)¹⁰⁵ offers helpful guidance. In that case, Cromwell J.A., as he then was, noted at paragraph 11:

In my view, civil contempt may be found in the absence of proof that the alleged contemnor intended to disobey the order.

And at paragraph 13:

The core element of civil contempt is failure to obey a court order of which the alleged contemnor is aware.

And at paragraph 17:

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 disobey the order, is not an essential element of civil contempt.

[8] However, before a court considers the alleged contemnor's actions, it is necessary to first consider whether the order that is alleged to have been breached is sufficiently clear and unequivocal in its direction. In *Skipper Fisheries Ltd. V.*

Thorbourne [1997] N.S.J. No. 56, Hallett, J.A. writing for the majority, noted at paragraph 76:

The terms of an order which it is alleged that a party has disobeyed and ought to be found in contempt must be clear and unambiguous (Borrie and Lowe, *The Law of Contempt*, 1973 at p. 315. It must be proven beyond a reasonable doubt that the court order was breached; *Filipovic v. Glusica* (1995), 174, A.R. 366 (Alta.C.A.)).

[9] Similarly, in *The Law of Contempt in Canada* (Carswell 1997), the author Jeffery Miller wrote at paragraph 8.7 . . .

Any ambiguity in an order has to be resolved in favor of a person accused of contempt.

ANALYSIS

[10] In this case there is no dispute about the facts. The respondent acknowledged what she did and clearly intended to act as she did. The first issue that must be decided in this case is whether the order is “clear and unambiguous.”

[11] Paragraph 2 of the order sets out the regular access. It specifically extends weekend access “if the Monday following...” is a holiday. Holiday is not defined but the parties through their affidavits clearly acknowledge that an “in-service” means holiday.

[12] Paragraph 5 states that the parties “shall share holidays and special occasions by dividing each equally and alternating each on an annual basis . . . “ The order then

goes on to define specifically the circumstances of Christmas, Easter, birthdays and Mother's and Father's Day.

[13] The problem, if any, with applying section 5 is understanding what is meant by "share" and "alternating each on an annual basis" in light of the specific provisions of section 2(a) which extends access for holiday Mondays.

[14] Under the Order, the applicant had his access extended an additional day because of a school in-service on Monday, November 10th. The respondent had the child with her for the statutory holiday November 11th, a day the child would normally be with the respondent. If holiday includes in-service and the intent is to alternate holidays, then the next holiday (in-service) which occurred on December 4th should belong to the applicant, the respondent having had the child with her the preceding holiday, November 11th. However, the interpretation argued by the respondent is that since holidays were to alternate and the applicant had the child with him for the last in-service on November 10th, the respondent was entitled to access on the next in-service, December 4th. By this interpretation, November 11th next year would alternate to the applicant on the basis that holidays were to alternate on an annual basis. This alternating of statutory holidays is the pattern set out in the

specifics of section 5 dealing with Christmas, Easter and birthdays.

[15] While the applicant's interpretation of section 5 might be the more logical and simpler to follow, the order as drafted is open to other interpretation.

[16] Holiday is not defined. It appears the parties turned their mind to holidays or in-services occurring on Mondays to extend the applicant's access weekends. Did they intend the applicant would get all holiday Mondays following his access weekend irregardless of whether or not he had exercised the last holiday preceding his access weekend? Was it intended that the provisions of 2(a) would take precedence on holiday Mondays and it was only holidays occurring on days other than the Monday following an access weekend that were to be alternated? Or, was it intended that statutory holidays such as Remembrance Day were to alternate (year about) and it was only other holidays that were to alternate sequentially? For example, if the respondent had access on Remembrance Day this year, is it intended that the applicant would have the child with him Remembrance Day next year irregardless of how other in-service holidays were alternating. Given the parties dealt specifically with Christmas, Easter and birthdays in section 5, the most reasonable interpretation is that the parties intended other holidays to alternate as

they occur with the proviso the respondent always get a holiday Monday following the access weekend. The use of the wording “share holidays...equally” and “alternating each on an annual basis” certainly indicate the parties intend to share, but is less than clear and unambiguous how it is to operate, given the various circumstances that can create a holiday.

[17] Drafting custody and access orders is never simple in a difficult case. It is impossible to address every situation. Ultimately common sense, reasonableness, and the willingness to communicate are necessary to promote the best interests of the child.

[18] In *Skipper Fisheries*, supra Justice Hallett noted at paragraph 74:

The jurisdiction of the Court to make a finding of contempt should be exercised with scrupulous care and only when the contempt is clear (*Rawlinson v. Rawlinson* (1986), 52 Sask. R. 191 (Q.B.)).

[19] Having considered the facts and applied the law as I understand it, I am not satisfied beyond a reasonable doubt that the respondent was in contempt. The order in my opinion is not clear on how holidays are to alternate. To the extent that the parties lack the common sense or will to act reasonably, the terms of the order should be better defined to remove ambiguities.

[20] The application for contempt is dismissed without costs.