SUPREME COURT OF NOVA SCOTIA
Citation: Mason v. Lavers, 2011 NSSC 97

Date: 20110215
Docket: Hfx 311778
Registry: Halifax

Between:

Donna Ann Mason and Pamela Bernadette Mason

Applicants/Respondents

v.

Lisa Michelle Lavers and Dolorosa Theresa Mason

Respondents/Applicants

DECISION RE: PENALTIES

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	February 15, 2011, in Halifax, Nova Scotia
Written Decision:	March 9, 2011
Counsel:	Michael I. King, for the Applicants Richard Bureau, for the Respondents

By the Court :

Introduction

[1] In a decision published as *Mason v. Lavers* 2011 NSSC 63 I found that Lisa Michelle Lavers was guilty of three allegations of contempt, and that Donna Mason was guilty of two allegations of contempt. The matter of assessing penalties for these findings was set over to this afternoon for oral submissions of counsel.

Law

[2] I incorporate paragraphs 22 and 23 of my earlier decision wherein I enunciate the relevant principles in assessing a penalty for contempt. To summarize, **Civil Procedure Rules 89.13** and **89.14** set out the available penalties. The **Rules** provide a broad discretion to the court to impose a remedy. This discretion is necessary as a means to respond to the wide array of circumstances that may result in a contempt finding.

[3] As stated in *TG Industries Limited v. Williams* 2001 NSCA 105 the court must determine the penalty having regard to that which is appropriate and in the

interest of justice in all of the circumstances. The primary purpose of the sanction is to coerce compliance with the order and so those circumstances include a consideration of whether and in what manner to restore the complainant to the position that they would have been in, but for the contempt. The decision in *TG* affirms the principle that the discretion in fashioning an appropriate penalty is a broad one.

[4] The court in *TG Industries* went on to set out a non exhaustive list of factors that may be considered:

1) That contempt based on disobedience to an order may, in the Court's discretion, be purged by subsequent compliance with it;

2) The diligence of the alleged contemnor in attempting to comply with the order;

3) Whether there was room for reasonable disagreement about what the order required;

4) The fact that the alleged contemnor did not benefit from the breach of the order;

5) The extent of the resulting prejudice to the appellant; and

6) The importance of court orders being taken seriously by all affected by them - this could be characterized as the generally deterrent effect of the penalty on others of like mind and in similar circumstances.

Complaints against Lisa Michelle Lavers

Allegation 1:

That Lisa Michelle Lavers wrongfully removed Dolorosa Theresa Mason from her home at 39 Wedgewood Avenue, Halifax Regional Municipality, without first consulting Dr. Angela Morash and obtaining a medical opinion to decide if it was in Dolorosa Theresa Mason's best interest that she be removed from her own home, contrary to the provisions of the consent order of the Honourable Justice Robert W. Wright granted on the 20th day of November, 2009.

[5] Ms. Lavers understood the meaning of this Order. She made a conscious decision, based on her own assessment of her mother's best interests, to move Mrs. Mason without asking Dr. Morash's opinion.

[6] Her consultations with Dr. Morash would not have generated the type of information that would be material to making the decision as to what residency arrangements were in Mrs. Mason's best interest.

[7] Obtaining Dr. Morash's report after Mrs. Mason was removed from her home did not serve to achieve the purpose of the Order. It cannot be said that Ms. Lavers was diligent in attempting to comply with the Order. In fact, given her lack of contact with Mrs. Mason between June of 2008 and June of 2010, it is apparent that Ms. Laver's decision was made without regard for any of the then current

information about her mother's condition. She simply decided that the time had come for her mother to return to institutionally provided assisted living. So Dr. Morash's opinion was unlikely to matter to Ms. Lavers.

[8] In mitigation, I note that the position taken by Ms. Lavers was one that was within her authority under the Power of Attorney, and that she was never going to be bound by Dr. Morash's opinion. As well, she had rationally based reservations about the weight that should be attached to Dr. Morash's opinion.

[9] Her decision to move Mrs. Mason was consistent with the decision of the previous attorney taken in 2008 and with the medical opinions of Doctors Malloy and Ginther and of Nurse Duke.

[10] Ms. Lavers did not benefit from the decision to move Mrs. Mason to Parkland.

[11] The Order was presumably intended for the benefit of Mrs. Mason, not Donna Mason, and so there could be no prejudice to Donna Mason, except to the extent that she did not realize her goal of having the doctor she previously chose,

express an opinion before Mrs. Mason was moved. I reiterate that the opinion, irrespective of what it was, would not and could not dictate Ms. Lavers' final decision.

[12] I have been invited, as part of the penalty phase, to consider conditions to expand the rights of the other family members to access medical information. While in and of itself, it is not an unreasonable request, and one that I would urge Ms. Lavers to actively consider as being a reasonable request, I fail to see the necessary nexus that would exist between the terms of the Order of Justice Wright, the contempt that I found, and the remedy that is suggested. So I am not prepared to impose the condition in this context.

[13] Again, and I know you will convey this to Ms. Lavers, Mr. Bureau, to some extent this is like so many other things. It is not that they are unreasonable requests, I am just not satisfied that the way the law and the facts of this case are structured gives me the opportunity to do what I have been asked, but it certainly sounded reasonable at the time. Let me just add that.

[14] So, having regard to all of these circumstances and the representations of the parties, I grant Lisa Lavers an absolute discharge in relation to Allegation 1.

Allegation 2

That Lisa Michelle Lavers failed to provide Pamela Bernadette Mason with copies of all bank statements relating to the bank accounts of Dolorosa Theresa Mason on a quarterly basis commencing January 1st, 2010.

[15] I found Ms. Lavers guilty of contempt by failing to supply the bank accounts for the first quarter of 2010 in a timely manner, to wit: July of 2010 instead of April of 2010.

[16] Those statements and those for subsequent quarters have been provided. Again, there was no benefit accruing to Ms. Lavers by her lack of diligence. However, there is prejudice to Pamela Mason, in that the late disclosure undermines her ability to assess whether Ms. Lavers is properly fulfilling her fiduciary responsibilities in managing Mrs. Mason's financial affairs.

[17] Having regard to the discord that exists among the siblings, and the obvious mutual distrust they have for each other, the supply of these statements is an important element of ensuring the best interests of Mrs. Mason are served by,

among other things, reducing the risk of litigation. This is important, since the costs incurred by Ms. Lavers may be charged back to Dolorosa Mason, given that the dispute arises in relation to her actions as attorney. When I say this, I say, may as in possible, not that I am suggesting that that should or could be done. It is the risk of cost of litigation that I am concerned about in this.

[18] I believe that Ms. Lavers now does fully understand her obligations and that there is deterrent value in the process of being tried and of being found guilty.

[19] Counsel for Pamela and Donna Mason argues for conditions to expand the disclosure requirements to other family members. Again, the existing Order of Justice Wright continues to be in effect. The contempt in this case addresses the failure to comply with that Order only. I find that there is no nexus between the contempt and the remedy suggested and so I am not prepared to impose the condition sought. Having said this, Ms. Lavers should consider herself warned that a future proven contempt may have a very different result.

[20] In this case the bank statements that were requested were supplied and so I direct that the contempt be discharged.

Allegation 3:

That Lisa Michelle Lavers failed to reimburse Donna Ann Mason for reasonable expenses attributable to Dolorosa Theresa Mason within 14 days from Donna Ann Mason providing a receipt for same.

[21] I concluded that Lisa Lavers is guilty of contempt by reason of her failure to pay the sum of $1468.31, being the reasonable and receipted amounts paid by Donna Mason for respite care and prescription medications for Dolorosa Mason.

[22] The amount has been paid and so I direct that the contempt is discharged.

Complaints against Donna Mason

Allegation 1:

That Donna Mason has not vacated the home of Dolorosa Theresa Mason within the 60 days of Dolorosa Theresa Mason's removal from the home as required by the Consent Order.

[23] Donna Mason opposed the placement of Dolorosa Mason in Parkland and insists that it is in her best interests to return to her own home. She concluded that Lisa Lavers breached her obligations under the Order by failing to first obtain Dr. Morash's report, thus raising a legal issue as to her right to remove her mother out

of the home. Ms. Mason submits that if she left, as directed, then the house would be sold and her mother would never have the option of returning to her own house to live out her remaining years. This would, it is argued, effectively condone Ms. Lavers' contemptuous conduct.

[24] Donna Mason is correct as to the effect of her vacating the house. In fact, such a result was required by paragraph 8 of the Order which states:

> 8. Upon Dolorosa Theresa Mason vacating her home, the home shall be appraised by a qualified real estate appraiser and listed for sale with the recognized real estate company. All proceeds from the sale of the home shall be used for the exclusive benefit of Dolorosa Theresa Mason.

[25] In acting as she did, Donna Mason not only disobeyed the requirement to vacate, but frustrated the ability of Ms. Lavers to sell the house and make those funds available for Mrs. Mason's benefit.

[26] Donna Mason claims altruistic motives in her disobedience of the Court's order. I accept, that she loves her mother and that she believes that she can care for her.

[27] Regrettably, she does not accept, and has never accepted, her mother's direction that others would act as her attorney and make those care decisions for her. Brenda Mason, then Angela Busche, and finally Lisa Lavers all functioned under Powers of Attorney. Donna Mason and her sister Pamela were not so entrusted. In saying this, I am cognizant of the existence of the June 2008 Power of Attorney. I am also alert to the unusual circumstances surrounding its execution after Dolorosa Mason had been found incompetent by medical authorities and further that the Power of Attorney dated October 17, 2006 is the one that is considered to be valid.

[28] Donna Mason's opposition to Ms. Lavers' determination is a direct challenge to Dolorosa Mason's own words, found in paragraph 10 of the Power of Attorney, which says:

> My attorney's decision, with respect to the aforementioned matters, shall be honoured by my family and physician(s).

[29] Donna Mason and her family have benefited personally from their failure to vacate as directed. They have lived in the house for the cost of the utilities, a substantial benefit which they enjoy at the expense of Dolorosa Mason who has

neither a rent payment nor the capital, and interest thereon, that a sale would have achieved. There is some evidence that they have maintained the property which would certainly offset some of the loss that is incurred by Mrs. Mason.

[30] So having regard to these factors, and the provisions of **Civil Procedure Rule 89.13**, I order that Donna Mason and her family vacate the Wedgewood property by June 30, 2011 as has been agreed upon the parties.

[31] Ms. Mason's contempt has been a continuing one since June of 2010 and by virtue of the agreement, she will continue to be in contempt until June 30, 2011. Therefore, I order that Donna Mason pay Dolorosa Mason a fine in the amount of $700.00 for each month in which the contempt continues, being the months of March, April, May and June of 2011.

[32] I further order that Donna Mason will pay to Dolorosa Mason a fine in the amount of $2500.00 per month for each month that she and/or her family remain in the property after June 30, 2011, and to continue until such time as they are in compliance with the court's order to vacate. Once Donna Mason and her family have vacated the premises, the contempt will be discharged.

Allegation 2:

That Donna Mason has not reimbursed Dolorosa Theresa Mason for Donna Mason's portion of utilities that she is required to pay for under the Consent Order.

[33] I concluded that Donna Mason is guilty of contempt of the order requiring that she pay 50% of the utilities. The net amount owed by Donna Mason is $807.44. This amount has been paid and so I direct that the contempt is discharged.

COSTS

[34] Donna and Pamela Mason submit that they are entitled to costs, because it was Lisa Lavers' obstinacy in considering their views as to the appropriate residence for their mother that effectively triggered the litigation. They argue her bad faith and point to her unwillingness to communicate on even the most obvious issues, such as payment of reasonable expenses.

[35] Lisa Lavers argues that this was the wrong forum in which to litigate the true issue, that is, whether Dolorosa Mason should be in her own house or not. I am

inclined to agree, but nevertheless both parties established cases resulting in findings of guilt, so there was merit in the approach that was undertaken, however ineffective it might have been, and that is a matter for others to gauge, as to whether it was effective or ineffective, in addressing the real problems that existed here.

[36] It has been submitted by Ms. Lavers' counsel that the result in this case mirrors the proposed settlement put forward by Ms. Lavers' counsel sometime ago. I do not agree that the result is the same, although the practical effect looks similar.

[37] In my view both parties, Ms. Lavers and Donna Mason, Pamela Mason to some extent I suppose, she is named here, all bear ample blame for the fact that this is here. The only difference is that Ms. Lavers would not be here, but for her mother's decision to appoint her as an attorney. I do not think it is as simple as Mr. King suggests, that if she had obtained Dr. Morash's report in advance and taken the same actions, that then Donna Mason would have honoured that decision without contest. That would be inconsistent with the determination she has

demonstrated throughout, since at least June of 2008 to keep her mother in her own home.

[38] In effect, the problems were the failure to heed Mrs. Mason's direction to honour the attorney's authority and that was complicated by being confronted with an attorney who was both non-communicative and exercising stubborn resistance to compromise.

[39] I have looked at the issue of the expenses and disbursements incurred and the respective positions of the parties. In my view, Dolorosa Mason, by her attorney should pay the sum of $475.00 to Donna Mason for her contribution to the Dr. Morash report. That is irrespective of what may have been discussed between the parties. In my view, the report was intended to be for the benefit of Mrs. Mason and her estate should pay for that, and getting the report was agreed to by her attorney, acting under the Power of Attorney. So irrespective of what the parties might have thought, in my view, that should be a cost paid by Mrs. Mason.

[40] Having said that, otherwise, in my view, the results have been mixed and I conclude that the parties shall each bear their own costs. I am not prepared to

make an order requiring Ms. Lavers to personally pay the costs of her and Dolorosa Mason. I do not make any comment on whether there are other ways or forms to assess the appropriateness of how those fees might be paid.

Delivered orally at Halifax, Nova Scotia on the 15th day of February, 2010.

Duncan J.