SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Richardson v. Carroll, 2013 NSSC 187

Date: 20130620
Docket: SFHMCA-069321
Registry: Halifax

Between:

Joann Carroll

Applicant

v.

Michael Richardson

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: June 10, 2013 in Halifax, Nova Scotia
(Oral Decision: June 10, 2013)

Counsel: Michael Richardson, self-represented
Fergus Ford, counsel for Joann Sawler

By the Court:

Introduction

[1] This decision relates to the penalty phase of a contempt motion. I sentenced Joann Sawler (formerly Joann Carroll) at the end of the hearing and am now providing my reasons in written form, with appropriate citations to the Civil Procedure Rules and the jurisprudence.

Contempt phase

[2] Michael Richardson moved that I find Joann Sawler in contempt of two court orders: an interim consent order of April 11, 2011 and an order of January 9, 2012, belatedly prepared following a hearing in May 2011.

[3] Mr. Richardson filed his motion in July 2012.

[4] Pursuant to Civil Procedure Rules 89.04(2) and (3), and as is the practice in the Family Division, the parties appeared before me for a conference in September 2012 to organize the hearing, which was held in January 2013.

[5] In particular, Mr. Richardson alleged that:

a) Ms. Sawler was in contempt of the provisions of the April 2011 interim consent order as the order related to his access to the parties' daughter, Grace;

b) Ms. Sawler was in contempt of the provisions of the January 2012 order as the order related to his specified access to Grace;

c) Ms. Sawler was in contempt of the provisions of the January 2012 order as it related to return of Mr. Richardson's personal property to him; and

d) Ms. Sawler was in contempt of the provisions of the January 2012 order as it related to his joint custody of Grace, by re-locating Grace's residence and failing to provide him with information relating to the location of Grace's residence and her school.

[6] In support of his motion, Mr. Richardson filed an affidavit. He was cross-examined. As is her right, confirmed in Civil Procedure Rule 89.09, Ms. Sawler offered no evidence with regard to the contempt allegations.

[7] I found Ms. Sawler was in contempt of the provisions of the January 2012 order as the order related to Mr. Richardson's specified access and joint custody of Grace.

[8] Mr. Richardson did not prove beyond a reasonable doubt that Ms. Sawler had denied him the access to Grace that was provided for in the April 2011 interim consent order or that she had failed to return personal property to him, as required by the January 2012 order.

Penalty phase

[9] Following my finding that Ms. Sawler was in contempt, I adjourned the penalty phase of the hearing and gave the parties directions for filing affidavits. Ms. Sawler filed an affidavit and brief, and Mr. Richardson filed an affidavit. Neither party was cross-examined. I heard submissions from each.

Evidence and argument

[10] In her affidavit, Ms. Sawler offered evidence of her "longstanding concerns" relating to Mr. Richardson's alcohol consumption. Particularly, she referred to a car accident on January 26, 2011. Mr. Richardson was driving and Grace was with him in the car. There was some indication Mr. Richardson was impaired at the time of the accident. Ms. Sawler noted that her lawyer addressed these concerns with Mr. Richardson's lawyer in correspondence of March 17, 2011.

[11] Ms. Sawler also offered evidence that Grace does not want to see her father and her refusal to see him is longstanding. Ms. Sawler referred to events in December 2011 when Grace called her from Mr. Richardson's home and asked Ms. Sawler to take her home, and to email messages between Grace and her father in which Grace says that she doesn't want to visit him. I had no evidence about when the email messages were exchanged between Grace and Mr. Richardson.

[12] I was provided with a note, on a prescription sheet, stating that on September 19, 2012 Grace saw her doctor about "her anxiety and stress". The doctor did not explain the basis of Grace's anxiety and stress: I don't know whether this relates to her relationship with her father, the injury she sustained in the car accident, academic problems, social troubles or something else.
Ms. Sawler says that Mr. Richardson has failed to undergo an assessment at the Capital Health Addiction Prevention and Treatment Service that Justice Gass ordered.

[13] Ms. Sawler said her “conduct has been appropriate and in the best interest” of Grace. She argued that Grace’s unwillingness to see her father, Mr. Richardson’s drinking and his failure to undergo an addictions assessment are mitigating circumstances that should moderate her sentence.

[14] In his brief, Mr. Richardson suggested the appropriate penalty would be:

a) to transfer primary custody of Grace to him (with Grace to have supervised access with her mother);

b) to compel Ms. Sawler to return his personal items to him or require that she pay a fine in an amount equal to the value of the items (approximately $1,870.00); and

c) to require Ms. Sawler apologize to Mr. Richardson and his family for “all the emotional anguish and family division that she has created by her actions.”

[15] In argument, he suggested the alternate penalty of a $4,000.00 fine.

[16] Based on her review of a child’s wish report which was prepared for an ongoing variation application, Ms. Sawler suggested that the penalty include sending Grace to counselling.

[17] In November 2012, Ms. Sawler began a variation application. In the context of that application, Justice Beaton ordered that a child’s wish report be prepared. This was done and the report became available to the parties just prior to the commencement of the penalty hearing. In argument, Ms. Sawler sought to rely on the report, which commented on Grace’s enmity toward her father and the bases for it.

[18] Because he had just received the report that very morning and had not yet reviewed it, Mr. Richardson objected to the report’s use. The report was ordered with the consent of the parties in the context of the variation application. Mr. Richardson didn’t consent to the preparation of the report for use in this proceeding and only became aware that Ms. Sawler intended to rely on it during her closing argument. I did not rely on the report in reaching my decision.

Sentencing principles

[19] At different stages in this motion, I have commented that contempt motions are unlike the proceedings we usually see in the Family Division. The peculiar

nature of contempt proceedings is apparent in my consideration of the principles relevant to sentencing Ms. Sawler.

[20] In sentencing, I'm to consider a number of principles. I'm to punish Ms. Sawler for the specific offences of which she's been convicted. The punishment is to be in proportion to her breach of the court order. I'm to consider whether there are mitigating or aggravating circumstances.

[21] Penalties are to coerce compliance, according to Justice MacPherson at paragraph 28 of his reasons in *Kopaniak v. MacLellan*, 2002 CanLII 44919 (ON C.A.), quoting Nigel Lowe and Brenda Sufrin in *Borrie and Lowe on the Law of Contempt*, 3rd ed. (1996) at pages 655-656. Penalties are to deter people from breaching orders in the future and to denounce those who fail to obey court orders.

[22] As I've noted, the penalties suggested were:

a) transferring primary custody of Grace to Mr. Richardson (with Grace to have supervised access with Ms. Sawler);

b) compelling Ms. Sawler to return Mr. Richardson's personal items to him or requiring that she pay a fine in an amount equal to the value of the items;

c) requiring Ms. Sawler apologize to Mr. Richardson and his family for "all the emotional anguish and family division that she has created by her actions";

d) ordering Ms. Sawler to pay a $4,000.00 fine; and

e) compelling Grace to attend counselling.

[23] I'll address each of the suggested penalties in turn.

[24] With regard to transferring Grace's primary custody, a child's parenting arrangement is based on the child's best interests. Punishing a parent is not a relevant consideration. So, changing Grace's primary residence is not an appropriate penalty in a contempt hearing. There is an ongoing variation application that relates to Grace's parenting. Ms. Sawler's failure to ensure that Grace had as much contact with her father as was ordered may be relevant to Grace's best interests in the context of the variation application, so it may be considered in that context, but I don't consider it now.

[25] I acquitted Ms. Sawler of the charge that she breached the provisions of the January 2012 order requiring her to return Mr. Richardson's personal property to him. Accordingly, I'm not to punish Ms. Sawler for this.

[26] Compelling Ms. Sawler to apologize shifts the focus of the penalty from Ms. Sawler's defiance of the court to the feelings of Mr. Richardson and his family. A contempt motion's focus is the contemnor's conduct *vis à vis* a judge or a court order. The motion is not a proceeding to enforce a court order. As Justice Little said in *Rogers*, 2008 MBQB 131 at paragraph 119, "The primary purpose of sentencing in contempt proceedings is the preservation of the integrity of the administration of justice."

[27] Compelling Grace to attend counselling does not punish Ms. Sawler. It puts the burden on Grace and may cause her to resent her father as the person who brought the motion that compelled her to attend counselling.

[28] Ms. Sawler has not mitigated her breach of the January 2012 order by apologizing. She has provided no evidence that she has purged her contempt and reinstated access or provided Mr. Richardson with the custodial information that he was not given earlier, though she has had the opportunity to do either of these things during the period when this proceeding was adjourned from the contempt phase to the penalty phase.

[29] The parenting terms of the January 2012 order were negotiated and agreed upon by the parties. They were read into the record at the hearing in May 2011. This is important, in my view, because the car accident in January 2011and the correspondence about Mr. Richardson's alcohol use pre-date the hearing in May 2011. Similarly, Ms. Sawler says that Grace has had a "longstanding" unwillingness to spend time with her father. Ms. Sawler cannot argue that these circumstances are factors which mitigate her failure to abide by the court order: the terms of the order were negotiated when she was aware of these circumstances. The specified access and joint custodial provisions would have been tailored to reflect what she felt was acceptable, given her concerns about Mr. Richardson's alcohol consumption and Grace's reluctance to spend time with her father. While Ms. Sawler says these circumstances are mitigating ones, in this case, I believe these are aggravating factors. Ms. Sawler has defied an order which she had a part in tailoring to meet her concerns.

[30] This is not a situation where the order was breached only once or briefly. At the end of January 2013, Mr. Richardson testified that he had had no overnight access with Grace since January 2012. Ms. Sawler defied the order for one year

and she continued to do so while this contempt proceeding was ongoing. This is an aggravating factor.

[31] Ms. Sawler argued that Mr. Richardson has breached the January 2012 order and that this is a mitigating factor. I reject this argument. My concern is Ms. Sawler's conduct, not that of Mr. Richardson. If Mr. Richardson is defying the order, a separate contempt motion can address his behaviour.

[32] Mr. Richardson asks that I order that Ms. Sawler pay a fine of $4,000.00. I find this amount to be excessive, and I order her to pay a fine of $1,000.00 to Mr. Richardson with this amount to be paid by a certified cheque, a trust cheque from her lawyer's office or a money order. The payment must be made no later than July 30, 2013.

[33] In November 2012, Ms. Sawler began a variation application. Civil Procedure Rule 59.17(1) requires the parties to attend the Parent Information Program. Ms. Sawler lives in Lunenburg County where the program is not presently available and, as a result, Ms. Sawler was exempted from attendance by virtue of Rule 59.17(5)(d). I order that Ms. Sawler attend the Parent Information Program in Halifax.

____

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia