SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Barnhart v. Hawes*, 2017 NSSC 56

Date: 20170310
Docket: SFHMCA-098713
Registry: Halifax

Between:

William Lee Hawes

Applicant

v.

Odette Marie Barnhart

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Beryl A. MacDonald

Heard: February 22, 2017

Keywords: Family; Contempt; Costs

Legislation: Civil Procedure Rule 89.13(1) (c); 77.03;77.05

Summary: The parties consented to a detailed plan of care with clear provisions about telephone contact, access arrangements and communication by e-mail. The Mother failed to permit telephone contact with the Father in the month of June, failed to provide arranged access on July 26, 2016, and refused to communicate by e-mail. She was in contempt and the court awarded a fine for each contempt finding as well as costs in the amount of $2,500.00.

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Counsel: William Lee Hawes with counsel, Terrance Sheppard
Odette Marie Barnhart, self-represented

By the Court:

[1] On August 12, 2016 Mr. Hawes filed a Notice of Motion for a Contempt Order alleging Ms. Barnhart failed to comply with the provisions in a Consent Order issued on March 29, 2016. The allegations were that she:

- in the month of June 2016 failed to provide telephone access between Mr. Hawes and their son as required by paragraph 4 (b);
- on July 26, 2016 failed to provide access between Mr. Hawes and their son as required by paragraph 4 (c) and the immediate following paragraph which was, due to a typographical error, also described as (b). This paragraph should have been designated as (d); and
- has refused to communicate with Mr. Hawes by email as required by paragraph 5 (a).

Background

[2] On December 2, 2015 Ms. Barnhart filed a Notice of Application requesting custody of the parties' son who was, at that time, approximately 4 ½ years old. In that application, she also checked an additional request for access to Mr. Hawes. In her Parenting Statement, she placed a check mark to indicate he should have reasonable access with the child but she also placed a check mark to indicate that access should be supervised.

[3] Mr. Hawes is a resident of Florida, USA. On February 26, 2016, he filed a Response to Application and in his Parenting Statement he requested access with their son every time he was in Nova Scotia, twice a year in Florida upon 7 days notice to Ms. Barnhart, FaceTime/telephone access 4 times a week at 7 PM Atlantic Standard Time on Monday, Wednesday, Friday and Saturday with the condition that if he was unable to place the call he would provide Ms. Barnhart with 12 hours' notice. He also had specific requests for access with their son in February and March.

[4] With the assistance of the conciliation service offered in this Court, the parties reached an agreement. Each signed a Consent Order incorporating the terms of their agreement. The terms providing access to Mr. Hawes were "interim", but those arrangements were binding upon the parties as provided for in paragraph 6 (d) and (e) (ii) until there was "a new Order of a Court of competent jurisdiction. To date there is no "new Order". The parties have a Hearing scheduled to determine what the terms of access should be. Although that Hearing has been referred to as a Variation Hearing, neither party will be required to show any change of circumstance because the present provisions in respect to access are interim provisions.

[5] The relevant provisions of the Consent Order are:

> 4. William Hawes has the following specified access with (the child):
>
> (b) [sic] Telephone calls every Tuesday and Thursday at 7:30 AM Nova Scotia time.
>
> (c) [sic] William Hawes will give Odette Barnhart 2 weeks written notice of his intention to exercise access with (the child) when he is in Nova Scotia;
>
> (b) [sic] All visitation access will be for up to 6 hours at a time. Times and dates to be negotiated between the parties.
>
> 5. The parties will follow the following conditions of access:
>
> (a) All parenting and access information exchange will be conducted directly between the parents through email;
>
> (b) William Hawes will refrain from consuming alcohol and drugs prior to and during all access visitation;
>
> (c) The parents agree that the scheduled access times can be changed where circumstances require it on the condition that the parent seeking the change gives advance notice of 72 hours to the other parent to allow a new schedule to be arranged.

Legal Principles

[6] In a Contempt Motion the Applicant bears the burden of proving contempt beyond a reasonable doubt. The elements that must be proven are:

1. The terms of the Order are clear and unambiguous;

2. Proper notice has been given to the Respondent about the terms of the Order;
3. Clear proof exists of the breach of the terms of the Order by the Respondent;
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.

[7] During the Contempt Hearing, there was discussion about whether Ms. Barnhart had a reasonable excuse for failing to obey the terms of the Order. While this terminology is not part of a defense it was used to obtain information to assist me in assessing the 4th element of contempt which is often referred to as the mens rea or the "intention". This is not necessarily an easy concept to grasp and this is why I have phrased it in terms of causation vs. accident. Did she do or fail to do something that was in her control, or was the "cause" of the failure to obey the Order caused by a factor beyond her control, for example an accident. This is the best layperson description I can give to the discussion about "intention" that appears in cases such as *TG Industries Ltd. v Williams*, 2001 NSCA 105, *Soper v Gaudet*, 20011, NSCA 11, and *Godin v Godin*, 2012 NSCA 54.

[8] I am aware the decisions in *Soper* and *Gaudet* may appear to suggest that if a person appears to be acting in the best interest of a child, and is not intending to disobey a Court Order, deliberately out of self interest or otherwise, no contempt

finding should be made. I do not accept this interpretation. Intent to disobey an Order is not the ‘intent” required for a civil contempt finding. (*TG Industries Ltd. v Williams*, 2001 NSCA 105, para 17)

[9] In *Soper* and *Gaudet* the Court of Appeal placed emphasis upon the action of the children themselves and determined the person, who was alleged to be in breach of an Order, effectively had no control over those older children and therefore was absolved from the contempt finding. The child in this proceeding is a young child.

[10] In assessing the facts the Court can “draw the inference that sane and sober persons intend the natural and probable consequences of their actions”. *R v Seymour*, [1996] 2 SCR 252 at para. 19.

Facts

Telephone Contact

[11] In the month of June 2016, while Mr. Hawes was working in the Bahamas his calls to their son on Tuesday and Thursday at 7:30 AM Nova Scotia time did not result in any communication between them. Ms. Barnhart acknowledged, in Exhibit K attached to her affidavit filed November 10, 2016, that his calls were

received in the month of June. However, Mr. Hawes was unable to speak with their son because when she answered the call she testifies there was either “no one on the other end”, or there was “static”. Mr. Hawes’ response was that he had no difficulty with phone calls to others while he was in the Bahamas.

[12] Ms. Barnhart had consented to an Order that required her to have their son available to speak with his father over the telephone on the dates and times stated in the Order. In her affidavit she complained about how unreasonable it is to expect a 4 ½ year old child to engage with a parent on the telephone. She explained how frequently she has asked Mr. Hawes to change the time for these calls. However, she is the person who consented to the time previously arranged knowing the age of their son. Exhibit K provides information that there were many occasions when this child was engaged in these phone conversations for 10 to 14 minutes.

[13] When there are differences in the evidence provided by each party I must assess each party’s credibility to determine whether Mr. Hawes has proven his allegation beyond a reasonable doubt. In assessing credibility I adopt the outline set out in *Novak Estate, Re*, 2008 NSSC 283, at paragraphs 36 and 37

> [36] There are many tools for assessing credibility:
>
> a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior

> inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.
>
> b) The ability to review independent evidence that confirms or contradicts the witness' testimony.
>
> c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in ***Faryna v. Chorny***, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.
>
> d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution ***R. v. Mah***, 2002 NSCA 99 at paragraphs 70-75).
>
> e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. ***R. v. J.H.*** [2005] O.J. No.39 (OCA) at paragraphs 51-56).
>
> [37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See ***R. v. D.R.*** [1966] 2 S.C.R. 291 at paragraph 93 and ***R. v. J.H.*** *supra*)

[14] Ms. Barnhart chose to provide information to me in this proceeding. I can consider that information in reaching my decision. It is clear she is dissatisfied with the Order to which she has consented.

[15] Ms. Barnhart wants to micro manage Mr. Hawes' parenting time. She complains about the car seat he had available, about the child playing in the snow

because the child's hands had "eczema." She complains when scheduled dates may need to be changed even in the face of the Order requiring the parties to "negotiate" the visitation dates. Given Mr. Hawes' employment and place of residence, changes are inevitable if he is to have any contact with their son. From her actions and complaints, it appears Ms. Barnhart does not intend to comply with the Order on any terms except as dictated by her. She asserts she is "flexible". I have determined she is not. She has testified that making arrangements for Mr. Hawes to have parenting time with their son is disruptive to her life and to the child's life.

[16] I do not believe Ms. Barnhart when she says that in June the parties' son did not talk with Mr. Hawes because there was no one on the phone when she answered or because there was "static". She knew who was calling and she did not bring the child to the phone or bring the phone to the child. This action must be required of her without detailing this in the Order. Given the age of the child the only way this Order can have any effect is if the parent gives the telephone to the child. The Order was clear; she knew what the Order required; she did not give the phone to the child. She is in contempt of the Order.

E-mail Communication and July 26, 2016 Access Visit

[17] On July10, 2016 Ms. Barnhart blocked all e-mail from Mr. Hawes and she stopped communicating with him directly. Her testimony is she did so because "... I felt he was unreasonable and causing severe and undue anxiety and stress which was taking a toll on my health and family life". This comment followed her complaint about the numerous e-mails that are required to "negotiate" the dates and times when Mr. Hawes can be in Nova Scotia and the changes that are sometimes necessary. She also complained because Mr. Hawes' girlfriend also communicated with her by e-mail on occasion.

[18] Mr. Hawes has not always been polite and it is unfortunate his "girlfriend" has become involved. However, neither of these circumstances excuse Ms. Barnhart's failure to carry out the terms of the Order.

[19] In order to arrange for access with their son Mr. Hawes' counsel attempted to be the intermediary. Arrangements were made for access on July 25th and 26th. The visit on the 26th was to begin at 1:00 p.m. from the Keshen Goodman Library.

[20] Mr. Hawes did have access on July 25th. His affidavit, filed August 12, 2016, describes that visit. I accept his evidence that the visit went very well. At the end of the visit Mr. Hawes returned with the child to the library but did not wait

outside. Instead he and the child played in the children's section of the library. Ms. Barnhart had been waiting outside and she became angry when she found Mr. Hawes inside, not only with the child but also with his girlfriend. She informed Mr. Hawes that she no longer wanted to communicate with his lawyer to arrange for access visits. Because of this Mr. Hawes asked his lawyer to communicate with Ms. Barnhart to confirm the arrangements for the July 26th visit. Her reply was:

> "I am unsure as to how to proceed as (the child) informs me that Bill Hawes had beer when they were at the arm view which is a direct violation of the court order. My gut tells me it is not a good environment and will have to seek legal counsel from Mr. Stordy not sure he will be available today."

[21] Mr. Stordy is duty counsel at the Supreme Court Family Division.

[22] Upon receiving this reply Mr. Hawes' lawyer reminded Ms. Barnhart about the terms of the Order and the specific arrangements that had already been made for the July 26 visit. She was informed that Mr. Hawes denied that he had a beer with lunch. Below from Mr. Hawes' affidavit filed August 12, 2016 is his testimony about what occurred on the 26th:

34. On Tuesday, July 26 I arrived at the Keshen Goodman Library for my 1 PM pickup time and the Respondent showed up at around 1:15 with no (child).

35. The Respondent said that (his girlfriend) owed her an apology regarding an exchange of emails they had back in May 2016. She also did not think (his girlfriend) was kind or classy enough to be around (the child).

36.The Respondent demanded an apology from (his girlfriend), or a promise from me that (my girlfriend) would not see “her son”.

37. (My girlfriend), (the child), and I had a wonderful visit together on the day before. (The child) appeared taken with (my girlfriend) and they got along famously so I told the Respondent that, and I would not make such promise.

38. During this exchange which lasted 1 ¼ hours, (my girlfriend) was not present.

[23] In answer to this, in her affidavit filed November 10, 2016, Ms. Barnhart says:

35. On July 26, I arrived at the Keshen Goodman Library with (the child) but went to talk privately to the Applicant. It was raining very hard. I told the Applicant that I do not feel comfortable letting (the child) spend time with someone who has defamed me on each and every available occasion. I also told the Applicant that in order for me to feel comfortable all three (3) of us should talk and clear the air and that if (his girlfriend) had been told the truth she would be compelled to offer an apology. I never once said that she was unkind, just “not classy”.

36. …. It is true that this conversation did last 1 ¼ hours. The Applicant did drive away without (the child).

[24] Exhibit A attached to Mr. Hawes' affidavit filed August 12, 2016 is a copy of the receipt from The Armview Restaurant and Lounge. It shows that on July 25, 2016 three people ordered and paid for soda and iced tea. There is no beer included in this receipt. I accept Mr. Hawes' testimony that he did not consume alcohol while their son was in his care on July 25, 2016. I do not accept, for the truth of its content, the statement, allegedly made by this young child, that his father was consuming "beer". I have no evidence that this child would know the difference between iced tea and beer or a soda drink and beer.

[25] As I have already noted, I do not find Ms. Barnhart to be a credible witness. My finding is reinforced by her acknowledgement that her conversation in the library with Mr. Hawes lasted for over an hour. He has testified that she arrived without their son. I believe him. I do not accept her testimony that their son was in the car because this would mean she left him alone in the car while she had this long conversation with Mr. Hawes inside the library. Ms. Barnhart purports to be a loving and concerned mother. I do not accept she would leave this child in the car alone for this length of time. From this I conclude the child was not available for access to occur and this was because she did not bring him. Even had she done so, her subsequent discussions with Mr. Hawes and her demand for an apology from

his girlfriend were used by her as an excuse not to carry out the terms of the Order and that is unacceptable.

[26] Ms. Barnhart is in contempt of the Order. She failed to provide telephone access in June 2016. From July 10, 2016 until the date of the hearing she failed to communicate directly with Mr. Hawes by e-mail. On July 26, 2016, she failed to have their son available for a prearranged access visit.

[27] Counsel on behalf of Mr. Hawes has requested the imposition of a $1,000.00 fine for each proven contempt finding. Civil Procedure Rule 89.13 (1) (c) provides that this fine may be payable “immediately or on terms, to a person named in the order”.

[28] I have considered whether Ms. Barnhart could purge her contempt. While some telephone contact is occurring, that fact does not purge her contempt for her failure to provide telephone contact in June. She must not form the conclusion that she has a choice in providing this contact. She will pay a $300.00 fine to Mr. Hawes immediately.

[29] Ms. Barnhart, up to the date of the hearing, refuses to communicate directly with Mr. Hawes to negotiate the dates and times when he is to have access in Nova Scotia. Because of the difficulties he has experienced he has not had access that

should have occurred. I am not satisfied that providing Ms. Barnhart with an opportunity to purge this contempt by giving her time to recommence direct communication is an appropriate remedy that will ensure her future compliance with the Order. She will pay a $600.00 fine to Mr. Hawes immediately.

[30] Because of her failure, on July 26, 2016, to have their son available for a prearranged access visit Ms. Barnhart will pay a $500.00 fine to Mr. Hawes immediately.

[31] Mr. Hawes is requesting a cost award. His counsel has provided an outline of services counsel believes are related directly to the Contempt Motion. However, I have decided that many of those services are best dealt with as part of the ongoing application in respect to access that is to be finalized at a Hearing to be held later this year.

[32] The Court has discretion to award costs to a successful party. Mr. Hawes is clearly the successful party in respect to this motion.

[33] Civil Procedure Rule 77.03 (1) provides as follows:

> Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the Costs and Fees Act, a copy of which is reproduced at the end of this Rule 77

[34] The relevant portions of Rule 77.03 state:

> (3) Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.
>
> (4) A judge who awards party and party costs of a motion that does not result in the final determination of the proceeding may order payment in any of the following ways:
>
> (a) in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;
>
> b) to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;
>
> (c) to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;
>
> (d) any other way the judge sees fit.

[35] Rule 77.05 (1) states that:

> The provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise.
>
> Tariff C provides a range for costs from $250.00 to $500.00 for a motion hearing lasting one hour or less.

[36] A Motion for a Contempt Order is very different from many of the motions that are requested in an ongoing proceeding. This motion required a ½ day Hearing, although, because of a late start, the Hearing lasted approximately 2 hours. Ms. Barnhart filed a 63-paragraph affidavit with numerous attached exhibits. Tariff C will not provide an appropriate cost award. Ms. Barnhart has income and is not impecunious. She is to pay costs to Mr. Hawes in the amount of $2,500.00.

B. MacDonald, J.