# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *A[redacted] v. A[redacted],* 2009 BCSC 854

Date: 20090629
Docket: E040142
Registry: Vancouver

Between:

**B[redacted] A[redacted]**

Plaintiff

And

**D[redacted] A[redacted]**

Defendant

Before: The Honourable Madam Justice Lynn Smith

## Reasons for Judgment

Counsel for Plaintiff: A.E. Thiele

Counsel for Defendant: R. Huinink

Written submission of Plaintiff: October 20, 2008
Written submission of Defendant: March 9, 2009
Written reply of Plaintiff: April 21, 2009

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[1] On August 28, 2008, I found the defendant in this matter, D[redacted] A[redacted], in contempt of two orders of this Court. The determination of the penalty for the contempt became the matter of written submissions, which were delayed for various reasons including the change of counsel for the defendant.

[2] The defendant, for a time, had refused to return the two children of the marriage (who are 11 and 9 years of age) to British Columbia from California, where she had wished to relocate.

[3] The February 17, 2005 consent order pronounced by Mr. Justice McEwan that was in effect provided that the defendant, who had primary residence, would discuss with the plaintiff significant decisions concerning the children. It also provided that the plaintiff would not unreasonably withhold his consent to her relocation of the children to the United States. There was no evidence that the defendant either discussed her decision to relocate the children with the plaintiff or consulted him about it.

[4] The plaintiff obtained an *ex parte* order on July 29, 2008, pronounced by the Honourable Mr. Justice Holmes, granting the plaintiff interim sole custody of the children, and requiring that the children be returned to British Columbia forthwith.

[5] On August 20, 2008, counsel for both parties appeared before Mr. Justice Powers, who ordered that the children be returned forthwith, and granted an adjournment of the hearing on that condition.

[6] When the matter came on for hearing before me on August 28, 2008, the defendant had not returned the children to British Columbia, and I found that she was in contempt of Court and ordered that the plaintiff have sole custody and primary residence of the children and that they be returned to British Columbia forthwith.

[7] In an affidavit filed in connection with this application, the defendant deposed as follows:

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> While I was in California, after the Plaintiff brought his motion in July, 2008, I sought legal advice in California. The attorney I retained advised me that I did not in fact have to go back to BC with the children. I now know that that advice was wrong in law. That attorney drafted up a petition to the Superior Court of the State of California, but that petition was never used. Now produced and shown to me and attached to this my Affidavit as Exhibit "P" is a true copy of that petition. I fully intended at all times to use the Courts and the legal process and to obey the orders of the courts, based on legal advice that I received. I now know that the Supreme Court of BC has jurisdiction over the children, not the courts of California.

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[8] In my Reasons on August 28, 2008, I held as follows:

> [38] It is beyond doubt that court orders must be complied with whether or not applications are pending to set them aside. Further, ignorance of the law is no excuse. Thus, the fact that the July 29th *ex parte* Order of Mr. Justice Holmes or the August 20th Order of Mr. Justice Powers might be set aside, or that Ms. B[redacted] believed that there had to be an order from a California court, does not mean that she was entitled to disobey the July 29th Order. She was ordered to return the children to British Columbia forthwith and she did not do so. The July 29th Order was left in place and reinforced by the Order of Mr. Justice Powers on August 20th, 2008. That Order provided that the applications of the parties were adjourned to August 27th, 2008, on a peremptory basis "provided that the defendant return with the children forthwith to British Columbia and that she provide the children to the plaintiff for access pending the further hearing date."
>
> [39] I am satisfied beyond a reasonable doubt that the defendant was aware of the two Orders and that she intentionally committed acts (leaving the children in California) in contravention of those Orders. I find that she is in contempt of court. I will deal later with the appropriate penalty for this finding of contempt.

[9] Ms. A[redacted] did return to British Columbia on August 30, 2008, with the children.

[10] Pursuant to a consent order of Mr. Justice Hinkson made on December 17, 2008, the parties have joint custody and joint guardianship, and are currently sharing the care of the children on a one week on/one week off basis. A report under s. 15 of the *Family Relations Act*, R.S.B.C. 1996, c. 128, has been ordered.

[11] The plaintiff seeks a penalty for contempt in the form of a summary order for special costs on the basis of legal fees recorded and out-of-pocket disbursements on and after August 5, 2008, in addition to costs on the ordinary tariff of costs for the application before the Honourable Mr. Justice Holmes.

[12] The plaintiff relies on the following authorities: *Everywoman's Health Centre Soc. (1988) v. Bridges* (1991), 54 B.C.L.R. (2d) 294, 47 (C.P.C. (2d) 97, at para. 14; *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316, 242 D.L.R. (4th) 152; and *Sound Contracting Ltd. v. Comox-Strathcona (Regional District)*, 2005 BCCA 167, 209 B.C.A.C. 189. In *North Vancouver (District) v. Sorrenti*, Madam Justice Newbury referred to the longstanding principle that "the person who obtains an order from the Court is entitled to have it obeyed without further expense to himself" (at para. 20).

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[13] The plaintiff also refers to s. 55 of the *Family Relations Act*, which provides:

> 55 (1) In this section, "convention" means the Convention on the Civil Aspects of International Child Abduction signed at The Hague on October 25, 1980.
>
> ...
>
> (4) The government is not bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings in relation to applications submitted under the convention, except to the extent that the costs are covered under British Columbia's system of legal aid and advice.
>
> ...

[14] Ms. Thiele for the plaintiff pointed to instances in which orders have been made, against parents who have removed children from the jurisdiction, to cover travel expenses for the other parent made necessary by the move: *Irl v. Irl*, 2002 BCSC 237; *W.M.U. v. A.U.*, 2005 BCSC 1242; and *J.E.A. v. C.L.M.*, 2002 NSSC 204, 217 D.L.R. ($4^{th}$) 205.

[15] The plaintiff's position is that the costs awarded should be the subject of a judgment as of September 5, 2008, the date when the penalty was to be assessed, with post-judgment interest accruing after that date, but that payment of the judgment amount should not be required until the sale or refinancing of the defendant's home or September 5, 2009, whichever shall first occur.

[16] The total sum which the plaintiff seeks is $21,105.37.

[17] The defendant's position is that the Court has broad discretion to structure a penalty for contempt, and the penalty in this matter should take account of the following circumstances:

(1) the defendant, who believed that the 2005 consent order did not prevent her from moving, incurred significant relocation expenses, quit her job in British Columbia, and then, when she returned, had to look for replacement employment in British;

(2) she has had to find and then rent new premises when she returned to British Columbia since she had leased her home in North Vancouver;

(3) the ongoing dispute between the parties has led to further expenses in legal costs and the costs of the s. 15 report; and

(4) the defendant has no previous history of ignoring court orders and has deposed that she received legal advice in California that she was not required to return the children to British Columbia.

[18] The defendant's position is that the objective of specific deterrence has already been met, and that she has fully complied with all court orders since her return to British Columbia. Counsel for the defendant submits that while the receipt of erroneous legal advice in California does not furnish a defence for a finding of contempt, it is a relevant consideration with respect to penalty.

[19] Mr. Huinink for the defendant also referred to the principle recognized by Mr. Justice Lambert in *MacMillan Bloedel Ltd. v. Brown*, [1994] 7 W.W.R. 259, 92 B.C.L.R. (2d) 1, at para. 134, that the ability of the person found in contempt to pay a fine is a factor. Counsel for the defendant submitted that the most appropriate remedy in all the circumstances would be an order that the defendant pay into an RESP for the benefit of the parties' children the amount of $5,000. He submitted that such penalty should serve as the full penalty, including costs, and should be suspended, to be imposed in the event of any future finding of contempt against the defendant.

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[20] In response, the plaintiff submits that the defendant's financial circumstances are not as difficult as she maintains, and that the plaintiff has done everything reasonably possible to accommodate the position the defendant has found herself in as a result of her own decisions.

[21] In reaching the conclusion I have in this matter, I have taken into account that violation of court orders is a very serious matter, and should result in appropriate consequences, whether in family proceedings or otherwise. I also take into account that the degree of wilful disobedience of a court order in this case may have been less than in other cases because of the defendant's belief about the meaning of the 2005 order and the legal advice the defendant received in California. However, that does not excuse her deliberate disregard of two court orders. I note that the plaintiff did return the children to British Columbia and has purged her contempt, but only did so after three orders of this Court and the scheduling of a Hague Convention hearing in San Diego.

[22] I take into account the overall circumstances in which the defendant finds herself, including her financial circumstances and her dislocation.

[23] It is also important to note that the plaintiff was required to retain counsel on short notice to bring on proceedings rapidly once he learned the children had been taken out of the jurisdiction. There is no suggestion that the legal services performed were unnecessary.

[24] I have concluded that the penalty for the defendant's contempt of court will be that she must pay, in satisfaction of the special costs and costs requested, the sum of $15,000 to the plaintiff with post-judgment interest from September 5, 2008, but payment will be suspended until she sells or refinances her home, or until December 5, 2009, whichever is sooner. At that time, she will pay at a minimum a lump sum of 50% of the amount due, and the remaining amount at $500.00 per month until the remaining balance is paid.

"Lynn Smith J."

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