SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *XD v. SZ,* 2023 NSSC 416

Date: 20231222
Docket: 115908
Registry: Sydney

Between:

XD

Applicant

v.

SZ

Respondent

Judge:	The Honourable Justice LeeAnne MacLeod-Archer
Heard:	December 4, 2023, in Sydney, Nova Scotia
Written Release:	December 22, 2023
Counsel:	XD, Self-Represented SZ, Self-Represented

LIBRARY HEADING

Judge:	The Honourable Justice LeeAnne MacLeod-Archer
Heard:	December 4, 2023
Decision:	December 22, 2023
Summary:	Mother applied for finding the father was in contempt of court orders relating to non-removal of the children from Nova Scotia; holding the children's passports in trust; virtual parenting time provisions; and payment of costs. Court found father in

contempt of non-removal clause and parenting time provisions. Sentencing phase to follow.

Key words: Contempt of court – civil

Legislation: Civil Procedure Rule 89.02

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By the Court:

[1] This is a decision on a motion filed by XD to find SZ in contempt of court orders. The background to the motion is relevant so I will outline it below.

[2] The parties are the parents of two young children. They signed an agreement on parenting after separation, but soon thereafter, problems arose and each filed applications with the court. By consent order issued December 17, 2019, they agreed to resolve their differences by registering the agreement as an order of the court. The agreement gave XD "custody" of the children and provided SZ with one day per week of parenting time.

[3] XD moved with the children to Ontario shortly after that consent order was issued. Because he was denied parenting time as contemplated in the agreement, SZ filed a contempt application, and after a hearing, XD was found guilty of contempt. She was ordered to return the children to Nova Scotia, which she eventually did.

[4] XD then filed a mobility application, seeking permission to move the children to Ontario and establishing parenting arrangements in that scenario. SZ opposed her mobility application. After a contested hearing, I released a decision on July 22nd, 2022. I declined to grant XD's request to move the children to Ontario.

[5] I granted shared parenting, set out a detailed parenting schedule, and set terms including a prohibition on removing the children from Nova Scotia without the other parent's consent or a court order; and a requirement that the children's Canadian and Chinese passports be held in trust by SZ's counsel, to be released only by agreement of both parties or by court order. This was all contained in the Final Varied Parenting (FVP) order issued August 19, 2022.

[6] Ironically given the context of this motion, the provision about passports was granted at SZ's request. He expressed concern that XD, who had removed the children to Ontario before the hearing, would take the children to China and not return.

[7] XD opted not to move back to Sydney to share parenting, so an interim order was issued by consent on January 17, 2023. It gave SZ primary care and decision making responsibility for the children. XD was to have virtual parenting time, to be

initiated by her. The order states that "All terms stated in the parties' Final Varied Parenting Order issued August 19, 2022, remain in place."

[8] At a scheduled review of that interim order, XD moved for an order to address denial of parenting time. A hearing was scheduled for March 7, 2023. SZ filed an affidavit and testified at the hearing.

[9] After hearing evidence, I reserved my decision. When I delivered my decision on May 3, 2023, SZ was in China, and he advised that the children were there with him. On learning of this, XD filed a motion to compel SZ to return the children immediately, for make-up parenting time, and to freeze SZ's assets in Canada to ensure that he returned the children.

[10] A hearing on XD's motion was scheduled for May 12, 2023. SZ filed an affidavit and testified from China virtually. I granted an order requiring SZ to return the children to Canada forthwith, along with make-up parenting time for XD, including an extended summer visit, and a preservation order freezing SZ's assets in Canada pending further order of the court.

[11] Those orders were issued June 20, 2023. However, SZ didn't return the children when ordered to do so. They weren't returned to Canada until early September, 2023. XD didn't get the summer make-up time with the children as ordered, and she says that she didn't even get the virtual parenting time set out in the interim order. She filed this motion for contempt on October 13, 2023.

THE ONUS

[12] XD bears the onus of proving, beyond a reasonable doubt, that SZ is in contempt of a court order, and specifically that:

i. the terms of the order are clear and unambiguous;

ii. proper notice was given to the contemnor of the terms of the order; and

iii. there is clear proof that the contemnor knowingly and wilfully committed an act which is prohibited by the terms of the order (or omitted to do something required by court order to be done)

[13] SZ was advised several times that he needn't respond to the contempt motion or give evidence. He exercised his right to remain silent, but he participated in the

hearing by asking questions on cross-examination. He opted to represent himself, although he was represented by counsel in earlier proceedings.

THE LAW

[14] Contempt proceedings in Nova Scotia are governed by *Civil Procedure Rule* (*CPR*) 89. The relevant parts state:

> **89.02 Contempt and order for payment of money**
>
> A contempt order may not be granted to punish a failure to pay money, unless the failure is in violation of either of the following kinds of orders:
>
> (a) an order for family maintenance or support;
>
> (b) an order for recovery of money that expressly provides that a failure to turn over, or pay, funds may be punished as contempt.
>
> …
>
> **89.13 Penalties for contempt**
>
> (1) A contempt order must record a finding of guilt on each allegation of contempt for which guilt is found and it may impose a conditional or absolute discharge, a penalty similar to a remedy for an abuse of process, or any other lawful penalty including any of the following:
>
> (a) an order that the person must abide by stated penal terms, such as for house arrest, community service, or reparations;
>
> (b) a suspended penalty, such as imprisonment, sequestration, or a fine suspended during performance of stated conditions;
>
> (c) a fine payable, immediately or on terms, to a person named in the order;
>
> (d) sequestration of some or all of the person's assets;
>
> (e) imprisonment for less than five years, if the person is an individual.
>
> (2) A contempt order may provide that a penalty ceases to be in effect when the person in contempt causes contemptuous behavior to cease, or when the person otherwise purges the contempt.
>
> (3) A contempt order may provide for, or a judge may make a further order for, the arrest and imprisonment of an individual, or sequestration of the assets of a corporation, for failure to abide by penal terms, fulfill conditions of a suspended penalty, or comply with terms for payment of a fine.

[15] As Chiasson, J. noted in ***Sleigh v. McLean***, 2017 NSSC 28 (varied 2019 NSCA 71):

14 The law related to contempt applications has been reviewed by our courts in a number of cases. Justice Saunders writing on behalf of the Court of Appeal in the case of *Godin v. Godin*, [2012] N.S.J. No. 277, stated in part at paragraph 47:

> ... Many of these [fundamental principals of contempt] were explored by Justice Farrar in Soper v. Gaudet, 2011 NSCA 11 (CanLII). From that and the jurisprudence cited therein, we know (and I am here extracting those principles which are especially important in this case) that:
>
> 1.finding a party in contempt falls within a trial judge's discretion;
>
> 2.on appeal, the standard of review applied to the exercise of that discretion is one of reasonableness.
>
> 3.we are not to substitute our own view for the judge's discretion unless we conclude that the judge erred in law; misapprehended material evidence; or produced a result which is obviously unjust;
>
> 4.notwithstanding its civil nature, contempt of court is quasi-criminal;
>
> 5.the standard of proof in contempt proceedings is proof beyond a reasonable doubt;
>
> 6.the party alleging contempt has the burden of proof;
>
> 7.in a case of civil contempt the following elements must be established beyond a reasonable doubt:
>
> (i)the terms of the order must be clear and unambiguous;
>
> (ii)proper notice must be given to the contemnor of the terms of the order;
>
> (iii)there must be clear proof that the contemnor intentionally committed an act which is in fact prohibited by the terms of the order, and
>
> (iv)mens rea must be proven which, in the context of civil contempt proceedings, means that while it is not necessary to prove a specific intent to bring the court into disrepute, flout a court order, or interfere with the due course of justice, it is essential to prove an intention to knowingly and wilfully do some act which is contrary to a court order."

15 The element of *mens rea* was addressed by Justice Cromwell (J.A.) as he then was in the case of *TG Industries Ltd. v. Williams*, 2001 NSCA 105 (CanLII). At paragraph 7 of the decision he stated:

> "The core elements of civil contempt are knowledge of the order and the intentional commission of an act which is in fact prohibited by it. The required intention relates to the act itself, not to the disobedience; in other

> words, the intention to disobey, in the sense of desiring or knowingly choosing to obey the order, is not an essential element of civil contempt."

16 In the case of *Godin, supra*, the court held at paragraph 70:

> [70] I fully appreciate the significance of the contempt power in a trial judge's arsenal as a ready means to maintain respect for the rule of law and to dispense even-handed justice to all parties. Nonetheless, it is a blunt instrument only to be wielded sparingly, in circumstances where no other sanction will do. Its penal consequences require a strict application of proper procedures. This critical balance is aptly described by Melissa N. MacKovski in Administering Justice: The Law of Civil Contempt, [2009] Annual Review of Civil Litigation 80:
>
> ... civil contempt may attract severe consequences. Court orders are meant to be followed and breaches in a civil context may result in criminal penalties. The contempt power remains an important tool in ensuring compliance with court orders which is fundamental to the rule of law and the fair and proper administration of justice. Without the ability to sanction for contempt, the dignity of the court and the integrity of the justice system are threatened. ... the use of the contempt power should be tempered and reserved for those cases where the breach is both serious and beyond a reasonable doubt. Otherwise the power itself risks being diluted. ...

17 In the case of *Soper v. Gaudet* 2011 NSCA 11, the Court of Appeal overturned the finding of contempt. In that case the children continued to remain in the care of the Sopers and were not returned to Ms. Gaudet. The court found that the Order was not clear as to who was to transport the children at the conclusion of the Sopers' time. The Court of Appeal also found no evidence that the Sopers restrained the children from leaving their care nor that they encouraged the children to remain with them. The court found that the apparent lack of clarity in the Order resulted in the court overturning the finding of contempt against the Sopers.

18 As such, the provisions of the Order which have been alleged to have been breached must be defined with precision so as to clearly define the parties' rights and responsibilities. In the absence of this precision, a contempt finding may not be sustainable. This direction must be given a contextual interpretation.

19 In the context of family proceedings the level of precision related to custody and access orders must not result in voluminous orders to address every contingency possible. The reality is that this would be untenable in many cases and would frustrate the parties' understanding of the court's direction. This is a result that is counter to the purpose of clarity and should be avoided. A balancing of these objectives must therefore occur when an order is drafted.

20 Although contempt is to be used sparingly, it must be used when circumstances dictate. People coming before this court must have some assurance that Orders respecting custody and access will be followed, and if not, that there will be consequences. There are administrative mechanisms in place for breaches related

> to financial provisions. Surely, the court must be able to enforce custody and access orders with the same degree of diligence.
>
> **21** The court must also be mindful of the practical reality of families coming before us. There are finite resources- both financial and emotional. We must not be distracted from the paramount consideration of all custody and access matters- the best interests of the children. In certain circumstances, the best interests of the children will only be served when all parties know and respect the provisions of a court order. If the court order needs to be revised because of a material change in circumstances then the parties should receive a clear message that the way to achieve this is through further agreement of the parties or court order- not unilateral action in clear defiance of a court order.

THE ALLEGATIONS

[16] In her motion, XD alleges that SZ is in contempt of several orders issued in this proceeding:

1. The FVP order which prohibits removal of the children from Nova Scotia without the other parent's consent or a court order;
2. The FVP order which directed that the children's Canadian and Chinese passports be held in trust, to be released only by agreement or court order; and
3. The January 17, 2023 order (the "interim order") which sets out specific dates and times for XD's virtual parenting time, which XD is required to initiate.

[17] In addition, when she filed her Updated Affidavit, XD alleged that SZ is in contempt of the June 20, 2023 order (the "preservation order") which requires SZ to pay costs of $500.00 to her within thirty days.

THE EVIDENCE

[18] For purposes of proving contempt, XD asks the court to consider SZ's affidavit filed on February 10, 2023. That affidavit was filed for purposes of an earlier motion in this proceeding. In ***Sleigh v. McLean***, 2019 NSCA 71, the Court of Appeal addressed the use to which an affidavit filed by a third party in a contempt motion can be put. Speaking for the court Hamilton, J. stated:

> **65** With respect to Ms. Royal-Preyra's affidavit, Ms. McLean says it should not have been considered because no notice was given under Rule 39.06(2), it contained hearsay and was irrelevant because even if she had moved by the time of

the sentencing hearing that would be a new contempt irrelevant to the sentence being imposed.

66 Rule 39.06 provides:

> Use of affidavit in same proceeding
>
> (1) An affidavit may be filed for use on a motion or application.
>
> (2)An affidavit filed on a motion in a proceeding may be used on another motion in the proceeding, if the party who wishes to use the affidavit files a notice to that effect before the deadline for that party to file an affidavit on the motion.
>
> (3)The affidavit may be used for other purposes in the proceeding, if a judge permits.

67 Ms. McLean's argument is that since Ms. Royal-Preyra's affidavit was filed in the "preservation motion", not the contempt application itself, it could not be relied upon without her being given notice under Rule 39.06(2). This argument is raised for the first time on appeal.

68 While it is ideal for the procedures set out in the *Nova Scotia Civil Procedure Rules* to be followed, failure to give notice in the form set out therein may not be detrimental if it is apparent from the record that the appellant had direct knowledge of the nature of the document such that the purpose of filing formal notice has been fulfilled.

69 This is in keeping with Rule 2.02(1) which states that "failure to comply with these Rules is an irregularity and does not invalidate a proceeding".

70 It is clear from the record that Ms. McLean was provided with a copy of Ms. Royal-Preyra's affidavit. She responded to it by filing two affidavits prior to the sentencing hearing. Therefore, she suffered no prejudice by not being given notice under Rule 39.06(2). She was not deprived of the right to know the case she had to meet and the opportunity to respond.

71 What is more, the judge had the ability to deal with this affidavit under Rule 39.06(3) which states that "[t]he affidavit may be used for other purposes in the proceeding, if a judge permits".

72 With respect to Ms. McLean's arguments concerning hearsay and irrelevance, Ms. Royal-Preyra's affidavit does contain some hearsay. Ms. McLean's trial counsel referred to this hearsay in his written submissions to the judge but made no argument that her affidavit, or any part of it, should not be admitted due to hearsay or rejected as irrelevant. The judge did question Mr. Sleigh's counsel about some of the hearsay in the affidavit but did not indicate how she would deal with it.

73 It is unnecessary for me to consider further whether the judge erred in admitting Ms. Royal-Preyra's affidavit as I am satisfied its admission had no impact on the fine or costs the judge imposed.

[19] The question here is slightly different: can XD rely on the affidavit previously sworn and filed by the opposite party in support of her motion? To answer that, I've considered whether to do so would breach SZ's right to remain silent. I find it does not. A sworn statement made before the motion was filed is akin to a party confession, which is admissible.

[20] Next, I must consider whether XD complied with *CPR* 39.06, and if not, whether I should exercise my discretion under *CPR* 2.02 to waive the notice requirement and consider the affidavit in any event.

[21] XD filed an affidavit on October 13, 2023, which references SZ's earlier affidavit. She then filed an Updated Affidavit which repeats that reference. I'm satisfied that she gave SZ proper notice under *CPR* 39.06(2).

[22] Even if I wasn't satisfied that was the case, it's clear that SZ knew about the affidavits, as they are his affidavits. He filed them with the court and relied on them for an earlier hearing (coincidentally a preservation of assets hearing like in ***Sleigh***). In these circumstances, I would have waived the irregularity in accordance with *CPR* 2.02 if proper notice hadn't been provided.

[23] In addition to the above evidence, XD asks that I find that SZ received a copy of the interim order by email. She attached an email exchange between SZ and court staff as an exhibit to her Updated Affidavit in which SZ acknowledged receipt of the revised interim order. That's the order arising from the parties' agreement on parenting terms which was issued on January 17, 2023 and clearly states that the terms of the FVP order issued August 19, 2022 remain in place.

[24] The problem with XD's argument is that the email exchange constitutes hearsay. I cannot rely on that evidence to find that SZ had notice of the contents of the interim order.

THE COUNTS

COUNT #1

[25] XD says that SZ removed the children from Nova Scotia without her permission or a court order, contrary to Clause 17 of the FVP order which states:

> 17. Neither parent will remove the children from Nova Scotia unless the other parent agrees in advance in writing or a court of competent jurisdiction orders.

[26] I'm satisfied beyond a reasonable doubt that this term is clear and unambiguous. The order very clearly prohibits either parent from removing the children from Nova Scotia without the other parent's authorization or a court order.

[27] I'm satisfied beyond a reasonable doubt that SZ knew what was in the order. Indeed, he requested that prohibition. In addition, he had copies of the order and he had legal counsel until recently who could clarify any uncertainties.

[28] I'm satisfied beyond a reasonable doubt that SZ intentionally breached clause 17 of the FVP order. In the hearing dealing with the preservation order, I concluded that SZ orchestrated the children's removal from Canada. I rejected his claim that his mother made the decision and organized travel documents for the children from Canada, while he was in China.

[29] That conclusion is supported by a number of findings in this hearing:

- There's XD's uncontradicted evidence that Ms. Shu (SZ's mother) is not sophisticated and doesn't speak English. I find it's highly unlikely that she could or would have booked airline tickets and travel documents through the Chinese embassy and then travel alone with the children to China, without SZ's involvement;

- According to SZ's affidavit filed May 30, 2023 he left for China on March 7, 2023. Yet there's uncontradicted evidence that XD was able to connect for a brief video call with the children on March 16, 2023. SZ's affidavit states that his mother refused to facilitate Facetime calls, and the call was made to his phone, so I find that SZ facilitated the call on March 16, 2023. The children left for China the next day. I find that SZ was very likely with them when they left Canada; and

- Z told XD in a text exchange on March 23, 2023 that the children were in Sydney, yet he states in his affidavit that the children left Canada on March 17, 2023 with his mother. I find that if SZ hadn't orchestrated the children's removal, knowing it was contrary to a court order, he wouldn't try to hide the fact from XD.

[30] The above findings raise the level of certainty from a balance of probabilities (on the preservation hearing) to proof beyond a reasonable doubt that SZ knew he was breaching a court order when he orchestrated the children's removal from Canada.

[31] At this stage I must consider whether I will enter a finding of guilt, or whether another remedy is adequate. Contempt is a discretionary remedy and should be used sparingly, in only the most egregious cases. In ***Callwood v. Callwood***, 2020 ONSC 3657 Desormeau, said:

> **51** I am mindful of the following principles regarding civil contempt:
>
> a. Contempt is a serious remedy and is not to be granted lightly: See Fisher v. Fisher, [2003] O.J. No. 976 (Ont. S.C.J.); See Perna v. Foss, 2015 ONSC 5636 at para. 12.
>
> b. Civil contempt is a remedy of last resort, one which should not be sought or granted in family law cases where other adequate remedies are available to the allegedly aggrieved party. Any doubt must be exercised in favour of the person alleged to be in breach of the order. (See G.(N.) c. Services aux enfants & adultes de Presott-Russell, (2006), 82 O.R. (3d) 686 (Ont. C.A.), Hefkey v. Hekfey, 2013 ONCA 44 (Ont. C.A.), and Children's Aid Society of Ottawa-Carleton. v. S.(D.), [2001] O.J. No. 4585 (Ont. S.C.J.): See Perna v. Foss, supra, at para. 12.
>
> c. Great caution should be exercised when considering contempt motions in family law cases: Hefkey v. Hefkey, supra.
>
> **52** The Supreme Court of Canada in Carey v. Laiken, [2015] 2 S.C.R. 79 addressed the law of civil contempt and held that proof beyond a reasonable doubt of an intentional act or omission that was in breach of a clear order of which the alleged contemnor had notice was required to establish civil contempt.
>
> **53** In Ruffolo v. David, 2019 ONCA 385, the Ontario Court of Appeal articulated the following:
>
> > We add two brief comments. First, as explained in Carey v. Laiken, 2015 SCC 17, [2015] 2 S.C.R. 79, at para. 36, contempt orders should not be so readily granted by motion judges:
> >
> > The contempt power is discretionary, and courts have consistently discouraged its routine use to obtain compliance with court orders. If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect." As this Court has affirmed, "contempt of court cannot be reduced to a mere means of enforcing judgments." Rather, it should be used "cautiously and with great restraint". It is an enforcement power of last rather than first resort". [Citations omitted.]
> >
> > Second, 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.
>
> Ruffolo v. David, 2019 ONCA 385, at paras. 18 and 19

[32] I have considered the above caselaw and considered the best interests of the children. The circumstances of this case are egregious and must be sanctioned by the court. I find SZ guilty of contempt of clause 17 of the FVP order.

COUNT #2

[33] XD says that SZ breached clause 19 of the FVP order requiring the children's passports be held in trust. In her affidavit, she says that SZ applied for Canadian passports and then emergency travel documents through the Chinese Embassy.

[34] However, the evidence in XD's affidavit in support of her claim is entirely hearsay. Nobody from the Consulate, Embassy, or Passport Office filed an affidavit or testified. I have no direct evidence to support the allegation, other than XD's evidence that she provided a statement to the Passport Office after they initiated inquiries.

[35] I cannot find SZ guilty of contempt based on inadmissible evidence. I enter a finding of not guilty on count #2.

COUNT #3

[36] XD says that SZ is in contempt of the interim order by refusing to allow virtual parenting time. In her affidavit she details a number of attempts to initiate video calls and SZ's response (or lack of response). Her evidence is uncontradicted, because although SZ tried to rebut XD's evidence in argument, his submissions don't constitute evidence.

[37] I'm satisfied beyond a reasonable doubt that SZ was aware of the terms for virtual parenting time. I'm satisfied beyond a reasonable doubt that the terms of the interim order are clear and unambiguous.

[38] I find that XD tried to initiate video calls with her children on numerous occasions after the interim order was issued. I also find that SZ refused XD's requests to schedule video calls with the children and that he terminated the few successful calls almost immediately after the connection was made. The dates of

these failed or interrupted calls include January 18, 2023; February 12 & 20, 2023; March 1, 13, 12, 19 & 20, 2023.

[39] The intent of the virtual parenting time set out in the interim order is to allow XD to speak with and see her children. Permitting the odd, very brief connection isn't in keeping with the spirit and intent of the order. I find there's proof beyond a reasonable doubt that SZ deliberately breached the interim order.

[40] It's in the children's best interests that I find SZ in contempt of clause 3 of the interim order. They are the ones losing out.

COUNT #4

[41] In her Updated Affidavit, XD alleges that SZ is in contempt of clause 11 of the preservation order, which requires him to pay her costs of $500 within thirty days. That allegation wasn't contained in her Notice of Motion filed October 13, 2023.

[42] I am not prepared to deal with this 4th count of alleged contempt. Even if the allegation had been properly advanced with her motion, *CPR* 89 precludes a contempt order for payment of monies absent certain circumstances. This case doesn't meet those criteria.

CONCLUSION

[43] I find SZ guilty of contempt of court orders issued by this court. He will be granted time to purge the contempt before the matter returns to court for sentencing. This means that SZ must comply exactly with the terms of the interim order and all subsequent orders.

[44] The sentencing phase of this hearing has been scheduled for January 29, 2024 at 11:00 a.m. I will accept affidavit evidence and written submissions on the issue of whether SZ has purged the contempt and on the proper penalty SZ should face, up to one week before the hearing.

COSTS

[45] I will hear from the parties on the issue of costs when the matter returns for sentencing.

MacLeod-Archer, J.