SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Howes v. Murphy, 2011 NSSC 354

Date: 20110516
Docket: 1201-062352
Registry: Halifax

Between:

Sean Howes

Applicant

v.

Kelli Murphy

Respondent

Judge:	The Honourable Justice Deborah Gass
Heard:	May 16, 2011, in Halifax, Nova Scotia
Written Decision:	September 28, 2011
Counsel:	Adrienne M. Bowers, for the respondent

By the Court:

[1] The applicant Sean Howes was granted leave to apply for a contempt order against Kelli Murphy.

[2] The Consent Corollary Relief Judgment of August 12, 2009 provides for access as follows:

> 4. The Petitioner, Sean Howes, shall have access to Ethan Joseph Howes and Brooke Heather Howes, on Tuesdays and Thursdays from 3:00 p.m. to 7:15 p.m., and Sundays from 1:00 p.m. to 7:00 p.m., and every third Saturday at 2:00 p.m. to Sunday at 3:00 p.m.
>
> 5. The Petitioner shall accommodate reasonable requests by the Respondent to have the children in her care for a full weekend when she is free to care for the children for an entire weekend.
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> 6. The Petitioner can on any Tuesday or Thursday he is not working, attend the day care and remove the children into his care at any time with a return to the Respondent at 7:15 p.m., but with not such frequency as to risk a full-time placement of the children at day care.
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> 7. The parties recognize they shall share holidays with the children. Specifically the Petitioner shall have Christmas Eve and Christmas Day until noon each year with the children. The Respondent shall have access with the children at Christmas commencing noon on Christmas Day. The Petitioner shall have such additional Christmas holiday access as can be agreed upon by the parties.
>
> 8. The Petitioner shall provide 30 days notice of one week's access in July and one week's access in August he wishes to have with the children. The Petitioner recognizes that the Respondent is entitled to summer access with the children and that such access may interfere with his regular access.
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> 9. The Petitioner shall have the children at such other reasonable times as the parties agree upon after the Petitioner has given reasonable notice of this request to the Respondent.
>
> 10. The parties agree whichever party picks up the children from daycare is the party responsible for any late fees incurred due to late pick up that day.

[3] On August 11, 2010, paragraph 4 of the Consent Corollary Relief Judgment was varied to read:

> 4. Paragraph 4 of the Corollary Relief Judgment shall be and is hereby replaced with the following:
>
> > 4. Sean Howes shall have access to Ethan Joseph Howes and Brooke Heather Howes, on Tuesdays and Thursdays, from 3:00 p.m. to 7:15 p.m., and Sundays from 1:00 p.m. to 7:00 p.m., and on the third Saturday of each month from 3:00 p.m. to Sunday at 7:00 p.m.

[4] The evidence in support of the contempt application is contained in the affidavit in support of the leave application. He asserted that she denied him access on both Thanksgiving Sunday, October 10, 2010 and Halloween Sunday October 31, 2010. She notified him by email dated September 30, 2010 that she would be having the children for the weekends of October 8 - 10 and October 29 - 31, 2010.

[5] The Applicant was of the view that this was not a reasonable request because he was not able to have them the first week of October because of work, and he suggested that she have the children for Thanksgiving and he have them for Halloween in keeping with his understanding that they were to alternate holidays. It was his view that she would be having them for two holidays in a row, which was not reasonable.

[6] Paragraph 5 of the order states:

> 5. The Petitioner shall accommodate reasonable requests by the Respondent to have the children in her care for a full weekend when she is free to care for the children for an entire weekend.

[7] In her defence, she stated that they had resolved Thanksgiving and she gave him a month's notice about the weekend encompassing Halloween.

[8] He argued that she was in breach of the spirit and intent of the order. They are to share holidays and this meant she had them two holidays in a row.

[9] The court rendered an oral decision dismissing the application and summarizing the reasons therefore, with the intention of providing written reasons.

[10] Contempt proceedings are governed by Rule 89 of the Nova Scotia Civil Procedure Rules. 2d ed 2008.

[11] These proceedings carry the same standard of proof as in criminal proceedings: proof beyond a reasonable doubt.

[12] The court must be satisfied beyond a reasonable doubt that the order is clear and unambiguous and that the person complained of intentionally committed an act that was prohibited by the order or intentionally refused to comply with the order, by not doing something that the order required.

[13] The burden of proof lies with the Applicant.

[14] The court considered the evidence and concluded that there was no wilful or intentional contravention of the order. The applicant argues that the breach was of the spirit and intent of the order.

[15] The times for access in paragraph 4 are clear and unambiguous. With regard to paragraph 5, the term “reasonable” creates an ambiguity which is subject to interpretation.

[16] The provision for reasonable arrangements is common in family matters to enable some flexibility, particularly to address the peculiar circumstances of the parties and contemplates some measure of reasonable rationale communication and interaction.

[17] The problem is that “reasonable requests” in paragraph 5 dilutes the specificity of paragraph 4.

[18] This is not usually an issue between parents and such conditions are not uncommon in family orders. The majority of these orders work well for many parents and their children.

[19] The lack of specificity is compounded by paragraph 7 wherein the parties agree to share “holidays”. “Holidays” are not defined in this order. Again, in most situations it is not necessary to specify what events are holidays and what are not.

Most people work this out. However, in the absence of an agreement or a definition to the contrary, I would conclude that Halloween is not a "holiday".

[20] Holidays generally are those occasions where employees might have the day off or schools are closed beyond the usual weekend. Thanksgiving and Christmas are two obvious examples. Valentine's Day and Halloween are examples of special days that are not holidays unless the parties specifically agree to include them.

[21] While this order is a reasonable one, arrived at by agreement between the parties and subsequently varied, its wording is not specific enough for the high burden of proof required in contempt proceedings.

[22] I am therefore not satisfied there has been a wilful or intentional breach of the order and I dismiss the application for a contempt order.

Application to strike the affidavit of the applicant:

[23] The final paragraph of the applicant's affidavit of December 14, 2011 shall be struck. It offends the principles set out in *Waverly (Village Commissioners) et al. v. Nova Scotia (Minister of Municipal Affairs) et al.* 1993 CanLII 3403 (NSSC). It contains inadmissible evidence, statements inappropriate to an affidavit.

Costs:

[24] Costs are in the discretion of the court. The respondent was successful in having the application dismissed. Generally, costs are awarded to the successful party.

[25] Contrary to the submissions of the applicant, there was nothing "wrong" with the order which was consented to in the first instance, and varied subsequently. It was a situation where the provisions of reasonableness and the interpretation of the order created a problem in October 2010.

[26] A token order for costs is appropriate. It is not intended to compensate for the costs of defending the contempt application, but recognizes the expense incurred in successfully doing so. Costs of $100.00 are ordered.

J.