

FAMILY COURT OF NOVA SCOTIA

Citation: *A.U. v T.C.*, 2018 NSFC 9

Date: 2018-02-28

Docket: Antigonish No. FATMCA-67800

Antigonish No. FATMCA-079691

Registry: Antigonish

Between:

A.U.

Applicant

v.

T.C.

Respondent

and

D.M.

Respondent

Judge: The Honourable Judge Timothy G. Daley

Heard: February 6, 2018, in Pictou, Nova Scotia
February 28, 2018, in Antigonish, Nova Scotia

Decision: February 28, 2018 – Oral Decision
March 6, 2018 – Written Decision

Counsel: Robert Moores, for the Applicant
Allison Kouzovnikov, for the Respondent
Meghan MacGillivray Case, for the Respondent

Introduction

[1] A.U. and T.C. are former common-law spouses. They have two children together and A.U. has a third child to whom T.C. has acted as a parent for many years. T.C. has been granted standing in the ongoing proceedings involving that child.

[2] In the most recent interim order in this matter, the Court granted joint custody of all three children to the parties, primary day-to-day care and residence of the children to A.U., parenting time to T.C., and ordered that T.C. was to immediately transfer the children to the care of A.U.

[3] A.U. alleged that T.C. was in contempt of court for failure to abide by the terms of that order, specifically the requirement that he deliver the children into her care. A contempt hearing was held on February 6, 2018 and in my written decision of February 9, 2018 (*A.U. v. T.C.* 2018 NSFC 4) I found T.C. guilty of civil contempt for his failure to obey the provisions of that order. Sentencing was adjourned to February 28, 2018 to permit T.C. to purge his contempt and for counsel to prepare for the sentencing.

[4] After the contempt hearing was completed but before the sentencing hearing commenced, counsel for T.C. notified the court that he been dismissed by T.C. By the sentencing hearing, T.C. had retained new counsel who made submission on his behalf.

[5] Despite his dismissal, T.C.'s former counsel did submit a brief on sentencing to assist T.C. Counsel for A.U. also provided a brief on sentencing.

[6] The hearing on sentencing proceeded on February 28, 2018 as scheduled.

Issues

[7] What is the appropriate penalty to be imposed on T.C.?

Positions of the parties

[8] A.U. says that T.C. has been afforded many opportunities to purge his contempt including the time between the contempt hearing and sentencing hearing. She notes that he has been represented throughout by counsel, with the exception of the period between dismissing one lawyer and retaining another prior to sentencing. The decision finding him guilty of contempt set out the evidence and findings of the court and T.C. would be aware of this. Despite this, he has only taken steps to return one of the children to her care approximately 10 days prior to sentencing and the other two children to her care one day prior to sentencing in an effort to purge his contempt.

[9] A.U. says that T.C. placed the children squarely in the middle of a highly contentious separation and created a "loyalty bind" for the children. She says that T.C. has repeatedly and clearly breached the court order, taking advantage of earlier orders that benefited him and failing to obey an order when it would be to his disadvantage. In doing so, the impact of the children has been significant. Specifically, his contempt has kept the children away from their mother for many months.

[10] A.U. says that any sentence must provide a measure of general deterrence as well as specific deterrence to T.C. to ensure his compliance with any future orders. Initially, she said that the appropriate sentence would be a term of imprisonment of 30 days which could be vacated upon compliance with the order. A.U. said that T.C.'s parenting time should be suspended until he satisfies the court that he will comply with the order or, in the alternative, that his parenting time should be supervised by someone approved by her. She further sought a fine of \$1,000 payable within one year and costs of \$1,000 payable to Nova Scotia Legal Aid, who provided representation for her.

[11] At the sentencing hearing, A.U. modified her position given that T.C. had returned the children. She says that it would be best to impose an appropriate sentence, which may include incarceration, as well as a requirement that T.C. attend parenting counselling and pay a fine and costs. A.U. also says that this sentence should be suspended to allow T.C. time to address his parenting deficiencies and permit a transition of one child back into A.U.'s home over a three-week period.

[12] T.C. says that he explained to the children that they had to go with their mother and did nothing to interfere with them going with or speaking to her. The oldest child seemed to have some animosity towards A.U. though the court concluded there was insufficient evidence to find that this was the result of alienation. He says that he is a good and loving father and has been fully involved in their lives. The children have a strong bond with T.C.

[13] T.C. says the appropriate sentence is a modest fine and that imprisonment will have a deep negative impact on the children. He says he is on social assistance and has limited means to pay.

[14] T.C. says that he should be ordered to attend counselling to address his parenting deficiencies as well as allow him to transition one of the children from his home to A.U.'s home over three weeks. He says his parenting time should remain as was set out in the most recent interim order.

[15] T.C. requested and was given the opportunity to apologize. He apologized to the court for his behavior and said he did not mean to disrespect the court. After being prompted by the court, he also apologized to the children and A.U.

[16] While not evidence, counsel did inform the court that the youngest of the children was returned to A.U.'s care approximately 10 days prior to sentencing and remains in her care. The middle and oldest children were return to A.U.'s care only one day prior to sentencing. The behaviors of the children are challenging for A.U. and it is proposed by both parties that the oldest return to T.C.'s care for three weeks to allow the other two to settle in. The oldest child would then be returned to A.U.'s care.

[17] Both parties propose that, for a period of six months, any sentence be suspended and T.C. be permitted to attend his counselling. The matter would return to court for review and possible variation of or vacating of the sentence for T.C.

[18] A.U. says that in the interim, she should be granted sole custody because of the circumstances of the last months and the poor communications between the parties. T.C. request that the interim order of joint custody remain.

[19] T.C. says that any order should include a provision requiring appropriate communications between the parents as well as a prohibition on derogatory comments by either party or anyone else when the children are with that parent. He also suggests a prohibition on any comments being made on social media about these proceeding or the family circumstances.

The Law

[20] The beginning point for determining an appropriate sentence for civil contempt is Civil Procedure Rule 89.13 which provides the court with authority to impose a variety of penalties following a contempt finding. That rule is as follows:

- (1) A contempt order must record a finding of guilt on each allegation of contempt for which guilt is found and it may impose a conditional or absolute discharge, a penalty similar to a remedy for an abuse of process, or any other lawful penalty including any of the following:
 - (a) an order that the person must abide by stated penal terms, such as for house arrest, community service, or reparations;
 - (b) a suspended penalty, such as imprisonment, sequestration, or a fine suspended during performance of stated conditions;
 - (c) a fine payable, immediately or on terms, to a person named in the order;
 - (d) sequestration of some or all of the person's assets;
 - (e) imprisonment for less than five years, if the person is an individual.
- (2) A contempt order may provide that a penalty ceases to be in effect when the person in contempt causes contemptuous behavior to cease, or when the person otherwise purges the contempt.
- (3) A contempt order may provide for, or a judge may make a further order for, the arrest and imprisonment of an individual, or sequestration of the assets of a corporation, for failure to abide by penal terms, fulfill conditions of a suspended penalty, or comply with terms for payment of a fine.

[21] In *TG Industries Ltd. v. Williams*, 2001 NSCA 105, Cromwell J.A., as he then was, of the Court of Appeal noted at paragraph 35 that when determining an appropriate penalty order, the court “is entitled to do so in a way that will obtain

compliance with the order so that the party entitled to the benefit of the order in fact receives it. The result is that the party in whose favour the order is made receives a remedy.”

[22] Cromwell J.A. also provided a non-exhaustive list of factors to consider at the penalty stage at paragraph 38 including the following:

... the diligence of the alleged contemnor in attempting to comply with the order, whether there was room for reasonable disagreement about what the order required, the fact that the alleged contemnor did not benefit from the breach of the order, the extent of the resulting prejudice to the appellant and, of course, the importance of execution orders being taken seriously by all affected by them.

[23] In *Keinick v Bruno*, 2013 NSSC 218, Forgeron J. cites at paragraph 14 the Manitoba Queen’s Bench decision of *Rogers v Rogers*, 2008 MBQB 131 as authority for factors to consider on penalties as follows:

- a) The penalty should ensure compliance to preserve the integrity of the administration of justice;
- b) The penalty should reflect an element of deterrence, both general and specific;
- c) Sentences should not reflect a marked departure from those imposed in similar circumstances;
- d) Restraint is always appropriate, given the twin objectives of protecting the best interests of children and the administration of justice. There is, however, a presumption that the current order is in the child's best interests and should be obeyed;
- e) A fine is appropriate in some circumstances, as are costs, provided such are at a level which would not negatively impact on the welfare of the children;
- f) The sentence must be proportional to the gravity of the wrong doing;
- g) Imprisonment should only be imposed in cases that are the most serious and deliberate of disobedience;
- h) The penalty must be assessed in light of the number of breaches, and the duration over which such breaches have occurred;

- i) The penalty should reflect the presence or absence of remorse, and whether an apology has been transmitted to the court, and to the other party;
- j) All sentences for contempt in family law should have regard for the children's best interests;
- k) A recognition that victims of contempt include not only the applying party, but also the children who have been prevented from spending time with the nonoffending parent; and
- l) Penalties are often multifaceted and can include incarceration, discharges, suspended penalties, costs, fines, and parenting courses (Little J. citing *Paton v. Shymkiw*, [1996] M.J. No. 569; and *MacNaughton v. MacNaughton*, [1998] M.J. No. 575 (Q.B)).

Factors Considered

[24] In arriving at an appropriate sentence in this matter, I have considered several factors.

[25] First, T.C.'s refusal for many months to comply with court orders permitting supervised parenting time to A.U. prior to the contempt application being made is significant.

[26] Second, T.C.'s refusal, until a few days ago, to abide by the most recent court order requiring that he transfer the children into the care of A.U. is significant. Even though A.U. made two trips to T.C.'s home and was available to take the children into her care, T.C. did not take reasonable steps to deliver the children to her. That resulted in the contempt hearing and a finding of guilt against him. He only returned the youngest child to A.U. 10 days prior to sentencing and the other two children the day prior to sentencing. That delay is significant.

[27] Third, though T.C. has offered an apology to the court, he only apologized to the children and A.U. when prompted by the court. This suggests he has yet to gain the insight required to understand the impact his behavior has had.

[28] Fourth, T.C.'s refusal to comply with court orders, including the last order until very recently, meant that the children were unnecessarily kept from A.U. for many months. When combined with the previous approximate eight month when A.U. was prohibited from having contact with the children because of a Provincial

Court undertaking, the children had no contact with A.U. for approximately one year. There is no question that this will have an adverse impact on the children and their relationship with their mother.

[29] Fifth, the ongoing conduct of T.C. in interfering with A.U.'s parenting time over many months, particularly after he was found guilty of civil contempt and refused to purge that contempt until recently, is a serious matter given its impact on the children and is clearly contrary to the children's best interests.

[30] Sixth, I have considered the impact any sentence will have on the children. If a fine or costs or both are ordered, that money will have to come from funds T.C. uses to care for the children. If imprisonment is ordered, it may interfere with T.C.'s ability to provide for the children. I am also mindful that imprisonment of T.C. will likely impact the children emotionally and make them even more aware of the conflict between their parents.

[31] Seventh, it is significant that T.C. proposes to attend parenting counselling to gain some insight into the impact of his behaviors. That is an important first step in addressing the poor judgement he has exhibited over the last number of months.

Decision

[32] It is essential that the Court impose a sentence that not only provides a specific deterrent to T.C. but also provides a general deterrent to those that come before Family Courts in this province.

[33] For the rule of law to be effective in a free and democratic society, citizens must be able to trust in and rely upon the authority of courts and their orders. Citizens must obey orders of courts despite any misgivings or opposition they may have about the content of those orders. To allow anything else would be to weaken the rule of law and replace it with the rule of the individual.

[34] This is particularly so in family cases where emotions run high and parents may be tempted to treat orders as suggestions or guidelines which they can choose to abide by or ignore based on their own judgment.

[35] Many parents find it difficult to accept that a court can impose upon them parenting arrangements, financial obligations and other terms and conditions which will directly affect their family and their relationship with their children. Yet if parties are in dispute, particularly regarding what is in the best interests of their children, there is no alternative to the court. It would be impossible for families who are separating and in are conflict to rely upon the rule of law and the authority of the court if court orders could be ignored or disobeyed. If permitted, this would result in nothing short of chaos and would clearly never be in the best interests of any child.

[36] In the specific case of T.C., he has had repeated opportunities to abide by court orders. Orders have been modified after he raised objections. The most recent order for which he was found guilty of contempt was clear. He did not take reasonable steps to abide by it. He has failed to purge the contempt until very recently and even then, a transition plan for the children is required due to their behaviors. He did offer an apology to the court but only apologized to the children and the mother when prompted. Only time will tell if he will abide by future court orders.

[37] The inevitable impact that his lack of insight and conduct will have on the children is a serious matter for this Court. The focus of this Court is solely and exclusively on the best interests of these children, not their parents. T.C. has yet to demonstrate that he has any concept of what that means.

[38] I find that T.C. failed to demonstrate any diligence in attempting to comply with the order. There was no room for reasonable disagreement about what the order required. I find that T.C. has benefited from the breach of the order by preventing the children from being with her mother and this significantly prejudiced not only A.U. but the children as well.

[39] I do understand that the imposition of a fine or costs or a period of incarceration will impact the children. But this must always be balanced against the other factors and examined in the light of the conduct of T.C. in failing to obey the court's order.

[40] I am mindful that I should always exercise restraint in such sentencing matters, particularly given consideration of the best interests of the children. But

respect for the administration of justice and the rule of law is of significant concern to this court in this circumstance.

[41] Given T.C.'s history of non-compliance, and late compliance just prior the sentencing hearing, leads me to conclude that unless a significant punishment is imposed, he is likely to continue to interfere with A.U.'s parenting time and is unlikely to obey the current or future court orders. It needs to be brought home to him the seriousness of this circumstance and to ensure, through coercion and specific deterrence, that he complies with court orders.

[42] Respecting the interim parenting arrangements, I find that it is necessary that A.U. have sole custody of the children. The conflict between the parties, the ongoing litigation including a finding of contempt and the behaviors of T.C. lead me to conclude that, though joint custody may be appropriate at some point in the future, it is not in the children's best interests at this time.

[43] After reviewing Civil Procedure Rule 89.13, the submissions, both oral and written, the case law, and the factors and analysis set out herein, I find it necessary to sentence T.C. as follows:

1. He will serve a period of incarceration of five days.
2. He is ordered to pay costs in the amount of \$1,000 payable to Nova Scotia Legal Aid within 6 months.
3. He must attend and successfully complete a parenting program or course of counselling which addresses the impact his behaviour has had on his children and A.U., identifying appropriate steps that can be taken by him to support and encourage the relationship between the children and A.U., and how to more appropriately co-parent the children with A.U. in the future.
4. The portion of the sentence imposing incarceration and costs will be suspended until the matter is brought back before this court for review in approximately 6 months. At that time, the court shall be provided with evidence of T.C.'s participation in counselling and a report of his progress, if any. The court shall also review T.C.'s

compliance with the interim order and any other evidence. At that time, the court will decide whether to impose, vary or vacate this portion of the sentence.

5. Until further reviewed by this court, T.C. shall have parenting time with all three children on the same terms as set out in the most recent interim order commencing on Easter weekend. Until then, the oldest child shall reside with T.C. for the next 3 weeks at which time T.C. shall deliver him into A.U.'s care at her home. During that 3-week period, T.C. shall not have parenting time with the other two children.
6. Though A.U. requested that parenting time for the youngest child, who is not T.C.'s biological child, be suspended, these children are sibling and have known T.C. as their father for many years. I find that it is their best interest to leave parenting time intact with all three participating so the youngest does not feel isolated from his siblings or T.C.
7. T.C. shall be responsible for all transportation for parenting time
8. All communication between the parties shall be conducted in a polite, respectful, businesslike and child-focused manner. If the parties each have cellular phones and texting capability, the primary means of communication between the parties shall be via text. Telephone or in-person communication shall only take place in the case of urgent or emergency matters concerning the children.
9. The parties are prohibited from making any derogatory comments respecting each other at any time that they have care of the children, the children are in home of or otherwise in the company of that party, or the children might be within hearing distance of the party. Further, each party shall ensure that no one else makes such derogatory comments about either party in such circumstances and if the other person does not immediately cease

such comments, the party in care of the children shall remove the children from that circumstance or ensure that the other person is removed.

10. The parties are prohibited from discussing these proceedings with the children and shall not permit the children to read any materials filed in or respecting these proceeding.

11. The parties are prohibited from posting on any social media any comments, discussions, materials or other information respecting these proceedings or the family's legal circumstances and are prohibited from responding to any such posting. The parties are prohibited from posting to any social media any derogatory remarks respecting each other and will ensure that the children do not view any such online communications or postings.

[44] This matter will return for review before me on August 21, 2018 at 9:30 a.m. in Antigonish at which time I will hear from the parties and counsel respecting the issue of T.C.'s parenting time and custody of the children.

[45] Counsel for A.U. is to draft the order.

Daley, J.