SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Penney v. MacKenzie*, 2014 NSSC 263

Date: 20140704
Docket: *SFSNMCA* No. 089556
Registry: Sydney

Between:

Darin Penney

Applicant

v.

Ralphalyn MacKenzie

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	June 4, 2014, in Sydney, Nova Scotia
Written Submissions:	Clara Gray – none received Catherine MacDonald – June 18, 2014
Counsel:	Clara Gray for the Applicant Catherine MacDonald for the Respondent

By the Court:

BACKGROUND

[1] Darin Penney and Ralphalyn MacKenzie are the parents of Devon Penney, born August *, 2003, and Ryan Penney, born January *, 2008. This dispute relates to their competing custody Applications and the issue of interim access.

[2] A hearing date was set for April 1, 2014, on Ms. MacKenzie's motion for interim relief. However, due to the late retainer of Mr. Penney's counsel, counsel requested a pre-trial and appeared before Justice Wilson on March 31, 2014. Justice Wilson granted an adjournment and rescheduled the hearing.

[3] At that time an "interim interim" access arrangement was presented to the Court by counsel. No determination was made on the merits of the motion at that time; rather the "interim interim" arrangement was intended to be a holding Order until the matter could return to Court at a later date.

[4] Mr. Penney's counsel was present for pre-trial on March 31, 2014. She met with Mr. Penney at the Courthouse before and after the pre-trial. Mr. Penney did not attend the pre-trial or appear before Justice Wilson. Ms. MacKenzie was not present in Court but communicated with her counsel by phone. After the pre-trial conference, Ms. MacKenzie's counsel emailed a draft Order to Mr. Penney's

counsel, which reflected their discussions in Court. The draft Order mirrors the terms of the Interim Order issued by Justice Wilson.

[5] The Interim Order granted Ms. MacKenzie access on Wednesdays, starting April 2, 2014, every second weekend, starting April 4, 2014 as well as special occasion access.

[6] On April 10, 2014, Mr. Penney filed a motion seeking a Court ordered parental capacity assessment/home study with psychological component. On the same day, Ms. MacKenzie filed a notice of motion for contempt, alleging that Mr. Penney has refused to allow access pursuant to the terms of the Order.

ISSUES

1. Is Mr. Penney bound by the Interim Order issued April 6, 2014?
2. What legal principles are applicable to a civil contempt proceeding?
3. Has Ms. MacKenzie proven beyond a reasonable doubt that Mr. Penney is in contempt of the Order issued on April 16, 2014?
4. If contempt has been proven, what is the appropriate sanction?
5. Is this an appropriate case for the Court to order a parental capacity assessment / home study with psychological component?

ANALYSIS

Issue 1: Is Mr. Penney bound by the Interim Order issued April 6, 2014?

[7] The preliminary issue of whether Mr. Penney is bound by the terms of the Order issued on April 16, 2014, was not canvassed by counsel. Counsel were asked to provide written briefs on the issue prior to a decision being rendered.

[8] Ms. MacKenzie's position is that Mr. Penney was aware of the terms of the Order. She points out that:

- when she went to retrieve her children for access on Wednesday April 2, 2014, she was allowed to take the children;
- Mr. Penney asked her on April 2, 2014 where the children would sleep when they went overnight with her.

[9] Mr. Penney's position is that, because he was not aware that an Order had been issued by the Court and believed the matter had been left in limbo pending a hearing, he is not bound by the Order.

[10] Mr. Penney discharged his counsel shortly after the pre-trial conference on March 31, 2014, and retained new counsel.

[11] Mr. Penney's former counsel outlined the terms of access before she left the Courthouse on March 31, 2014. She told him "this is the way it is", or words to that effect. He was aware of the specific days and hours of Ms. MacKenzie's access, as his counsel provided him with a slip of paper with the dates and times marked on it before she left Court.

[12] Ms. MacKenzie's position is that Mr. Penney is bound by the terms of the agreement read into the record and incorporated in the Interim Order, irrespective of whether an Order had been issued by the Court, irrespective of whether he received an issued copy, and irrespective of his denial that he agreed to overnight or unsupervised access.

[13] Mr. Penney's position is that he never, at any time, agreed to unsupervised or overnight access, and that there are concerns with her care of the children. He wants supervised daytime access only, until a parental capacity assessment / home study with a psychological component can be completed. His mother is available to supervise access in the meantime.

[14] Mr. Penney cannot be held in contempt of an Order which does not bind him. If the March 31, 2014 agreement between counsel was an informal agreement governing access until the matter was rescheduled, that is quite different from an agreement which forms the basis of a Court Order.

THE LAW

[15] The Court of Appeal in **Rother v. Rother**, 2005 NSCA 63, considered the issue of a lawyer's authority to bind a client. At trial, a settlement agreement between the parties was held to be valid, even though Mr. Rother claimed he had imposed limitations on his solicitor's authority to settle. Justice Wright quoted from the Court of Appeal in **Landry v. Landry** (1981), 48 N.S.R. (2d) 136, at p. 130:

> The agreement itself had been entered into by counsel for the parties with the apparent authority to do so. The fact that one party felt that his solicitor did not have full authority to make the settlement on his behalf does not avoid such a settlement when his solicitor has the apparent authority to act on his behalf.

[16] The Court of Appeal dealt with a similar issue in **Kedmi v. Korem,** 2012 NSCA 124. However, in that case, the parties agreed to terms of settlement read into the record in the presence of counsel. On appeal, Ms. Kedmi raised the issue of her lawyer's competence. The Court noted that incompetency of counsel is not a ground of appeal in a civil matter. The Court also noted, however, that a ground of appeal may exist in the rarest of civil cases where a very compelling public interest is engaged, such as cases involving vulnerable persons like children and those under a mental disability.

[17] In the case before the Court, the issue involves unsupervised access with children who are 2.5 and 5 years of age. They are certainly vulnerable persons and one could argue there is a compelling public interest in ensuring their safety during access.

[18] However, the Order of April 16, 2014, represents a change from what was the *status quo* while Mr. Penney was working out of province. The children were in the primary care of Ms. MacKenzie during his absence. I do not accept that his family cared for the children. They may have assisted, but Ms. MacKenzie was the primary caregiver.

[19] The Interim Order limits her access to three hours on Wednesday afternoons, every second weekend and on special occasions. The allegations of mental health issues, neglect, and other risks to the children remain unproven. Ms. MacKenzie took the children for a 3 hour unsupervised access visit on April 2, 2014, and returned them as scheduled. There is no allegation that the children came to any harm during that visit. There is no direct or compelling evidence that their safety would be at risk if access proceeds on an unsupervised basis. There is no public policy reason to find the Order does not bind Mr. Penney. There are public policy reasons to hold it binding. Courts cannot function properly if they cannot act on

the advice of counsel. The administration of justice would suffer it parties are allowed to revoke agreements which form the basis of a court order.

DECISION ON INTERIM ORDER

[20] I find that the Interim Order based on the agreement read into the record by counsel for the parties on March 31, 2014, is binding on Mr. Penney for the following reasons:

- He was present in the Courthouse on March 31, 2014 and provided instructions to counsel;
- His counsel had apparent authority to bind him and did not advise the Court or Ms. Mackenzie's counsel of any limits on her authority;
- The draft Order sent by Ms. MacKenzie's counsel to Mr. Penney's counsel and the Interim Order issued April 16, 2014 reflect the terms read into the record on March 31, 2014;
- Mr. Penny was advised by his counsel on March 31, 2014 when he was provided with the access schedule that "this is the way it is" or words to that effect;

- His counsel told him the terms of access after she attended the pre-trial conference with Justice Wilson;

- She gave him a slip of paper containing the terms of access as they are contained in the Order that followed.

ANALYSIS

Issue 2: What legal principles are applicable to a civil contempt proceeding?

[21] The Court of Appeal summarized the current law in Nova Scotia with respect to civil contempt proceedings in two recent decision: **Godin** v **Godin**, 2012 NSCA 54 and **Soper** v. **Gaudet,** 2011 NSCA 11.

[22] The burden of proof in this case rests with Ms. MacKenzie, who alleges that Mr. Penney is in contempt of the Order issued April 16, 2014. The onus is proof beyond a reasonable doubt.

[23] The following elements must be proven:

1. The terms of the Order must be clear and unambiguous;

2. Proper notice must have been given to Mr. Penney of the terms of the Order;

3. Clear proof must exist that the terms of the Order have been breached by Mr. Penney; and

4. The appropriate *mens rea* must be present.

[24] In determining whether the appropriate *mens rea* is present, I must be mindful of the following:

1. The intention to disobey a Court Order is not a necessary or essential element of civil contempt.

2. The core element of civil contempt is failure to obey a Court Order of which the alleged contemnor was aware.

3. Knowledge of the order and the intentional commission of an act which is prohibited by the Order or failure to take an action which is required by the Order must be proven.

[25] A contempt proceeding is a quasi-criminal proceeding and some Courts have noted that in family proceedings, caution must be exercised in finding a party in contempt. However, as Justice Forgeron noted in **Keinick v. Bruno**, 2012 NSSC 140, that cautionary principle cannot be raised to the level of a legal presumption.

[26] The competing view is that Courts must act to enforce their Orders, particularly in the family context where the parent/child relationship can be irreparably damaged by disregard for the Order.

Issue 3: Has Ms. MacKenzie proven beyond a reasonable doubt that Mr. Penney is in contempt of the order?

[27] Ms. MacKenzie's position is that she has proven the necessary elements for a Contempt Order. She says Mr. Penney wilfully denied access with full knowledge of the terms of the Order. At the time she filed her Motion, she had been denied the first of her scheduled weekend access visits with the children. She had access on three occasions after the pre-trial conference of March 31, 2014.

[28] Mr. Penney's position is that he is not in contempt. He says he was not aware that an Order had been issued after the March 31, 2014 pre-trial conference. He says he did not instruct his counsel to agree to unsupervised and/or overnight access and he cannot be held in breach of an Order that he was not aware had been issued.

DECISION ON CONTEMPT

[29] I have reviewed ***Civil Procedure Rule 89***, the case law, the submissions of counsel, and the evidence. I find that Ms. MacKenzie has proven beyond a

reasonable doubt that Mr. Penney is in contempt of the Order issued April 16, 2014.

[30] In reaching this decision, I have relied on the following findings:

1. Mr. Penney was aware of the terms of the Order;
2. The terms of the Order are clear and unambiguous;
3. The fact that Mr. Penney was not aware an Order had been issued does not negate the fact that he was advised of **the terms** of the Order (namely, access as set out in the Interim Order issued April 16, 2014);
4. Mr. Penney had counsel on March 31, 2014 and was given proper notice of the terms of the Order;
5. Mr. Penney allowed Ms. MacKenzie to exercise access with the children on April 2, 2014, in accordance with the terms of the Order;
6. Mr. Penney refused to allow Ms. MacKenzie to exercise access the weekend of April 4 – 6, 2014, as contemplated by the Order;
7. Mr. Penney refused to allow Ms. MacKenzie to exercise scheduled access in accordance with the terms of the Order thereafter;
8. There was a supervised access visit on Mother's Day at Mr. Penney's home, but the Order does not require supervised access;

9. There was one other visit which neither party described in great detail, but which was supervised;

10. The requirement for supervised access was imposed by Mr. Penney unilaterally;

11. The limitations on access were imposed by Mr. Penney unilaterally;

12. It was clear that Ms. MacKenzie wished to exercise access under the Order;

13. It is clear Mr. Penney failed to take an action (allow access) required by the Order;

14. There is no compelling evidence of risk and no adequate reason from Mr. Penney for his refusal to allow access under the Order;

15. Mr. Penney's failure to allow access under the Order was wilful, deliberate and contemptuous.

Issue 4: If contempt has been proven, what is the appropriate sanction?

[31] The Court has discretion to impose a number of sanctions when a contempt finding is made. In her motion for contempt, Ms. MacKenzie simply requests that Mr. Penney be found in contempt and the Order enforced.

[32] The penalties available to the Court include conditional or absolute discharge, a fine, incarceration, and other lawful penalties. However, Ms. MacKenzie simply requests access to her children. I have discretion to adjourn sentencing for contempt if Mr. Penney purges the contempt by complying with the Court Order. I am prepared to allow him that opportunity.

[33] The matter will be adjourned for 2 months during which time the Order issued by Justice Wilson on April 16, 2014, will be followed. The matter will be returned to Court in 2 months for sentencing. In the event the contempt has been purged by compliance with Court Order, I will consider a conditional or absolute discharge.

ANALYSIS ON PARENTAL CAPACITY REPORT

[34] Mr. Penny requests a parenting assessment/home study with a psychological component (parental capacity report). He asks that only Ms. MacKenzie be assessed.

[35] Ms. MacKenzie suffered from depression several years ago, relating to the trauma of delivering a still-born child. She says there is no need for a parental capacity assessment because:

- she does not currently suffer from mental health illness;

- while Mr. Penney was working in Western Canada over the past few years, she was the primary caregiver for the children.
- Mr. Penney's parents live across the street and assisted with childcare;
- they were not the primary care givers;
- she is not delusional or a risk to her children; and
- her physician can confirm her current health status.

[36] She, in turn, raises concerns about Mr. Penney's care of the children. Those concerns do not involve clinical issues requiring an expert opinion, rather they reflect the type of concerns routinely assessed by this Court.

[37] Mr. Penney has not requested disclosure of Ms. MacKenzie's physician files nor her mental health records. I agree with the caution expressed by other Courts that parental capacity assessment reports are costly and invasive, and should only be ordered where other avenues for bringing relevant information before the court are not available.

[38] I agree the Court must resist the temptation to delegate the assessment of parenting and the best interests of the children to third party professionals. Such assessments are made every day by the Court and are within our legislated

responsibility. Judges decide issues of parenting every day. The exception is where serious concerns of a clinical nature arise, in which case a parental capacity assessment may be appropriate .

[39] In this case, Mr. Penney has the option of seeking disclosure of Ms. MacKenzie's health records. In the event those records disclose any ongoing concerns of a clinical nature, he may opt to seek a parental capacity assessment or he may subpoena the physician to give evidence at the custody trial.

[40] I am not satisfied at this time that this is an appropriate case for a Court ordered assessment.

CONCLUSION

I find Mr. Penney in contempt of the Order issued April 16, 2014. Sentencing is adjourned for 2 months to permit him an opportunity to purge his contempt. Mr. Penney's motion for a parental capacity assessment is dismissed.

MacLeod-Archer, J.