IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: B.E.D. v. J.L.H., 2003 NSSF 10

Date: 20030417
Docket: SFH-F-007319
Registry: Halifax

Between:

B.E.D.

Applicant

v.

J.L.H.

Respondent

Judge: The Honourable Justice Donald M. Hall

Heard: April 8, 2003, in Halifax, Nova Scotia

Written Release of Decision: April 23, 2003

Counsel: B.E.D. - represented self
J.L.H. - represented self.
Nicholas Dorrance - Intervenor Dept. of Community Services

By the Court: (Orally)

1. Before the court are applications by Mr. B.E.D. to cite Ms. J.L.H. for contempt and to vary custody and access as ordered by this Court by order dated December 23, 2002. A third application by Ms. J.L.H. to vary access was abandoned by her.

2. The issues to be decided are first, whether Mr. B.E.D. has proved that Ms. J.L.H. disobeyed the order respecting access in such a way as to constitute contempt and secondly, whether the terms of the access to the child should be varied as requested by Mr. B.E.D..

3. Ms. J.L.H. and Mr. B.E.D. had cohabitated for a number of years during the 1990s. The child R. was born to them on […], 1994. The parties separated during the year 2000. The separation has been filled with acrimony and conflict which resulted in Mr. B.E.D. being charged and convicted of assault in 2000. At that time a so-called "no contact order" prohibiting him from any contact with Ms. J.L.H. was put in place. Since that time, in November, 2002, as the result of an incident, charges of assault have been laid with respect to the parties and are to be heard in Provincial Court in November of this year.

4. In 2001 Gass, J., of this Court, granted an interim order for custody of R. to Ms. J.L.H.. Detailed specific access was provided to Mr. B.E.D.. There were and are still outstanding other

issues between the parties respecting a division of property and spousal and child maintenance.

5. The parties were back in court in June of 2002. At that time an order was granted by Campbell, J., on June 11, 2002, awarding custody of R. to Ms. J.L.H. and access to Mr. B.E.D.. The formal order, however, is dated Dec 23, 2002.

6. Animosity and conflict between the parties continued and continues over the issues between them including custody and access of R., as well as property and other financial matters. In particular, an incident occurred on November 8, 2002, when Mr. B.E.D. was picking up R. after R.'s basketball practice and Ms. J.L.H. intervened and prevented Mr. B.E.D. from taking R. with him. As a result of this altercation a charge of assault was laid against Mr. B.E.D. and he, in turn, had Ms. J.L.H. charged with assault. Arising out of the assault charge a "no contact order" was again placed against Mr. B.E.D. prohibiting him from having any contact with Ms. J.L.H. except when initiated by her. As stated above the trial for the assault charges are scheduled to be heard in November of this year.

7. Following this incident Mr. B.E.D. filed an application requesting that Ms. J.L.H. be cited for contempt for denying him access and to vary the terms of his access.

8. The parties were again in court on December 24, 2002, with respect to Christmas access. At that time Smith, J., ordered a psychological assessment of the family which was completed by

Ms. Deborah Garland, a registered psychologist, and a report was filed with the court on April 1, 2003. The report recommended, among other things, that the Monday night access be changed to Sunday night on the weekends that Mr. B.E.D. was to have access. There was no recommendation for a change of custody. As a result of comments contained in the report, however, Mr. B.E.D. decided to seek a change in custody awarding custody to him. I ruled, however, that the custody question could not be dealt with at this time because no application had been filed and inadequate notice had been given to Ms. J.L.H. who stated that she was not prepared to deal with the issue at this time.

9. The issues between the parties had been scheduled for hearing in November of 2003. On December 16, 2002, however, it was decided that the three applications referred to above should be tried on April 8 and 9, 2003.

10. The Department of Community Services has intervened as *amicus curiae*.

11. Mr. B.E.D. complained of further denials of access by Ms. J.L.H. following the pre-Christmas appearance in court. He stated that on two occasions messages were left for him by Ms. J.L.H. that R. was sick and unable to go with him. On another occasion Ms. J.L.H. left a message that she was sick and that Mr. B.E.D. could pick up R. at her home. He also complained that he was not able to exercise access during the past March break as Ms. J.L.H. did not make R. available to him.

12. Mr. B.E.D. takes the position that the order should be varied changing the Monday night access to Sunday night on the weekends that he has access. He also urges the court that Ms. J.L.H. should be found in contempt for denying him access to R..

13. Ms. J.L.H. puts forth the position that the *status quo* should be maintained. She says that it would not be in R.'s best interests to make any change respecting the access arrangements at this time. As to the contempt application, she says that she did not want to deny access to Mr. B.E.D. but was concerned for the safety of her child.

14. **Civil procedure rules** 55.05 and 55.09 provide in part:

> **55.05(1)** The court may make a contempt order in Form 55.05A which may order that,
>
> (a) a person cited for contempt be imprisoned as ordered or until further order;
>
> (b) when a person cited for contempt fails to comply with any term or condition in an order, he be imprisoned as ordered therein;
>
> (c) a sheriff enter upon and take possession of any property of a person cited for contempt and receive and collect the rents, profits or income thereof until the person shall clear his contempt buy complying with the terms of the order;

(d) direct a person cited for contempt to pay a fine, give security for good behaviour, pay such costs and expenses or comply with such other order as the court may grant under rule 55.09.

55.09 Nothing in rule 55 shall limit the powers of the court to make an order requiring a person found guilty of contempt uner this rule to,

(a) pay a fine;

(b) give security for his good behaviour;

(c) pay such costs and expenses as it thinks just;

(d) when he is a party to a proceeding,

(i) have his pleading, or any part thereof, struck out;

(ii) have the proceeding stayed or dismissed, or have judgment entered against him;

(iii) prohibit him from introducing into evidence any designated document, thing or testimony;

(iv) do or refrain from doing any other act as the court thinks just.

15. Following are applicable provisions of the **Maintenance and Custody Act**:

18 (2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order

(a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or

(b) respecting access and visiting privileges of a parent or guardian or authorized person.

18 (4) Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise

(a) provided by the **Guardianship Act**; or

(b) ordered by a court of competent jurisdiction.

18 (5) In any proceeding under this Act concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration.

37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

16. Turning first to the question of contempt of court, it will be seen as stated in **R. v. Hill**, (1976) 33 C.C.C.(2d) 348 in quoting from **R. v. Gray** [1900] 2 QB 36 at page 40:

Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done, or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Court is a contempt of Court.

17. Contempt of court may arise in a number of ways including the disobeying of a court order. In contempt proceedings the burden is on the complainant to prove beyond a reasonable doubt the guilt of the person complained against. Where the substance of the complaint is that the person complained against disobeyed an order of the court, before a person may be found guilty of contempt it must be proven beyond a reasonable doubt that:

1. the person complained against was served with or had knowledge of the order. It is not necessary that the order be reduced to writing but it is sufficient if it is established that he or she had knowledge of the order;
2. the person complained against intentionally committed an act which was prohibited by the order. It is not necessary to prove that he or she intended to disobey the order which is a different matter.
3. the act or acts complained of were prohibited by the order or done in contravention of the order, which must be obeyed according to its spirit as well as its letter.

18. It is not a defence that the things done were done reasonably and despite all due care and attention in the belief based on legal advice that they were not breaches. See **Canada Metal Company Ltd v. Canadian Broadcasting Corporation** (1976) 11 O.R.(2d) 167, nor that the order was incorrect, or unconstitutional, or under appeal. See **Ontario (Securities Commission)**

v. Gaudet (1988) 65 O.R.(2d) 24. As well, his or her misinterpretation of the order does not afford an excuse for its breach. See **Sheppard v. Sheppard**, (1974) 4 O.R. 585.

19. In the present case there are a number of alleged incidents of disobedience of the order by Ms. J.L.H., all involving denial of Mr. B.E.D.'s access to R..

20. Mr. B.E.D. claims that Ms. J.L.H. refused or failed to permit him to access in accordance with the order or as agreed on the following occasions:

<u>2002</u>

October 11 - he was only able to obtain access with the aid of the police.

October 25 - he received a letter from Ms. J.L.H.' lawyer advising that access was being denied.

October 28 - Ms. J.L.H. refused to permit access.

October 31 - access was obtained only after intervention of a judge of this court.

November 4 - Ms. J.L.H. was late in delivering R. to the pick up point.

November 7 - Ms. J.L.H. telephoned Mr. B.E.D. and asked him to pick up R. at her home but he refused to do so as he was afraid to go to her home.

November 8 - The altercation following the basketball practice when Ms. J.L.H. intervened and refused to let R. go with Mr. B.E.D..

There was no further access by Mr. B.E.D. until the court appearance on December 24, 2002.

21. Following Christmas, 2002, there were three other occasions not described above as well as the March break when Mr. B.E.D. did not have access.

22. Ms. J.L.H.' response or explanation respecting these events is as follows:

October 11 - She telephoned Mr. B.E.D. and asked him to pick up R. at the Basinview School because it was his first basketball practice. Mr. B.E.D. insisted that the pick up be at her home.

October 25 - 28 - The Department of Community Services investigation of R.'s allegation of physical abuse was still ongoing. She had been advised by the social worker that she must not permit access.

November 4 - She was not intentionally late for the pick up but was delayed in getting R.'s Club uniform.

November 7 - She was sick and could not go out.

November 8 - R. did not want to go with Mr. B.E.D. following the basketball practice because he was not feeling well. Because she thought it was in his interests for him to remain with her, she tried to prevent Mr. B.E.D. from

taking R. and succeeded in doing so. The police told her that they would not give R. to Mr. B.E.D. because of the assault.

23. As to the incidents after Christmas, on two occasions R. was sick. Ms. J.L.H. telephoned Mr. B.E.D. and left a message informing him of this. On the third occasion she was sick. She telephoned Mr. B.E.D. and left a message for him to pick up R. at her home but he did not respond. With respect to the March break she wrote to Mr. B.E.D. asking him to confirm that he would be taking R.. Mr. B.E.D. did not reply or contact her so she assumed that he did not intend to exercise access.

24. The incidents that concern me most are those that occurred between October 25, 2002 and December 24, 2002. As to the other incidents I am satisfied that Ms. J.L.H. did not intentionally do anything to deny access to Mr. B.E.D.. She tried to contact Mr. B.E.D. to make some adjustment in the pick up arrangements or to advise him as to the reason why R. should not go with him. In particular, with respect to the "March break", it was reasonable for her to insist on confirmation that Mr. B.E.D. would be taking R. for that period. Mr. B.E.D. did nothing to facilitate his having access, but relied entirely on the letter of the terms of the order that he was to have R. during the March break. It was because of his lack of flexibility that he did not have access at that time and not due to fault on the part of Ms. J.L.H..

25. What occurred between October 25 and December 24, however, is another matter.

26. Because of the complaint of physical abuse the social worker from the Department of Community Services advised Ms. J.L.H. that she was not to permit Mr. B.E.D. to have access. Although I question the wisdom of the social worker's directive in the particular circumstances and in view of the order of this Court respecting access, under the **Children and Family Services Act** the agencies have a very grave and heavy responsibility for the protection of children who may be at risk of harm. As well, they have very broad authority to take action to protect children in such circumstances. Ms. J.L.H. was concerned that if she did not accede to the directive of the social worker that she would be in jeopardy of being charged with being a party to abuse and that action would be taken to have R. taken "into care" under the **Act**. In the circumstances I am satisfied that her reaction was reasonable and appropriate. This is not the same as acting on wrong advice from another source. Here, she was complying with the directives of a governmental agency acting under the authority of the **Children and Family Services Act.**

27. I am not satisfied, however, that there was any justification for her interference in Mr. B.E.D.'s access on November 8, 2002, following the basketball practice. Wether R. was not feeling well and expressed a desire to remain with his mother is immaterial. Mr. B.E.D. was equally capable of taking care of him and it is not for a child of his age to determine issues of his custody and access. Ms. J.L.H. knew that according to the order Mr. B.E.D. was to have access at that time. Despite this she deliberately and intentionally prevented him from doing so. She

was entirely wrong in intervening as she did. Her conduct on this occasion, although she may have been well motivated in her mind, amounted to disobedience of the order of this Court. Accordingly, with respect to this incident, I find her to be in contempt. It appears that the contempt continued until the parties were before the court again on December 24, 2002. I will deal with the punishment to be imposed later in these reasons.

28. With respect to Mr. B.E.D.'s request that the access provisions be changed to provide that he have Sunday night access instead of on Mondays and Thursdays as stated in the order, I have concluded that it would not be in R.'s best interests to do so. The evidence is that R. regularly attends Sunday night mass with his mother, which he enjoys and which is apparently having a salutary effect on him. This is confirmed by the letters from the parish priests that were received in evidence. Ms. J.L.H. has assumed responsibility for R.'s religious education and it would not be appropriate for the court to interfere at this time.

29. Mr. B.E.D.'s application to vary is therefore dismissed and the previous order of this Court is confirmed in all respects.

30. As to sentence with respect to the contempt, Mr. B.E.D. proposes that a fine should be imposed. He says that imprisonment would not be in R.'s best interest. Ms. J.L.H. states she is not in a position to pay a fine. She says that she acted on her instinct as a mother, that she never intended to deny access and that she wants R. to have a relationship with his father.

31. Having considered all of the circumstances of this case, the submissions of the parties and the options available to the court, I have concluded that the proper disposition in these circumstances is to suspend the passing of sentence for six months. During that time Ms. J.L.H. is to be subject to an order containing the following conditions:

1. She shall comply strictly with the terms of the order granted June 11, 2002 and dated December 23, 2002;

2. She shall not interfere with access when being exercised by Mr. B.E.D.; and

3. She shall remain away from activities which the child R. is participating in during periods of access being exercised by Mr. B.E.D., unless express consent to her attendance has been given by Mr. B.E.D..

32. I would not want to see a repeat of the abhorrent and disgraceful conduct of the November 8th incident. I must say that it is disturbing and disheartening to see the damage that two loving and concerned parents can cause to their child due to their misguided and inappropriate conduct toward each other. It seems that each has a great deal of bitterness and contempt towards the other. They must realize, however, that the daggers that they throw at each other end up in the child. It is he who suffers most, currently and in the long term, from their antipathy and wrongful acts toward each other.

33. It is unfortunate that criminal charges remain outstanding against each of the parties. I am sure it will do nothing to improve the relationship between them to go through criminal trials. More importantly, however, I am sure that it will be anything but a benefit to the child to have his parents bear the additional strain of criminal proceedings and possibly end up with criminal records.

34. For the good of the child and his future development I strongly urge the parties to put aside their differences and to demonstrate more flexibility and goodwill toward each other and some understanding of the other's position. I can assure them that if they continue on in their ways it will lead to nothing but disaster for R. as he goes through adolescence and his teen years.

Donald M. Hall, J.