SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Novak v. Novak*, 2020 NSSC 166

Date: 2020-05-28
Docket: 1206-7285
Registry: Sydney, NS

Between:

Michele Novak

Applicant

v.

Albert Novak

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	August 30, 2019 in Sydney, Nova Scotia
Final Written Submissions:	September 25, 2019
Oral Decision:	November 13, 2019
Sentencing Decision:	May 27, 2020
Subject:	Contempt Sentencing
Result:	Absolute discharge upon payment of fines and court costs.

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Novak v. Novak*, 2020 NSSC 166

Date: 2020-05-28
Docket: 1206-7285
Registry: Sydney, NS

Between:

Michele Novak

Applicant

v.

Albert Novak

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	August 30, 2019, in Sydney, Nova Scotia
Written Release:	May 28, 2020
Counsel:	Steven Jamael for the Applicant Laura McCarthy for the Respondent

By the Court

Orally:

[1] This is a sentencing decision in relation to the finding of contempt. Ms. Novak filed a motion asking the court to hold Mr. Novak in contempt of an Amended Corollary Relief Order issued by Justice Robert Gregan after a contested divorce hearing.

[2] A bifurcated contempt hearing was held. At the first phase of the hearing Mr. Novak opted to testify, so I heard evidence from both parties. I gave an oral decision on November 19, 2019 in which I found Mr. Novak in contempt of two counts of contempt. Those counts involved refusing to follow the parenting schedule, and not arranging life insurance of $500,000 with the three boys named as irrevocable beneficiaries.

[3] I adjourned the second phase of the hearing to allow Mr. Novak to purge his contempt and to receive submissions from counsel. In the meantime, an appeal was launched and Covid-19 has delayed the sentencing.

[4] In any event, Mr. Novak filed an unsworn affidavit on December 13, 2019. A sworn copy of that affidavit was never filed. In it, Mr. Novak states that he made application to name the three boys as irrevocable beneficiaries of his life insurance. However, I have no confirmation that the insurance was ever secured. I am assuming that if proof of the irrevocable beneficiary designation hadn't been provided, Ms. Novak through her counsel would have brought that to my attention. So, for the purposes of this decision I am assuming that the irrevocable beneficiary designations have been put in place.

[5] Mr. Novak's counsel filed a letter on January 31, 2020 to request that the sentencing phase of the contempt hearing be adjourned, to allow her time to review the Court of Appeal decision when it was released. I granted that request. In her letter, counsel indicated that she would be asking that I exercise my discretion to enter a stay of proceedings under *Civil Procedure Rule 88*, as it would "significantly impact the administration of justice" where the corollary relief order was declared invalid by the Court of Appeal as being "defective in substance".

[6] At the hearing of Mr. Novak's appeal, the Corollary Relief Order was vacated. A written decision was released on March 13, 2020. In it, the Court of Appeal ordered a new trial on parenting and child support. Justice Scanlon delivered the court's reasons. He stated in paragraph 24 (**Novak v. Novak**, **2020 NSCA 26**)

> It will be for a judge on a retrial to determine what, if any, retroactive child support is owed once the co-parenting arrangement is properly considered, and the exercise of imputing income is reconsidered.

[7] In her submissions, Ms. Novak references the court's broad discretion to impose a penalty for contempt under *Civil Procedure Rule 89.13*. She says that Mr. Novak blatantly disregarded the order, and that a fine of $4,000.00 is appropriate to deter him from breaking court orders in the future, and to ensure he takes orders seriously going forward.

[8] She says that she should never have been forced to bring a contempt motion, and that she is entitled to solicitor/client costs. Her counsel has provided an invoice dated December 11, 2019 showing legal fees totalling $5,732.00 for the contempt hearing. Her counsel subsequently filed updated submissions on May 6, 2020 in which the Court of Appeal decision is referenced, and its impact is analyzed.

[9] Ms. Novak argues that the Court of Appeal's reasons should have no bearing on Mr. Novak's ability to follow the original order "while it lasted". She notes that there was no error identified by the Court of Appeal that would have precluded Mr. Novak from following the parenting order and placing the appropriate life insurance, pending appeal.

[10] Mr. Novak's counsel filed submissions on May 12, 2020 in which he argues:

1. the Court of Appeal's finding that Justice Gregan committed "palpable and overriding errors" with respect to the parenting decision and child support, means that for this court to hold Mr. Novak in contempt of the impugned order would be a "material error".
2. he was acting in the best interests of the children;
3. he has purged his contempt regarding the life insurance;

4. he should not have been found in contempt on the life insurance provisions of the order, as the child support which it is intended to secure, was ordered in error.

[11] As I noted when I found Mr. Novak guilty of two counts of contempt, he didn't apply for a stay of the corollary relief order pending appeal. Counsel's briefs provided no case law on the status of an order pending appeal, or the implications when there is no stay sought or granted, but where an order is subsequently overturned. Relief under *Rule 88* wasn't pursued.

[12] I'll deal first with Mr. Novak's submissions. He attacks the finding of contempt on the basis of the Court of Appeal's decision. But that argument displays a misunderstanding of the second phase of a contempt hearing. My finding has been made. This hearing is to deal with penalty only, it is not to second guess the original finding. As the Supreme Court of Canada said in **Carey v. Laiken, 2015 SCC 17**, "Mr. Carey used the second stage of the proceedings to attack the motion judge's findings and declaration of contempt. That was inappropriate".

[13] A motions judge has discretion to revisit a contempt finding in very narrow circumstances, which include where a contemnor has purged the contempt, or where new facts or evidence come to light after the finding was made.

[14] The Supreme Court in **Carey v. Laiken (supra)** spells out the narrow circumstances under which a court can properly revisit an initial contempt finding. In that case, the applicable Ontario Rule was akin to *Civil Procedure Rule 89.14* in Nova Scotia, which gives the court authority to vary or discharge a contempt order. But that Rule wasn't cited by Mr. Novak's counsel, and as the court in **Laiken** noted: "Once a finding of contempt has been made at the first stage of a bifurcated proceeding, that finding is usually final."

[15] The second way in which a court might revisit a contempt finding is by exercising its discretion to permit fresh evidence, or where new facts not before the court at the first hearing come to light. I've considered the Court of Appeal decision vacating the order as a new fact before me, and I've considered Mr. Novak's assertion that he applied to increase the amount and change his beneficiary designation on his life insurance.

[16] In Mr. Novak's submission, he argues that because the order was vacated on appeal, he shouldn't have been expected to comply with it. The Ontario Court

of Appeal in **Laiken v. Carey, 2013 ONCA 530**, which was upheld by the Supreme Court of Canada, stated "It is well-established that court orders must be respected, even if they were improperly or improvidently granted". The Supreme Court in **Laiken** cited a decision from **Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council**, **2006 O.J. No. 4790** in which the Ontario Court of Appeal had earlier said "The law is clear that an order of the court, however wrong, must be obeyed until it is reversed or varied".

[17] The reasoning behind this is important. Canada is a country governed by rule of law. That means that people must obey the law. People can't just decide what laws they like and which they don't, and which they'll comply with. That includes court orders. Saying you didn't follow a court order because you don't like it, or you know better than the judge what is best for your children isn't an acceptable reason to flaunt a court order. If everyone did that, there would be chaos. As Family Division judges, we hear cases every single day where parents disagree on what's best for their children. They often disagree with the orders granted. But they are expected to comply with them.

[18] Even parties who act on erroneous legal advice may be held in contempt according to the **Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2) (1974), 48 D.L.R. (3d) 641 (ONCA)** as cited in **Laiken**.

[19] I accept Ms. Novak's argument that until the Court of Appeal vacated Justice Gregan's order, it should have been complied with. The order wasn't a temporary or interim order, and it wasn't superseded by a further order until the Court of Appeal reinstated the shared parenting arrangements on the day of the appeal hearing on January 15, 2020. The Corollary Relief Order remained operative until then.

[20] In crafting a sentence, I've considered the fact that the Court of Appeal sent the issue back for re-hearing and reinstated a shared parenting arrangement. According to his affidavit, pending the Court of Appeal decision, Mr. Novak made efforts to comply with the order but his efforts were complicated (he says) by the wishes of the boys. I've considered the fact that Mr. Novak says in his affidavit that he's considered the serious consequences of failing to follow a court order.

[21] I've considered Mr. Novak's concern that he travels outside of Canada, and he would like to take the children on trips with him. A criminal record could

impair his ability to do so. Finally, I've considered that there is no evidence that Mr. Novak has previously been held in contempt of any court order.

[22] I find that in all of these circumstances that a conditional discharge on both counts is appropriate. The discharge will become absolute upon payment of a fine of $500.00 per count, for a total fine of $1,000.00. Mr. Novak will also pay court costs to Ms. Novak of $4,000.00. All sums are payable within 60 days.

[23] Ms. Novak asked for solicitor/client costs. Solicitor/client costs are awarded in rare cases where the conduct of a party merits condemnation. I have no doubt that Ms. Novak's legal bill now exceeds the $5,732.00 shown in her submissions. I normally wouldn't hesitate to grant solicitor/client costs on a contempt hearing, but there was divided success on the contempt finding at the first phase of the hearing. Thus the sum of $4,000.00 is intended to represent a significant contribution to her legal expenses, but not full restitution.

[24] Once Mr. Novak has made payment of the fines and court costs, his discharge will become absolute. Ms. McCarthy is directed to forward the appropriate form of order to the court, after she has sent the order to Mr. Jamael for review.

MacLeod-Archer, J.