2013 ONCA 478 (CanLII)

COURT OF APPEAL FOR ONTARIO

CITATION: Chan v. Town, 2013 ONCA 478
DATE: 20130715
DOCKET: C56803

Feldman, Simmons & Juriansz JJ.A.

BETWEEN

Nancy Chan

Appellant/Applicant

and

Kenneth Town

Respondent/Respondent

Anita Kain and Lisa Katz, for the appellant

Peter M. Callahan, for the respondent

Heard and released orally: July 5, 2013

On appeal from the order of Justice Antonio Skarica of the Superior Court of Justice, dated March 20, 2013.

ENDORSEMENT

[1] The appellant is the mother of two girls, M. now age 16 and J. age 13. The appellant and respondent were former common law spouses now living separate and apart. The mother was found in contempt of the order of Justice Murray,

2013 ONCA 478 (CanLII)

which was a final order dealing with custody, access, support, and all issues regarding the parenting of the children.

[2] The particular issue was the father's access at March break. The motion judge found that the mother had manipulated M. into believing she could go on a school trip to Europe during March break, so that when M. refused to go to Whistler with the father on March break, the motion judge found that was the mother's fault and therefore found her in contempt. He then ordered, as a remedy, that the custody and the decision-making authority for both girls, as set out in the order of Justice Murray, be changed to the father from joint custody, until August of this year.

[3] In our view the motion judge made a number of errors, both in finding contempt and in the remedy. First, the notice of motion seeking contempt did not supply sufficient detail, including the particular impugned actions by the mother, to allow her to know the case she had to meet. In fact, although the allegation was that she breached s. 6(c) of the order of Justice Murray, the motion judge's fundamental finding was that she breached s. 8, which was not alleged.

[4] Second, the motion judge failed to consider all of the evidence before him, because he limited himself to two affidavits filed. In so doing he ignored one affidavit of the mother. This was an error where he was making a finding of proof

2013 ONCA 478 (CanLII)

of contempt beyond a reasonable doubt. The excluded affidavit could potentially have raised a reasonable doubt.

[5] Third, and most important, in our view the record does not support the finding that the trial judge made. The affidavits were conflicting and no cross-examinations were held. Having regard to M.'s own conversations in the record about her wishes, it was unreasonable on that record for the motion judge to find, beyond a reasonable doubt, that it was solely the mother's manipulation that led her to want to go on a school trip to Europe during March break and to refuse to go with her father on the Whistler vacation.

[6] We therefore set aside the finding of contempt. It is nevertheless necessary to state that the remedy imposed by the motion judge was not an available remedy under rule 31(5) of the *Family Law Rules*. Custodial arrangements of children cannot be used as a punishment for contempt. That is not to say that there may not be a circumstance where a change in custodial arrangements would be in the best interests of the child, but this is not that case. There was no motion to vary the final order for custody based on a material change in circumstances. The motion judge's rationale was that he hoped that this would bring peace to warring parents, although he said he recognized that it could make matters worse. Finally, we do not see the basis on which the motion judge purported to retain jurisdiction, presumably to revisit in August the custodial arrangements.

2013 ONCA 478 (CanLII)

[7] The appeal is therefore allowed and the contempt order and the remedy are set aside. Costs of the appeal to the appellant in the amount of $15,000.00 inclusive of disbursements and HST. Costs of $5,000.00 payable on the motion, now payable to the appellant by the respondent.

K. Feldman J.A.

Juriansz J.A.