SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *M.G. v. D.R.*, 2019 NSSC 335

Date: 20191108
Docket: Halifax No. 1201-069035
Registry: Halifax

Between:

M.G.

Applicant

v.

D.R.

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	May 22 & June 17, 2019 in Halifax, Nova Scotia
Key Words:	Contempt of court, parenting, access, relocation
Summary:	The father filed a contempt motion against the mother resulting from a denial of his parenting time and the relocation with the children. The contempt motion is dismissed. Following the denial of parenting time, the parties agreed to follow the recommendations of a counsellor. The father also agreed the mother could look at a home outside the geographical area specified in the CRO. As a result, both counts of contempt are dismissed.
Legislation:	NS Civil Procedure Rules

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Counsel:	Gordon R. Kelly, for the Applicant

By the Court:

[1] The parties in this matter have three children: E, and twins, F and JM. A Corollary Relief Order was issued on September 9, 2016, which incorporated the Minutes of Settlement and Parenting Agreement ("Corollary Relief Order"). On October 11, 2018, Mr. G filed a Notice of Application for Contempt Order as against Ms. R. Ms. R was advised of her right to remain silent and availed herself of that right. The only evidence before the court on the contempt application was the evidence of Mr. G.

ISSUES:

1) Is Ms. R guilty of contempt in relation to her alleged breach of paragraph 9 of the Parenting Plan incorporated into the Corollary Relief Order? Paragraph 9 prohibits either parent from moving "with the children more than 15 minutes drive (at speed limit) from the Tantallon Superstore without prior written consent of the other parent or an order of a court of competent jurisdiction."

2) Is Ms. R guilty of contempt in relation to her alleged denial of parenting time as between Mr. G and the children in the time period May 4, 2018, to October 4, 2018? Specifically, is Ms. R guilty of breaching paragraphs 5(a), (b), (c), and (g) of the Corollary Relief Order during the specified time frame as noted herein?

LAW & ANALYSIS

[2] The inherent jurisdiction for superior courts to punish for civil contempt was confirmed in the recent case of *Sleigh v MacLean*, 2019 NSCA 71 (N.S.C.A.). Although superior courts have the jurisdiction to address contempt motions, there has been some discussion that such motions should be a last resort when all else has failed.

[3] *Carey v Laiken*, 2015 CarswellOnt 5237 (S.C.C.) reaffirmed the principle that the contempt power should be exercised "cautiously and with great restraint as

an enforcement of last rather than first resort". If a finding of contempt would work an injustice in the circumstances of the case, the court may decline to make such a finding.

[4] The Court reviewed the discretionary authority of the court at paragraph 37 of *Carey v Lakin, supra*:

> "For example, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt: see, e.g., Morrow, Power v. Newfoundland Telephone Co. (1994), 121 Nfld. & P.E.I.R. 334 (Nfld. C.A.), at para. 20; TG Industries, at para. 31. While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, I wish to leave open the possibility that a judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case."

[5] The reluctance of the court to address contempt in the context of family matters was highlighted in the recent case of *Chong v Donnelly*, 2019 Carswell Ont 15935 (Ont CA). In *Chong v Donnelly, supra*, the Ontario Court of Appeal reviewed the principles in *Carey v Laiken, supra*, and *Ruffolo v David*, (2019), 25 R.F.L. (8th) 144 (Ont. C.A.). The Court noted that the motion judge had a duty to consider whether to exercise her discretion to decline making a finding of contempt.

> "In our view, the motion judge's failure to consider these discretionary factors before making a finding of contempt was an error of law. It is especially important for courts to consider the discretion to impose a contempt finding in high-conflict matrimonial cases such as this one. We note, in fairness to the motion judge, that she refused to impose any penalty but that still left the appellant with the opprobrium of a contempt order. We are persuaded that while it was proper to find that the appellant had breached the order, it was not in the interests of justice in the context of this case to add a formal order of contempt."

[6] Civil Procedure Rule 89 provides the statutory framework for motions for contempt. The duty noted in *Chong v Donnelly, supra*, to consider "discretionary factors" is not part of the statutory framework in Nova Scotia. Contempt motions should be examined with diligence and caution, but, the court must reserve the right to address any flagrant disregard of a court order. To do otherwise, may lead to meaningless paper orders- a result which is not to be endorsed or advocated. Court orders are to be followed or varied, unless the parties agree otherwise.

[7] The test for contempt was reiterated in the case of *Hawes v Barnhart*, 2017 NSSC 56 (N.S.S.C.). The applicant must prove the four elements of contempt beyond a reasonable doubt:

1) Proper notice has been given to the Respondent about the terms of the Order;
2) The terms of the Order are clear and unambiguous;
3) Clear proof exists of the breach of the terms of the Order by the Respondent; and
4) The Respondent caused the breach. It was not accidental. It did not occur because of the intervention of some other event or person beyond the control of the Respondent. (para 6, *Hawes v Barnhart*, *supra*).

[8] Ms. R received a copy of the Corollary Relief Order and was aware of the terms of the Order. Mr. G submitted various email exchanges between the parties to confirm discussions related to the terms of the Corollary Relief Order. The first element of the test is satisfied. The court must then turn to an examination of the remaining three elements of contempt.

1ST COUNT- ALLEGATION RE: MS. R'S CHANGE OF RESIDENCE AND BREACH OF PARAGRAPH 9

[9] Evidence confirmed that Ms. R moved approximately 45 minutes away from the Tantallon Superstore. The Corollary Relief Order provided that neither party could move more than 15 minutes drive from the Tantallon Superstore without written agreement or court order. Mr. G asserts that this evidence is sufficient to ground a finding of contempt.

[10] Exhibit 7 was an email written from Mr. G to Ms. R. That email noted in part:

> "I would suggest you look in the Windsor area just encase [sic] I am successful with my bid for my choice of private school."

[11] The Windsor area is outside of HRM and would have exceeded the 15 minute drive restriction in the CRO. Ms. R took this statement in the email to mean that the parties did not intend to abide by the mobility restriction in the CRO. Mr. G indicated that this amendment to the terms of the CRO was conditional on where the children would be attending school.

[12] The allegation of contempt must be proven beyond a reasonable doubt. Due to the quasi-criminal nature of contempt proceedings, there must be clarity with respect to the proof of the elements of the offence. In the absence of the email entered as Exhibit 7, there would be clear proof of breach of the CRO. The email of Mr. G, however, casts doubt on whether the parties intended to abide by the restriction in the CRO prohibiting either party from moving further than 15 minutes drive from the Tantallon Superstore. Ms. R is found not guilty on the 1st count.

2nd COUNT- ALLEGATION OF DENIAL OF PARENTING TIME BY MS. R

[13] The 2nd count relates to the alleged denial of Mr. G's parenting time by Ms. R. The CRO is specific with respect to the parenting time of Mr. G. The evidence is clear and unequivocal that Mr. G did not get the parenting time as ordered.

[14] Those uncontroverted facts do not end the enquiry when dealing with matters of contempt.

[15] The fourth element of contempt as noted in *Hawes v Barnhart, supra,* addresses the issue of whether there was the "intervention of some other event of person beyond the control of the Respondent." At the time of the denial of parenting time, there had been an incident whereby Mr. G was accused of inappropriate discipline of one of the children.

[16] There was a subsequent investigation by the Department of Community Services. The investigation was concluded and the file was closed. Mr. G sought a return to his parenting time as set out in the CRO. That did not happen. Instead the parties sought the assistance of professionals to help them work through the parenting arrangements. Mr. G was clear from the outset that he was working towards a return to his parenting time as set out in the CRO.

[17] In October 2018, Mr. G indicated that he was no longer prepared to work with the professionals and demanded a return to the parenting schedule under the CRO. Prior to that time, he had been prepared to work towards a resolution of the parenting issues. That stance should be commended. It is child focussed and deals with the best interests of the children as opposed to his own interests of securing his court ordered parenting time.

[18] As noted in *Ruffolo v. David, supra* at paragraph 17:

> "… where the main issues to be decided concern access to children, the best interests of the children should be the paramount consideration. In this case, with the court's assistance, the parties have, since the contempt hearing, taken steps to involve professionals to speak and work with the children to address their relationship with the respondent. Such steps are to be encouraged.."

[19] In suggesting that the parties should have professional assistance as an alternative to making a finding of contempt, the information before the court should include consideration of whether: the issues are amenable to professional services, the parties are amenable to professional services, and the professional services are available and accessible on a timely basis.

[20] Parents may not have the financial resources to retain professionals to assist them. When they do have such resources, the engagement of a professional does not always equate with a resolution of the issues. When a parent is unreasonable and obstructionist then the professional assistance may be futile. In such cases the courts must be available to review the circumstances, make findings of contempt where appropriate and to impose reasonable sanctions and consequences against the defaulting parent if the circumstances warrant.

[21] Mr. G did agree to employ professionals to assist with the parenting arrangement from the spring of 2018 to October 2018. What should be lauded as a wonderful parental attribute is also the reason that the 2nd count of contempt must fail. The allegation of denial of parenting time was for the period May 2018 to October 2018- the very time period that Mr. G acquiesced to having the assistance of professionals to regain his parenting time.

[22] By agreeing to amend the parenting schedule in the CRO and to work with the professionals he cannot then assert a denial of his parenting rights and a finding of contempt as against Ms. R. Had the motion for contempt been brought for a period of time following his unwillingness to work with the professionals, the result may have been different. Ms. R is found not guilty on the 2nd count of contempt.

CONCLUSION

[23] The application of Mr. G for a finding that Ms. R is guilty of contempt is dismissed. Each party shall bear their own costs of this matter.

Chiasson, J