Case Name:
S. v. S.

Between
V. M.S., Applicant, and
L. F.S, Respondent, and
Director of the Family Responsibility Office, for the benefit of V.M.S.

[2006] O.J. No. 2485

2006 ONCJ 227

North York Registry No. F21303/02

Ontario Court of Justice

S.B. Sherr J.

Heard: June 9, 2006.
Judgment: June 16, 2006.

(25 paras.)

Family law -- Practice -- Courts -- Jurisdiction -- Contempt -- Application by the father for a finding that the mother was in contempt -- Application dismissed -- The father claimed that the mother failed to advise him of her move to Texas, failed to provide him with information concerning the children, and failed to make the children available to meet with his therapist -- The mother had custody of the children, who were born in 1990 and 1992 -- The proper forum for this motion was Texas -- The father had acquiesced to Texas being the jurisdiction by delaying bringing this motion.

Application by the father for an order finding the mother in contempt of a previous order -- The father claimed that the mother failed to advise him of her move to Texas, failed to provide him with information pertaining to the children's schooling and health, and failed to make the children available to meet with his therapist -- The mother argued that the proper forum for this motion was in Texas -- The mother had custody of the children (who were born in 1990 and 1992) -- The children did not wish to see their father -- The father had not paid the court-ordered child support -- HELD: Application dismissed -- The proper forum for this motion was in Texas -- It would have been financially difficult for the mother to de-

fend the motion in Toronto -- The children had been resident in Texas since January 2005 and the move was not in violation of a court order -- The children's wishes were important given their ages -- The father had delayed bringing this motion and as such, had acquiesced to the jurisdiction being in Texas.

Statutes, Regulations and Rules Cited:

Family Law Rules, O. Reg. 114/99, as amended, Rule 5(6), Rule 5(7), Rule 5(8)

Court Summary:

Civil procedure -- Venue -- Venue for enforcement remedy -- Motion for contempt to enforce court order -- Fourteen months after mother and children moved to Texas, father made motion for contempt of access order before Ontario court at venue where access order was made -- Ordinarily, subrule 5(6) of Family Law Rules required such motions to be made where children ordinarily resided but, under subrule 5(7), court at venue where access order had been made had discretion to determine whether to hear contempt motion -- Motions judge compiled non-exhaustive list of factors governing this discretion including delay, merits of contempt motion and observation that test of simple balance of convenience was lower threshold than "substantially more convenient" in subrule 5(8) [motion for transfer of venue] -- On basis of these factors, judge declined to exercise discretion, suggesting that father's remedy lay with courts in Texas.

Cases cited:

Genua v. Genua (1979), 12 R.F.L. (2d) 85, [1979] O.J. No. 1016, 1979 CarswellOnt 324 (Ont. Prov. Ct., Fam. Div.).

Sharpley v. Sharpley (2005), 21 R.F.L. (6th) 443, 2005 ONCJ 483, [2005] O.J. No. 5697, 2005 CarswellOnt 7763 (Ont. C.J.).

Statutes cited:

Family Law Rules, O. Reg. 114/99 [as amended], subrule 5(7) and subrule 5(8).

Counsel:

Steven D. Benmor for the applicant

Kim Larsen for the respondent

E. Chang student-at-law for the Director

S.B. SHERR J.:--

1: INTRODUCTION

1 In January of 2005, the applicant mother moved from Toronto to Texas with her children, A.S. (DOB) and N.S. (DOB). The respondent father has brought a motion to find the applicant mother in contempt of the orders of Justice Marvin A. Zuker, dated 30 June 2003, and of Justice Harvey P. Brownstone, dated 2 September 2004, alleging that the applicant mother:

(a) failed to advise him in advance of the move;
(b) has not provided him with medical and schooling information concerning the children; and
(c) failed to make the children available to meet with his therapist.

2 The applicant mother's position is that any enforcement action should be brought and heard in Texas. In the alternative, she argues that there is no merit to the respondent's motion and it should be dismissed.

3 It was agreed that I would first rule whether the contempt motion should be heard in Toronto. This is my ruling.

2: THE COURT ORDERS

4 The order of Justice Zuker of 20 June 2003 granted the applicant mother final custody of the children and provided, on a final basis, for a number of incidents of access, including access to the children's school and medical records and requiring the applicant to notify the respondent of her new address and telephone number if she moved. It also ordered an access schedule on a temporary basis.

5 On 31 July 2003, Justice Brownstone made a final order with respect to the access schedule, providing the respondent with specified access to the children on alternate Wednesday evenings and Sundays.

6 Unfortunately, this access fell apart. The children did not want to see their father. The Office of the Children's Lawyer became involved in the case.

7 A temporary consent order was made by Justice Brownstone on 12 July 2004. He suspended the access schedule and permitted telephone access to the children once per week.

8 In his affidavit sworn on 31 August 2004, a social worker from the Office of the Children's Lawyer, Robert Croezen, stated the following:

(a) The children did not want to see their father and did not find the visits enjoyable.
(b) The children were uncomfortable when their father used foul language in referring to their mother.
(c) The father pressured them to write letters in support of him. At one point, he threatened to go on a hunger strike if they did not write a letter.
(d) They did not want to speak with their father on the telephone as he made them feel uncomfortable.

(e) Collateral contacts confirmed the children's views.
(f) He did not believe the mother was influencing the children against their father.

9 On 2 September 2004, Justice Brownstone made the following final order:

1. The order of Justice Brownstone dated 31 July 2003 and the order of Justice Zuker dated 30 June 2003 in respect of access shall be varied by granting the respondent final access to the children of the marriage, namely A.R.S. (DOB) and N.D.S. (DOB) as agreed between the parties and in accordance with the children's wishes.
2. The children shall be given the respondent's address and telephone number by the Office of the Children's Lawyer forthwith so they can contact him at anytime.
3. If the respondent engages in individual therapy with a qualified psychologist and if the psychologist wishes to meet with either one or both of the children for the purpose of better understanding the respondent's issues, then the applicant shall make the children available to meet with the respondent's therapist. No meetings with the therapist shall involve the children and the respondent being together without the children's consent.

3: THE CONTEMPT MOTION

3.1: The Test

10 Subrule 5(7) of the *Family Law Rules*, O. Reg. 114/99, as amended, states:

(7) *Alternative place for enforcement -- Order enforced by contempt motion*. -- An order, other than a payment order, that is being enforced by a contempt motion may also be enforced in the municipality in which the order was made.

11 Counsel agreed that this subrule gives me discretion to determine whether I should hear the contempt motion.

12 The applicant mother argues that the onus is on the respondent to establish that the contempt motion should be heard in Toronto and that this discretion should only be exercised when there is an immediate need or danger. I disagree. The test is not that onerous.

13 There is an array of factors that a court should weigh in exercising its discretion under subrule 5(7). A non-exhaustive list would include:

(a) An assessment of where it would be more convenient to hear the case on a balance of convenience. This is a slightly lower threshold than the test set out in subrule 5(8) of the *Family Law Rules*, which provides that a court may transfer a case to another municipality where it is ***substantially more convenient***. This is because, in subrule 5(7), we are dealing with whether the matter should be

heard here at all, not whether it should be transferred. There should be no onus on either party in determining this.

(b) The habitual residence of the person against whom the contempt finding is sought. A contempt finding can carry serious consequences, including jail. The court should not lightly hear a contempt motion when the responding party lives far from his or her jurisdiction.

(c) The habitual residence of the children. This consideration becomes more important when the contempt issue involves the children and if their views and preferences are relevant to the issue.

(d) Any delay in bringing the contempt motion.

(e) The seriousness of the alleged contempt.

(f) The merits of the case for contempt on the face of the material filed.

(g) The ability of the moving party to enforce the order in the foreign jurisdiction.

(h) The motivation of the moving party in seeking contempt. If the motivation is vindictiveness and a desire to punish, this is a negative consideration.

(i) The behaviour of the parties. The court should look at whether the moving party is coming to the court with "clean hands".

3.2: Analysis

14 I have decided not to hear the contempt motion.

15 The balance of convenience favours Texas as the jurisdiction to hear enforcement of the access orders. I considered the following:

(a) It will be financially difficult for the respondent to enforce the orders in Texas.

(b) It will be financially difficult for the applicant mother to come to Toronto to defend herself. The respondent is not paying her the court-ordered child support.

(c) The children have been resident in Texas since January 2005. It has become their habitual residence. There was no violation of a court order when the applicant moved to Texas.

(d) Given their ages, the wishes of the children are very important. The respondent father has argued that the applicant did not make the children available to meet with his therapist as set out in paragraph 3 of the order of Justice Brownstone of 2 September 2004. The views of the children, including their desire to participate in this process, would be relevant in a contempt proceeding. *Genua v. Genua* (1979), 12 R.F.L. (2d) 85, [1979] O.J. No. 1016, 1979 CarswellOnt 324 (Ont. Prov. Ct., Fam. Div.). This evidence exists in Texas. Any evidence from collateral sources dealing with the children would also exist in Texas.

(e) Because of the serious consequences of a contempt finding, the mother's residence is an important factor. If she were to go to jail,

the court would have to decide what to do with the children. This would be difficult to determine from Ontario.

(f) No evidence was provided to me that the respondent father could not register and enforce the access order in Texas if he chose to.

16 The respondent's delay in bringing his contempt motion is also a significant factor. He argued that he could not afford to litigate the contempt issue. However, the record shows that he participated in other litigation after the order of Justice Brownstone of 2 September 2004. He appealed the order of Justice Brownstone unsuccessfully. He moved in October 2005 in this court to adjust support arrears. He did not bring his motion for contempt until the end of March 2006 -- 14 months after the move to Texas. By delaying, I find that he has acquiesced to the jurisdiction being in Texas.

17 On the face of his material, the respondent would have considerable difficulty proving the applicant is in contempt of the court orders.

18 A finding of contempt must be made beyond a reasonable doubt, on clear and unequivocal evidence. See ***Sharpley v. Sharpley*** (2005), 21 R.F.L. (6th) 443, 2005 ONCJ 483, [2005] O.J. No. 5697, 2005 CarswellOnt 7763 (Ont. C.J.). On the face of the material filed, the respondent's case appears to be weak.

19 The applicant mother argues that the final access terms contained in Justice Zuker's order of 20 June 2003 ended when Justice Brownstone varied it on 2 September 2004 and did not include them in his order. She argues that, when the variation order was made, it became the comprehensive access document and that the respondent cannot pick and choose which access provisions of the order of 20 June 2003 of Mr. Justice Zuker survived. She submits that the temporary order of Justice Brownstone dated 12 July 2004 is superseded by his final order. She submits that, since the access terms from the prior orders were no longer in effect once Justice Brownstone made his order of 2 September 2004, she cannot be found in contempt of them.

20 On a plain reading of the order of 2 September 2004, the applicant mother's argument has merit. If the order of 2 September 2004 had not referred to Justice Zuker's order, had limited itself to the access schedule, or if the order specified that the clauses in Justice Zuker's order continued, the applicant would not be able to make her argument. This was not the case. Even if the incidents of access terms survived the order of 2 September 2004, I wonder how the applicant can be faulted for interpreting the order differently.

21 Even if Justice Zuker's order survived, the applicant has a strong argument that she substantially complied with it. The court order did not prevent the applicant from leaving the jurisdiction with the children. It did not require her to notify the respondent that she was leaving in advance of her move. The parties agreed that the applicant notified the respondent of the move shortly after she left for Texas. She did provide him with her telephone number. She provided him with a post office number because she said she was terrified that he would track her down and possibly hurt her. There is no evidence she has prevented the children from calling their father. Sadly, he has not seen them since March of 2004.

22 The seriousness of the alleged breaches is also a consideration. This is not as serious as a case where the applicant has breached a non-removal order or denied the re-

spondent specified access. Unfortunately, the evidence is that these older children do not want to see their father. When combined with the ambiguity of the alleged breaches, the respondent's delay in bringing this motion and the balance-of-convenience factors discussed above, Texas is the appropriate jurisdiction to deal with these issues.

23 The applicant mother's counsel asked me to decline hearing the motion because the respondent has not come to court with "clean hands". He argues that support has not been paid, the respondent continues to protract litigation, he has been violent with the applicant in the past and he posted the children's pictures on an Internet website, claiming they had been kidnapped.

24 Although the respondent father has showed poor judgment at times, his behaviour does not factor into my decision. The outcome of the litigation has been terribly painful for him. He is not presently seeing the children he loves. He wants to retain any type of contact with the children that he can. He wants to know that they are healthy. He wants to know whether they are doing well in school. He wants them to know that he loves them. I find his motivation in bringing the contempt motion was based on his desire to achieve these modest and reasonable goals. I encouraged counsel for the applicant to have his client provide this information to the respondent. Her safety concerns can be met by blacking out the name and address of the schools on the report card. The children should know that their father loves them and is interested in them. It will make them feel much better about themselves and, hopefully, pave the way for some form of positive contact in the future.

4: CONCLUSION

25 The respondent's motion to find the applicant in contempt of the court orders is dismissed. If they cannot agree, counsel may make written submissions concerning costs by 30 June 2006.