FAMILY COURT OF NOVA SCOTIA
Citation: *A.U. v. T.C.*, 2018 NSFC 4

Date: 20180209
Docket: Antigonish No. FATMCA-67800
Registry: Antigonish

Between:

A.U.

Applicant

v.

T.C.

Respondent

Editorial Note: Identifying Information has been removed from this electronic version of the judgment. In addition, Paragraph 3 of the electronic version of this decision has been modified in accordance with the attached erratum, dated March 1, 2018

Judge: The Honourable Judge Timothy G. Daley

Heard February 6, 2018 in Pictou, Nova Scotia

Counsel: Robert Moores, for the Applicant
Pavel Boubnov, for the Respondent

Introduction

[1] A.U. seeks a finding of contempt against T.C., alleging that he failed to abide by the terms of the interim order of this Court granted January 12, 2018 and issued January 17, 2018. Specifically, she alleges that he failed to abide by the term of the order granting her primary day-to-day care and control of three children, N.C., I.C. and N.U. and requiring T.C. to immediately transfer the children to her care.

Issues

[2] The issues for determination by this Court are as follows:

a. What is the law applicable to civil contempt proceedings?

b. Has A.U. proven beyond a reasonable doubt that T.C. is in contempt of the Court order?

c. If contempt has been proven beyond a reasonable doubt, what is the appropriate sanction in this case?

Background

[3] The parties have two children together, N.C., who is 12 years old, and I.C., who is 10 years old. A.U. has another child, N.U., who is 7 years old and for whom T.C. has acted as his stepfather. N.U.'s natural father has not been involved in his life and T.C. was granted standing in this matter to seek custody of N.U.

[4] In a series of orders beginning in 2010, the parties were granted joint custody of N.C. and I.C. with A.U. having primary day-to-day care and control of the children and T.C. having access (now known as parenting time), with them.

[5] This changed on June 6, 2017, when this Court granted T.C. standing with respect to the child N.U., granted T.C. primary care of all three children and ordered that A.U. would have no parenting time with the children until further order of the Court. This interim order was issued on June 7, 2017.

[6] This significant change occurred due to A.U. being charged with assault on the child N.C. It was alleged that she had hit him with a closed fist. At the time of

the interim order, A.U. was subject to an undertaking to have no contact with the children.

[7] The criminal matter proceeded over many months thereafter, as did the undertaking prohibiting contact between the mother and the children.

[8] Ultimately A.U. pled guilty to a single count of assault and was sentenced to a conditional discharge. There was no condition in her probation order restricting contact between her and the children. Once that restriction was lifted by the Provincial Court, this Court issued an interim order permitting parenting time for her with the children, under supervision. The first of these orders was granted on September 26, 2017 and provided for reasonable parenting time upon reasonable notice under the supervision of staff of the Minister of Community Services, someone approved by the Minister or the maternal grandfather. This allowed T.C. to have someone observe the parenting time of A.U. if he chose. It did not permit him to deny the parenting time.

[9] After T.C. objected to supervision by the paternal grandfather, this Court granted a further interim order on December 19, 2017 requiring supervision of the mother's parenting time by the mother's sister-in-law.

[10] Unfortunately, T.C. did not permit any parenting time throughout the winter and into early 2018.

[11] A.U. then made application under section 40 of the *Parenting and Support Act* seeking a finding that the father had wrongfully denied parenting time and seeking a change in primary care of the children to her. An interim hearing took place on January 11 and January 12, 2018.

[12] At the conclusion of the evidence and submission, I found that there had been a wrongful denial of parenting time by T.C. and that there was no longer need for supervision of the A.U.'s parenting time. I varied the interim order, placing the children in the primary care of A.U. and ordering T.C. to immediately transfer the children into the care of A.U. This interim order, granted on January 12, 2018 and issued on January 17, 2018, is the order which is the subject of these proceedings.

Law Applicable to Civil Contempt Proceedings

[13] The leading decision respecting civil contempt is that of *Carey v Laiken* 2015 SCC 17. Writing for a unanimous Court, Justice Cromwell discussed the basis of civil contempt as follows:

> **30** Contempt of Court "rest[s] on the power of the Court to uphold its dignity and process... The rule of law is directly dependent on the ability of the Courts to enforce their process and maintain their dignity and respect… It is well established that the purpose of a contempt order is "first and foremost a declaration that a party has acted in defiance of a Court order...
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> **31** … With civil contempt, where there is no element of public defiance, the matter is generally seen "primarily as coercive rather than punitive…However, one purpose of sentencing for civil contempt is punishment for breaching a Court order… Courts sometimes impose substantial fines to match the gravity of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct...

[14] Justice Cromwell went on to set out the elements of civil contempt as follows:

> **32** Civil contempt has three elements which must be established beyond a reasonable doubt… These three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases...
>
> **33** The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done"…
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> **34** The second element is that the party alleged to have breached the order must have had actual knowledge of it...
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> **35** Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels...

[15] As to what is required to establish the requisite intent, or *mens rea*, the Nova Scotia Court of Appeal decision in *Godin v Godin* 2012 NSCA 54 is helpful. Though this decision predates *Carey* supra, its discussion of intention, I find, is applicable when Justice Saunders writes at paragraph 47:

> *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 willfully do some act which is contrary to a Court order.

[16] I am also mindful that I should move to a finding of contempt with caution in family proceedings. (see *MacKenzie v. MacKenzie* (1984), 65 N.S.R. (2d) 52 (C.A.); *White v. White* [1999] N.S.J. No. 312 (S.C.); *Frith v. Frith* 2008 BCCA 2; and *Brooks v. Vander Meulen* (1999), 141 Man.R. (2d) 25 (Q.B.F.D.))

[17] On the other hand, in family proceedings, adherence to parenting arrangements in orders is particularly important, given that failure to do so may have significant negative impact upon children. As noted by Justice Forgeron in *Keinick v Bruno*, 2012 NSSC 140:

> **20** I recognize such cautionary principles given the *quasi* criminal nature of a contempt proceeding. Such cautionary principles, however, cannot be raised to the level of a legal presumption. Nor, can such cautionary principles be interpreted as preventing a Court from entering a contempt finding, when all elements have been proven beyond a reasonable doubt, just because the case involves parenting issues. **Indeed, it can also be argued that in such circumstances, it is essential that the Court act to enforce its orders, not only to ensure administration of justice principles, but, also to ensure that the parent child relationship will be maintained, and not irreparably harmed.** (emphasis added)

[18] T.C. raises the defense of impossibility to the allegation of contempt. He says that he could not comply with the provision in the order to immediately return the children to A.U. because, at various times, two or all three children did not want to go and that he took all reasonable steps to persuade them to go with her.

[19] The defense of impossibility was addressed in *Carey* supra in which Justice Cromwell cited *Jackson v Honey* 2009 BCCA 112 and *Sussex Group Ltd. v Fangeat* 920030, 42 CPC 95th) 274 (OSCJ).

[20] In Jackson supra, the Court held that Ms. Honey "could not be said to have willfully or deliberately disobeyed" an order where "it was impossible for her to have complied with it." That order required her to return a light fixture to Ms. Jackson but that fixture had been sold previously when she sold the house in which it was contained. The Court of Appeal held that Mr. Jackson had not proven that Ms. Honey's inclusion of the fixture in the sale was in contempt of another order that she not dispose of or remove personal property which was set out in a list.

The Court held that because it was impossible for Ms. Honey to return the fixture, she was not guilty of contempt.

[21] In *Sussex Group* supra, the Court held:

> **56** It is not a defence to an allegation of contempt that it is impossible for the contemnor to purge his contempt or to comply with the Court order where such impossibility is the result of the contemnor's own conduct. See Manis v. Manis (2001), 55 O.R. (3d) 758 (C.A.).

[22] In *Fresno Pacific University Foundation v. Grabski* 2015 MBCA 70, the Manitoba Court of Appeal was dealing with a motion for contempt and, in relation to defenses, commented as follows:

> 30 As can be seen from the above review of the jurisprudence, even if the elements of contempt have been proven beyond reasonable doubt, there remains residual discretion in the motion judge to refuse to make a finding of contempt. There are many factors that a judge might consider in the exercise of his/her discretion.
>
> 31 One of them is where noncompliance is due to circumstances beyond the control of the alleged contemptuous party. The person ordered to perform is not an insurer. It would bring the administration of justice into disrepute if a person was held in contempt for not performing an act that it was impossible for him/her to perform.
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> **32 However, the person cannot be excused if the impossibility of performance was brought about by his/her own actions or deliberate inaction. The person ordered to perform must show the Court that he acted in good faith and made reasonable efforts to comply with the Court order.** (Emphasis added)

Evidence of Contempt

[23] At the beginning of the contempt hearing, counsel for T.C. confirmed, on the record, that his client conceded that the first two elements of civil contempt had been made out on the evidence. Specifically, he conceded that the order alleged to have been breached stated clearly and unequivocally what should be done. Paragraph 2 of that order states as follows:

> 2. The Applicant, A.U., shall have the primary day to day care and residence of the children. The respondent, T.C. shall immediately transfer the children to the care of the Applicant.

[24] Counsel for T.C. also confirmed on the record that his client had actual knowledge of the order. Specifically, counsel confirmed that at the end of the interim hearing on January 12, 2018, the order was explained to his client. His client understood that he was to immediately transfer the children to the care of the mother.

[25] Therefore, only the third element of civil contempt is left outstanding; has A.U. proven beyond a reasonable doubt that T.C. intentionally failed to do the act required by the order, specifically "immediately transferring the children to the care of A.U."

[26] The second issue, interrelated with this analysis, is whether T.C. has established the defense of impossibility. He says that it was impossible for him to comply with the term of the order described because the children refused to go with their mother and he made every effort to encourage them to do so.

January 12, 2018 Evidence

[27] A.U. testified that she left Court on January 12, 2018 and went home. She waited for T.C. to bring the children to her home. He did not do so.

[28] With the assistance of the Naomi Society, contact was made with the Sherbrooke detachment of the RCMP. It was agreed that Constable MacLeod would attend at the home of T.C. that evening when A.U. arrived to take the children to ensure that any safety concerns would be addressed. There was an agreement that they would meet at T.C.'s home at 7 p.m.

[29] A.U. said she arrived at T.C.'s home at 7:15 p.m. Her sister-in-law, F.U., was in the van with her. Constable MacLeod was already present, along with Constable Fisher of the same detachment. T.C.'s evidence was that Constable Fisher was present at his request to ensure safety as well.

[30] After A.U. had a conversation with Constable Fisher, the child, N.U., ran out of T.C.'s house, wrapped his arms and legs around A.U. and told her he was happy, he loved her and he missed her. She believes N.U. was ready to go with her. He then said that he was going back into the house to get his brothers.

[31] A.U. said that N.U. then came out of the house a second time saying that his brother, I.C., was afraid of her. She was informed by Constable Fisher that I.C. was upstairs, under blankets and did not want to come out.

[32] Again, N.U. went into T.C.'s home and N.C. came out and spoke to his mother. She said he was not afraid to speak to her and he showed no fear. N.C. told her that he and his brother, I.C., were not going with her and told her that if she took N.U. with her it would hurt them and make them cry. N.C. then told A.U. that he and his brother, I.C., had the decision and choice of whether to come with their mother or not because that was what Constable Fisher told him.

[33] In her viva voce evidence, A.U. said that N.C. told her that he didn't want to leave because he didn't want to miss a sleepover and other activities at his father's home that night.

[34] A.U. said she waited about an hour. I.C. then came out of his father's home, went to her, hugged her and started to cry. She said that I.C. told her he was not afraid of her, but he was afraid of his mother taking him away from fun that night. She testified that present at T.C.'s residence that evening was T.C.'s friend, J.H., and J.H's son, who was approximately the age of N.C.

[35] A.U. said that she continued to speak with I.C. He told her he didn't want to leave at that time but that he missed her, loved her and both cried. They were joined by N.U. She said she did not argue with the children about leaving.

[36] At that point, A.U. took N.U. with her to her home. I.C. and N.C. remained with T.C. at his home.

[37] A.U. testified that at no time did she speak to T.C. He did not interfere with the children coming and speaking to her or otherwise restrict their movements or their conversations with her. He was outside, near the back of her vehicle when she was speaking with the children.

[38] Constable MacLeod provided evidence in the matter. She confirmed she is an officer with the RCMP and has worked at the Sherbrooke detachment since August 2017.

[39] She confirmed she did attend at T.C.'s home on January 12, 2018. This was at the request of A.U. through the Naomi Society. She attended to ensure that peace was maintained. She was aware that Constable Fisher was present at the request of T.C.

[40] Though she did not provide evidence of any conversations overheard between A.U. and the children, she generally corroborated the evidence of A.U.

regarding the comings and goings of the children and each of them speaking with their mother. She also testified that each of the boys spoke to T.C. at that time and the father took no steps to prevent the children from going to speak with the mother. Constable MacLeod also testified that she observed no signs that T.C. encouraged the children to go with their mother.

[41] She said that T.C. was outside and "down the drive a bit" and the closest he was to the van of A.U. was approximately 2 1/2 metres.

[42] K.P., a friend of T.C., provided evidence in the matter. She said she was present at T.C.'s home on January 12, 2018. She was there with her boyfriend, J.H., and his son.

[43] She testified that she heard T.C. tell the three boys that their mother was coming to pick them up. She said T.C. did not force them to go with their mother.

[44] She generally confirmed what happened outside of the home after A.U. arrived. She was not able to provide any detailed evidence of what was said.

[45] She could say that I.C. was upstairs in the bedroom under blankets and that he was afraid. She said she spent about a half hour with him while he was crying under the blankets.

[46] K.P. said that Constable Fisher and T.C. were upstairs at times with I.C. and Constable Fisher told him he must go to speak with his mother. She offered no evidence of what T.C. said or did with respect to I.C. going to his mother and into her care.

[47] She confirmed that her boyfriend's son and A.U.'s children had taken part in sleepovers before but maintained that none were planned for that evening.

[48] Though he was entitled to exercise his right to silence, T.C. did testify. He said that on January 12, 2018 he was in Court when the decision was rendered and the order made. He confirmed he was represented by counsel and understood that he was to immediately return the children into their mother's care.

[49] He said that he arrived home that evening and spoke to the children, explaining to them that their mother would be coming around 6:00 p.m. to pick them up. He said that he got them ready by getting their jackets and school bags for them.

[50] T.C. said that J.H., K.P., his grandparents and Constable Fisher were present when A.U. arrived.

[51] He explained that he called the Sherbrooke detachment of the RCMP and asked for an officer to attend to ensure peace and safety when A.U. arrived. Constable Fisher was on duty and attended as requested.

[52] He said that when the mother arrived, I.C. and N.U. went outside, but then they. went back inside. N.U. was excited to leave with his mother. N.C. and I.C. were upstairs. He said he got N.C. but couldn't find I.C.

[53] T.C. said N.C. went outside and spoke to his mother. He got N.U. ready, who also went outside.

[54] He said Constable Fisher found I.C. upstairs under blankets but T.C. did not observe I.C. hiding. T.C. told I.C. that he had to go with his mother. He said I.C. was upset, crying and didn't want to go. He said Constable Fisher told I.C. that he knew it was hard.

[55] T.C. testified that he tried for one half hour to persuade I.C. to go. This began approximately 5 to 10 minutes after N.U. was ready. He said that I.C.'s bag was ready to go, meaning his schoolbag.

[56] Eventually he went outside with I.C. who went to his mother and they spoke. T.C. backed away.

[57] T.C. testified that he knew that the children had to be given to their mother and he told the children that they had to go with her that night. He denied there were any activities planned that night for the children.

[58] His evidence was that he did not interfere with the mother speaking with the children or with the children going to see her. He maintained a distance of 10 to 15 feet away from them. He did not speak to the mother, yell or threaten the mother.

[59] In cross examination, the following question was put to T.C. and he provided the following answer:

> Q. Did either you or Officer Fisher in your presence tell the children that they had a choice and that they could do whatever they wanted?

> **A.I told them that it was their choice, that I couldn't physically force them to go with their mother.** (emphasis added)

January 21, 2018 Evidence

[60] After A.U. took N.U. home with her on January 12, 2018, she kept him that week and, in accordance with the terms of the interim order of January 12, 2018, she prepared him to go with T.C. for a parenting visit.

[61] On January 19, 2018, T.C. came to the home of A.U. and took N.U. for a visit as required under the order. N.C. spent the weekend with T.C.

[62] T.C. said that when he picked up N.U. at A.U.'s home on Friday for his parenting time, he said I.C. and N.C. went into A.U.'s home without him. They were inside for approximately five minutes and all three children came out and got in his vehicle. He provided no evidence that the children were under stress or were fearful at that time.

[63] When A.U. attended at T.C.'s home on Sunday, January 21, 2018 to retrieve all three children, she testified she arrived around 6:10 p.m. Her brother, W.U., was with her in her van.

[64] A.U. testified that when she first arrived, she noticed N.U. in the window of the door and he stuck up his middle finger at them. She said that the children, T.C., J.H. and T.C.'s grandparents all came out of the home.

[65] She said that N.U. came to speak to her and told her he wasn't coming back with her because T.C. had purchased a big Nerf gun for him, which he had with him, and he wasn't allowed to bring it home so he was staying.

[66] A.U. said that no adult present told the children they had to go with her. T.C. did not prevent the children from leaving the house or speaking with her and she did not hear T.C. speaking with the children. He did not threaten or yell at her at any time.

[67] W.U. provided evidence. He said that on Sunday, January 21, 2018 he was with A.U. in her vehicle when she went to T.C.'s home to get the children. He said T.C., T.C.'s grandparents, and J.H. were all present. He observed N.U. showing them his middle finger in the window of the door to the house.

[68] He said that N.U. approached him while he was in the vehicle and told him that he hated him. W.U. knew of no reason why N.U. would say this to him.

[69] He overheard N.U. explaining to A.U. that he was not going with her because he just got a Nerf gun. W.U. said that he and A.U. sat in the vehicle, waiting for the children for 20 to 30 minutes and nothing happened. Nothing was said or done by any of the adults to encourage the children to go or to deliver them to their mother. He did not see any bags ready for the children.

[70] T.C.'s evidence was that the mother arrived at his home to pick up the children. He said N.C. and I.C. did not want to go. He said N.C. and I.C. told their mother that they were not going. N.U. said he was scared to tell his mother that he didn't want to go. He said all three children spoke to the mother.

[71] In cross-examination, T.C. said that he prepared the children by getting their jackets and school bags, but no clothing or other possessions, ready to go with their mother.

Analysis and Decision

[72] As noted earlier in this decision, counsel for T.C. acknowledged, on the record, that the first two elements of civil contempt are admitted, specifically that the order clearly and unequivocally states what should be done and that T.C. had actual knowledge of the contents of that order.

[73] Even if these admissions had not been made, the evidence supports a finding that both of these elements of civil contempt have been proven beyond a reasonable doubt.

[74] I find the term of the order respecting return of the children into the care of their mother is clear and unequivocal. There is no doubt, on a plain reading of that provision of the order, that T.C. had a positive obligation to immediately transfer the children into the care of their mother.

[75] With respect to the second element that T.C. have actual knowledge of the order, I likewise find it has been proven beyond a reasonable doubt. T.C. was present in Court on January 12, 2018 when the decision was made and the order was granted. His evidence was that he heard and understood the terms of the order. His evidence was that he took steps that evening to inform the children they would now have to go with their mother. He testified that he took steps to prepare

them. There is no reasonable doubt that he had actual knowledge of the order and, in particular, the provision in the order respecting immediate transfer of the children to the care of their mother.

[76] Respecting the third element, which requires that A.U. prove beyond a reasonable doubt that T.C. intentionally failed to do the act required by the order, I am satisfied that she has met that burden.

[77] The *mens rea* of the offense is proof of an intention to knowingly and willfully do something or fail to do something contrary to the Court order. I find the evidence is clear that T.C. intended to breach that provision of the order.

[78] Evidence of this is inextricably linked with the defence of impossibility raised by T.C. In raising this defence, he argues that he did everything possible to get the children to go with their mother and that in the end, despite these efforts, it was impossible to comply with the order due to their resistance and refusal.

[79] The only evidence of efforts made by T.C. to ensure compliance with the order was his testimony that he spoke to the children on repeated occasions to tell them that they had to go with their mother and that he took steps to prepare them by getting their jackets and school bags ready.

[80] He told the children before their mother arrived on January 12, 2018 that they had to go with her. When I.C. refused to go, he said that he spent about a half an hour with Constable Fisher trying to persuade I.C. to go and I.C. refused.

[81] Fatal to T.C.'s position on both *mens rea* and the impossibility defence is his own evidence in cross-examination that he told the children that it was their choice whether to go with their mother and that he couldn't physically force them to go. This, I find, is clear evidence of the *mens rea* required under the third branch of civil contempt. He gave the three children the choice. This makes clear to me that he did not intend to obey the Court order and instead deflected his responsibility by making it a choice for the children to make.

[82] In family cases, it is trite to say that children should not be left with decisions respecting adult matters. This includes decisions about custody and parenting time. These are matters for their parents and other adults in their lives, and possibly the Court, to decide. This is particularly so in high conflict separations such as this, where children are aware of conflict between the adults

involved and, by giving them decisions over a parenting time, they are placed squarely in the middle of the dispute.

[83] With respect to the defence of impossibility, I find that to sustain this, the burden is on T.C. to produce sufficient evidence that he took all possible steps to obey the Court order and despite these efforts, it was impossible to comply. This evidence must leave me with a reasonable doubt as to whether he is in contempt of the Court order for having intentionally failed to do the act required under that order.

[84] With respect to this issue, I find that T.C. has failed to produce sufficient evidence and I am not left with a reasonable doubt.

[85] As noted earlier, the only steps taken by T.C. to immediately transfer the children to their mother's care was to explain that the children that they must go, to work with I.C. when he didn't wish to go and to prepare them by getting their jackets and school bags ready.

[86] By raising this defence and testifying himself, T.C. had ample opportunity to provide evidence of any other reasonable steps he took to ensure compliance with the order. He did not do so.

[87] Some steps that would be reasonable for any parent to take in such a circumstance would include, but not be limited to the following:

- Speaking with each child individually, addressing any concerns they may have and making clear that they must go with their mother, thereby setting a clear expectation that the children must comply with the direction of their father. This is consistent with good parenting in any circumstance. For example, if the child refused to go to school, to a doctor or to any other activity or service required, the parent would set an expectation for the child and ensure the child's compliance. There is no evidence T.C. did this.

- Impose a consequence for failure to follow the direction of the parent. All parents experience resistance from their children. A reasonable parent, faced with this, will usually impose a consequence, such as the removal of a toy, activity, game, cell phone or device or some other valued item or activity to compel the child to comply. There is no evidence that T.C. did any of this with any of the children. For example, he purchased a Nerf gun

for N.U. and there is no evidence that he was prepared to take that gun away until N.U. complied with his direction to go with his mother.

- Seek the support of family, many of whom were present, to reinforce the expectation.

- Seek assistance from professionals such as a social worker, counsellor or psychologist to ensure compliance of the child.

- Take each child by the hand, stand by the vehicle and tell them he expected them to go and to get in the vehicle.

[88] A parent cannot give such a choice to a child. It is here that the evidence of T.C. that he gave the children a choice of whether to go with their mother is fatal to his defense of impossibility. I find that this statement to the children demonstrates that any impossibility was the result of his own conduct. By doing so, in a high conflict and high stress environment where those same children are caught in the middle, T.C. abdicated his parenting responsibilities and directly contributed to the children refusing to go with their mother.

[89] To frame it another way, it is not sufficient to say that T.C. did nothing to interfere with the children going with their mother and communicating with her about their wishes. This does not meet the test for the defence of impossibility. He must show that "he acted in good faith and made reasonable efforts to comply with a Court order" *Fresno Pacific* supra. He has failed to do so.

[90] Though not specifically raised by T.C., it appears implied in his evidence that the children's refusal to go with their mother was somehow connected with risk. He has identified no such risk in this hearing. He has not provided any evidence of why the children did not want to go with their mother, other than to say that they refused and some of them expressed fear of her.

[91] If he or either of the peace officers present on January 12, 2018 felt that the children were at risk if placed in the care of the mother, any of them should have intervened and at least reported such concern to the child protection authorities. This was not done. I find that a reasonable inference from this is that there were no apparent risks if the children were with their mother.

[92] Furthermore, whatever discussions occurred between Constable Fisher, I.C. and the other children and whatever steps Constable Fisher took which may have affected the decision by the children to refuse to go with their mother, is no answer to either the third leg of the civil contempt test nor the defence of impossibility. T.C. is responsible for compliance with the order. He cannot deflect that responsibility by looking to others. Whatever Constable Fisher's discussions, directions or indications, it lay with T.C. to ensure compliance and he failed to do so.

[93] I also find that A.U. acted in a remarkably restrained manner throughout this circumstance. When she attended at T.C.'s home on January 12, 2018, she remained in or near her vehicle. She did not cause any manner of disturbance and when N.U. was ready to go, she left the other two children behind based on their express wishes. She did not request that the officers interfere or intervene in bringing the children to her vehicle. She did not confront T.C. or anyone else and simply left.

[94] Even after two of her children were not delivered into her care as required, she permitted T.C. to come to her home and allowed N.U. to go with T.C. for his weekend parenting time. As well, when they arrived, I.C. and N.C. came into her home and she did not prevent them from leaving. She did not cause any upset to them. This is further evidence of her restraint.

[95] Finally, when she arrived at T.C.'s home on January 21, 2018, she again acted with restraint. She did not involve the police or any other authority, did not confront T.C. or anyone else and ultimately left without the children.

[96] In reaching a decision, I have reviewed Civil Procedure Rule 89 respecting civil contempt, the law, the evidence before me and submissions of counsel. I find that A.U. has proven beyond a reasonable doubt every element of civil contempt.

[97] I find further that the defence of impossibility raised by T.C. has not been made out and does not leave me with any reasonable doubt with respect to civil contempt.

[98] I therefore find T.C. guilty of civil contempt for his failure to obey the provisions of paragraph two of the interim order of this Court of January 12, 2018, specifically that he failed to immediately transfer the children, N.C., I.C. and N.U., into the care of A.U.

Sentencing

[99] In civil contempt proceedings where there is a finding of guilt, an appropriate sentence must be considered. In doing so, it is generally the practice of Courts to adjourn sentencing to a later date to provide the contemnor an opportunity to purge his contempt before sentencing. I will allow T.C. that opportunity.

[100] Sentencing will take place at the Antigonish Justice Centre on Wednesday, February 28, 2018 at 1:30 p.m. Counsel will provide written submissions on sentencing one week in advance.

Daley, JFC

FAMILY COURT OF NOVA SCOTIA

Citation: *A.U. v. T.C.,* 2018 NSFC 4

Date: 20180209
Docket: Antigonish No. FATMCA-67800
Registry: Antigonish

Between:

A.U.

Applicant

v.

T.C.

Respondent

Erratum

Judge: The Honourable Judge Timothy G. Daley

Heard: February 6, 2018 in Pictou, Nova Scotia

Counsel: Robert Moores, for the Applicant
Pavel Boubnov, for the Respondent

Erratum Date: March 1, 2018

Erratum: The electronic version of this decision has been modified to remove identifying information from para. 3.