

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA

Citation: *M.G. v. C.M.*, 2009 NSFC 15

Date: 20090710

Docket: FKMCA-020318 (FK00-0069)

See Also: FKMCA-051795

Registry: Kentville

Between:

M.G.

Applicant

- and -

C.M., J.G., and D.G.

Respondents

- and -

T.M. and C.F.

Third Parties

Judge:

The Honourable Judge David A. Milner, a Judge of the Family Court for the Province of Nova Scotia

Court Appearances and Telephone Conferences:

January 10; January 18; and March 26, 2008; and May 1, 2009

Last Date for Filing Briefs: May 15, 2009

Decision Date:

July 10, 2009

Counsel:

Melanie Perry; then Megan Hanson;
and finally Anita Hudak - for the Applicant

Tim Peacock - for the Respondent, C.M.
The Respondents, J.G. and D.G. - not participating

Leanne Wrathall; then Sandra Doucette;
and then Leanne Wrathall again - for the Third Parties

INTRODUCTION

[1] A young mother of a young child alleged in court that the police had failed to enforce her child custody order.

[2] Two police officers were then summoned to come to court and explain themselves.

[3] This case has raised these questions:

Should the police be expected to "enforce" child custody court orders?
If so, how should they go about it?

What role should the courts play in monitoring the police?

Is there a better way?

NATURE OF CHILD CUSTODY

[4] When children are born, their parents do not own them.

[5] Usually both of a child's parents are involved together in raising the child. In situations where the mother and father live together with the child in the same residence, there is little thought given to the notion of child custody. If we thought about the legal nature of the relationship of these parents to their child, however, we would probably say the parents had joint custody.

[6] In most cases, the parents would not have any documentation to show how they had divided up the privileges and responsibilities of their child custody. The closest thing they would have to a legal document, showing they even had custody of the child, is the child's birth certificate.

[7] If there were disagreements about responsibility or privilege, the parents would be expected to work out their differences, without outside assistance. Therefore, it would be considered quite unusual for either parent to call the police.

NATURE OF A CHILD CUSTODY COURT ORDER

[8] An order can be a request or authorization for something - such as an order from a restaurant menu, or a doctor's order for a medical test to be done or a prescription to be filled; however, we usually think of an order - especially a court order - as a *command* to be *obeyed*.

[9] Where the subject of a court order happens to be property, and the terms of the order are clear and unambiguous, the notion of order as command may be appropriate.

[10] Where parents separate or have never lived together with their child, a court order often results, expressing for the first time the nature of the relationship between the parents and the child.

[11] Because it addresses ongoing human relations and evolving future circumstances, a child custody court order is less of a command to be obeyed, and more of a *design* to be *fulfilled*.

PROCEDURAL CONTEXT OF THIS CASE

The Court Order:

[12] An order of the Family Court for the Province of Nova Scotia provided for joint custody of a nine-year-old boy, involving both of his parents and two of his grandparents.

[13] The order also contained this "standard enforcement clause":

All sheriffs, deputy sheriffs, constables and peace officers shall do all such acts as may be necessary to enforce this order and for such purposes they, and each of them, are hereby given full power and authority to enter upon any lands and premises whatsoever to enforce the terms of this order.

The Statutory Procedure:

[14] Section 41 of Nova Scotia's *Maintenance and Custody Act* provides:

41 (1) Where it is made to appear under oath that a person has failed to comply with an order pursuant to this Act, the court may require the person to appear to explain the failure to comply or a party to the order may make an application to bring the matter before the court for determination.

(2) In an application pursuant to subsection (1), the court shall determine the issue and may make any additional order the court deems necessary to ensure the order of the court is complied with, including an order for contempt which may include imprisonment continuously or intermittently for not more than six months. (Underlining added.)

[15] Section 9 of the *Family Court Act* provides:

9 (2) **It shall be the duty of peace officers** to serve any process issued out of the Family Court, **to execute any order issued by any judge of the Court**, to convey a young offender to such place or places as may be directed in such orders and to assist the Court and the officers of the Court in carrying out the *Young Offenders Act* (Canada) and any other matters or enactment for which the Court is responsible. (Emphasis added.)

THE APPLICATION TO COURT

[16] The child's mother applied to court to change the terms of the custody order, to have the child returned to her care, and to review the father's access.

[17] In her application, under oath, the mother stated: "**The RCMP have repeatedly failed to enforce the Order as directed.**" (Emphasis added.)

[18] Upon first considering the mother's application - including the sworn assertion that the RCMP had failed to enforce the order - the Honourable Judge Robert C. Levy, as a judge of the Family Court, signed a summons directing two specified members of the RCMP ("the third parties") to attend court and explain the alleged failure of the RCMP to enforce the order.

[19] The summons cited both Section 41 of the *Maintenance and Custody Act* and Section 9(2) of the *Family Court Act* as authority, although there was no

express indication that the officers might be found in contempt of court. In other words, it did not read like a contempt citation.

[20] I understand there were several docket appearances before Judge Levy, and that he allowed the court proceeding to be delayed so that the general question of police enforcement of custody orders could be reviewed outside the court setting.

[21] I have been made aware that an *ad hoc* committee of stakeholders was established to consider the issue. The committee included representatives of the Nova Scotia Department of Justice, the Nova Scotia Association of Chiefs of Police, the Halifax Regional Police Service, the RCMP, the Nova Scotia Public Prosecution Service, and practising family law lawyers. If it had not been for this court proceeding, the *ad hoc* committee might have been expanded to include judges as well.

[22] At some stage, Judge Levy must have felt that insufficient progress was being made with the alternative procedure, and he directed that the court proceeding should continue. It was then that I was asked by the Chief Judge to assume judicial responsibility for the case.

[23] Despite how it might have been seen by others, I have not considered the proceeding to be a contempt of court application initiated by the Court. From the beginning of my involvement, I have always deemed the mother's position to be important because, under the procedure of Section 41, it was only her assertion under oath which enabled the Court to issue the summons to the police in the first place.

WHERE'S THE JURISDICTION?

A Provincial Family Court:

[24] As members of the RCMP, a federal police force, the third parties take the position that they are agents of the federal Crown.

[25] Section 21(1) of the federal *Crown Liability and Proceedings Act* provides:

21. (1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim. (Underlining added.)

[26] Because the Crown is entitled to have all claims made against it dealt with in either the Federal Court of Canada or a superior court within the Province, the third parties say that they cannot be the subject of any application in the Family Court for the Province of Nova Scotia. This is simply because the Supreme Court of Nova Scotia is the superior court in Nova Scotia, while the Family Court is not.

[27] If the third parties, as members of the RCMP, cannot be considered as “persons” under Section 41, but can only be considered as agents for the federal Crown, we would have to look at whether the Family Court has authority to deal with this application.

[28] The Family Court for the Province of Nova Scotia is a provincial court. The Court gets its authority only from legislation - not just the *Family Court Act* which created and continues the Court, but all other legislation which places matters within its jurisdiction. Included in this statutory authority is “implied authority”. [See: *Blois v. Blois* (1988), 13 R.F.L. (3rd) 225 (N.S.C.A.)]

A Provincial Superior Court - Without Unified Family Law Jurisdiction

[29] The Supreme Court of Nova Scotia is also a provincial court, existing under provincial legislation. The *Judicature Act* provides that the historic Supreme Court of Nova Scotia continues to be a superior court of record in its present-day structure: (1) the Supreme Court of Nova Scotia, with original jurisdiction; and (2) the Nova Scotia Court of Appeal, with appellate jurisdiction.

[30] Unlike the Family Court whose judges are appointed by the provincial government under Section 92 of the *Constitution Act, 1867*, judges of the Supreme Court are appointed by the federal government under Section 96.

[31] The Supreme Court also gets its authority from statutes - express and implied authority.

[32] The Supreme Court of Nova Scotia has been around longer than either Nova Scotia's Legislative Assembly or Canada's Parliament. It has also existed longer than most of the courts in Canada.

[33] The Supreme Court of Nova Scotia has some additional jurisdiction in common law and equity which does not come from a Canadian parliament or legislature, but comes with its long history and traditions. This additional authority can be called "inherent jurisdiction." [See: *The Inherent Jurisdiction of the Court*, by Master I.H. Jacob, in *Current Legal Problems*, 1970, pp. 23- 52.]

[34] The *Judicature Act* also creates the Family Division of the Supreme Court of Nova Scotia, which is a "*unified*" family court, having full superior court jurisdiction plus all the jurisdiction of the Family Court for the Province of Nova Scotia; however, the Family Division operates only in the Halifax Regional Municipality, and on Cape Breton Island.

[35] Because this case has arisen in Kings County (which is outside the two designated areas of operation for the Family Division) it illustrates part of the problem of not having a unified family court throughout the Province.

[36] In Kings County, the superior court (the Supreme Court of Nova Scotia) has no jurisdiction under the *Maintenance and Custody Act*. On the other hand, the Family Court, which has exclusive jurisdiction under the *Maintenance and Custody Act* in Kings County, has no jurisdiction as a superior court.

[37] It is unfortunate that a technical argument such as this can still be made in a family law proceeding anywhere in Nova Scotia.

[38] When the Family Division began to operate in Nova Scotia in April 1999, the Federal Government and Provincial Government, in implementing the Family Division, let it be known that within *two to five years*, The Supreme Court of Nova Scotia (Family Division) would be expanded to operate in all parts of Nova Scotia. Unfortunately, this has not happened over the intervening *ten years*, and there are no signs that it will happen soon.

DECISION ON JURISDICTION

[39] In all circumstances where a person is vicariously responsible for the actions of that person's agents, the agents are still personally responsible for their own actions. The only exception is under contract law where a person can stipulate that he or she is contracting only as the agent for someone else.

[40] Because the members of the RCMP are agents of the federal Crown, their actions might well render the Crown liable in any situation; however, the particular members of the RCMP would still be personally responsible.

[41] Section 41 of the *Maintenance and Custody Act* refers to any person who fails to comply with a court order. This would include a parent who might fail to comply with the substantive custody provisions, or to a police officer who might fail to comply with the procedural provisions for enforcement.

[42] During the court appearance in Kentville on March 26, 2008, I ruled in an oral decision that the matter could proceed in Family Court against the RCMP officers as "persons" within the meaning of Section 41 - **so long as the mother wanted the matter to go ahead.**

POSITION OF THE MOTHER

[43] Shortly afterwards, the mother advised through her counsel, Ms. Hanson, that **she did want the matter to proceed.**

[44] I then asked counsel representing all parties, to arrange among themselves a court hearing date which was convenient for themselves, their clients, and any witnesses.

[45] No court date was ever arranged, despite some periodic prodding from the court over the ensuing year. Although it was never made clear to me why, I have assumed the reason no date was ever arranged by counsel was because the mother, and the other parties, had little interest in seeing the matter proceed further.

[46] Eventually, the mother appears to have changed her position. Her counsel, Ms. Hudak, has advised that, as the applicant, the mother does not now want the matter to proceed - although she would be available as a witness.

[47] No decision has yet been made as to whether the matter should proceed if the mother did not want it to go ahead.

POSITION OF THE POLICE

RCMP Policy on Enforcement of Custody Orders:

[48] If the third parties are required to testify in this proceeding, they would not only speak about the particular steps they took in relation to this family; they would also explain the general approach taken in response to requests for assistance in child custody cases.

[49] I have been made aware, through submissions of their counsel, that the RCMP has a policy to guide its members in dealing with child custody orders, which is summarized as follows:

- investigate the complaint;
- if necessary attend a scene to keep the peace;
- review the order with the parties and advise them of the consequences for non-compliance;
- if the child is in danger and there is a risk of child abduction, then execute the order and contact social services to take custody of the child;
- if there is no immediate threat of harm to the child and there is an apparent non-compliance with the order, advise the parties to return to the issue court for relief;
- determine if this is an appropriate case for charge under s. 127 of the *Criminal Code of Canada*, keeping in mind that a s. 127 charge should not be laid where applicable provincial legislation (s. 41 MCA) provides a process to deal with non-compliance with the court order.

Police Discretion:

[50] Parents have the primary obligation of complying with a child custody court order, and they should be expected to work out normal disagreements between

themselves. There might be good reason, however, why a parent feels unable to comply with all aspects of an order - for instance, in circumstances involving domestic violence, illness, intoxication, or stormy weather.

[51] Police officers are trained professionals who know how to deal with people in many different situations. They should be able to exercise discretion in dealing with situations they encounter, including requests for assistance with child custody orders.

[52] In many cases, a word from a police officer to a parent about the importance of complying with the court order, would be all that is needed to achieve compliance.

[53] Police officers do have an enforcement role to play, and should respond to requests by parents for assistance with child custody orders. They should take reasonable steps to assist in promoting compliance.

[54] Police discretion, however, should not be used as an excuse for simply doing nothing.

ENFORCEMENT CLAUSES IN CHILD CUSTODY ORDERS

[55] Most parents would never want to, or need to, involve the police in relation to their child custody orders.

[56] There is no need for an enforcement clause in a child custody order before police officers can become involved, although they might like to see such a clause to confirm that their assistance is requested or authorized.

[57] I respectfully suggest that lawyers and courts should only include such clauses where there are reasons to think that compliance will be a problem. For instance, if there has been a history of non-compliance, an enforcement clause might be added to a new order. (See: *Reid v. Durning* (1995), 137 N.S.R. (2d) 300, especially at paragraphs 22-26 (N.S.S.C.))

[58] I have sometimes thought that the language of enforcement clauses could show more respect for the police and their professional discretion, and better recognize the nature of a child custody court order by **requesting** and **authorizing** police involvement rather than commanding it.

[59] For example, wording such as: “Police officers are hereby requested and authorized to take all reasonable steps necessary to ensure compliance with the terms of this order.”; might work just as well as: “... shall do all such acts as may be necessary to enforce this order”

IS THERE A BETTER WAY?

[60] Over the years, in court proceedings brought by the Director of Maintenance Enforcement under the *Maintenance Enforcement Act*, I have been asked a number of times by parents, who have been taken to task for defaulting in the payment of their child maintenance orders: “Where can I find the Director of Access Enforcement?”

[61] I have never answered: “At the police station.”

[62] Usually I respond by saying something about child maintenance and access being separate legal issues. [See: *Twaddle v. Twaddle* (1985), 46 R.F.L. (2d) 337 (N.S.C.A.)] That answer, however, never seems to satisfy the questioner - nor should it.

[63] It seems to me that facilitation of access under child custody orders is a serious issue which should be addressed by government-sponsored services.

[64] Perhaps there *should be* a “director of access enforcement” as the maintenance-paying-parents have suggested. Or, perhaps there should be an Office of Family Responsibility, with both a maintenance enforcement branch, and an access facilitation branch. It would be staffed with professionals trained in all aspects of parent-child relationships. Such a system could include a mechanism for emergency calling by parents, to address access problems which happen on weekends and after hours; and provision for police support, as necessary.

[65] Alternatively, there could simply be support services provided, to help families cope with access compliance problems. These services might be associated either with the current court structure, or even better, with a Supreme Court of Nova Scotia (Family Division) which is fully operational in all areas of the Province. The services could include: access supervision - in access supervision centres; mediation; parent training; and counselling for parents and children.

[66] Family responsibility involves more than paying maintenance; however, maintenance payments are easier to measure than child custody is to monitor. Nevertheless, that is no excuse for not giving access-compliance greater attention than it gets now.

[67] More could be done to resolve the problem than conscripting police to "enforce" access through court orders.

[68] To address the issue would of course require financial resources. It would, however, be money well spent.

CONCLUSION

[69] The issue to be determined now is whether this proceeding should continue. I have decided, *no, it should not*.

[70] I now order that the mother's application under the *Maintenance and Custody Act*, as it relates to the third parties (the police officers) be discontinued, because:

- (1) The mother no longer wants to move her application forward as it relates to the third parties, and it would appear other than impartial for the court to presume to take her place;
- (2) I approve, generally, of the RCMP policy which has been presented as an approach to enforcing child custody orders; and
- (3) I think it is highly unlikely that I would find the actions of the police officers to be contemptuous in their dealing with the specific

court order in this case, as contemplated by Section 41 of the
Maintenance and Custody Act.

[71] I thank all counsel for their assistance, and if an order is needed, other than the decision itself, please prepare and send it along.

David A. Milner, A Judge Of The Family Court
For The Province Of Nova Scotia