

News

Up to parent to guarantee shared access

CHRISTOPHER GULY

Parents risk being found in contempt if they rely on their children to comply with access orders, the Court of Appeal for Ontario recently ruled.

A court should consider a child's wishes before making an access order, but once it "has determined that access is in the child's best interests a parent cannot leave the decision to comply with the access order up to the child," said Associate Chief Justice Alexandra Hoy along with Justices Gloria Epstein and Grant Huscroft in their unanimous ruling Aug. 4 in *Godard v. Godard* [2015] O.J. No. 4073.

Although parents aren't required "to do the impossible in order to avoid a contempt finding," they must do "all that they reasonably can" to ensure compliance, the appellate court held in dismissing appellant Terri-Lynn Godard's request to quash a contempt order.

Earlier this year, Superior Court Justice Robin Tremblay found her in contempt of Justice Cindy MacDonald's order last November that Godard provide her ex-husband, Christopher Godard, with access to their now 13-year-old daughter every second weekend, in which the mother would drop off and pick up the teen at her paternal grandparents' home. Ms. Godard didn't comply, and Mr. Godard sought a second motion to find her in contempt. (His first attempt, earlier in 2014, was dismissed by Justice Dan Cornell, who nevertheless noted "serious concerns" that Ms. Godard "engaged in a pattern of behaviour designed to alienate [the daughter] from her father" in *Godard v. Godard* [2014] O.J. No. 3412.)

Mr. Godard's second attempt was successful after Justice Tremblay, the motion judge, found the appellant had "abdicated her parental authority on the issue of access" and was convinced beyond a reasonable doubt that she was in contempt of the November 2014 order based on the three-part test outlined by Ontario's appeal court in *Les Services*



Bala

aux Enfants et Adultes de Prescott-Russell c. N.G. [2006] O.J. No. 2488:

That the order breached "must state clearly and unequivocally what should and should not be done";

The party disobeying the order "must do so deliberately and wilfully"; and

"The evidence must show contempt beyond a reasonable doubt."

The motion judge held that Ms. Godard failed to "take concrete measures to apply normal parental authority" to ensure her daughter complied with the access order. "Had these measures been utilized and proved unsuccessful, the mother would likely not have been found in contempt of the court order," said Justice Tremblay.

Guy Wainwright, Ms. Godard's counsel, argued the motion judge also gave his client "the benefit of the doubt" that she tried to encourage access visits and that it was inconsistent to then find deliberate and wilful disobedience beyond a reasonable doubt.

Yet the appellate court held that the appellant "did not go beyond mere encouragement to attempt any stronger forms of persuasion."

Wainwright told *The Lawyers Weekly* that counsel for custodial parents "should consider calling a child — old enough to take an

oath — as a witness in a contempt proceeding so the court would have firsthand evidence of the situation with which the custodial parent is dealing."

Paul Mongenais, Mr. Godard's counsel, did not respond to an interview request.

Queen's University family law professor Nicholas Bala said the ruling is important because the appeal court affirms an approach courts have increasingly used to enforce access orders and "modify alienating behaviour" of parents who undermine a child's relationship with the other parent.

"This case illustrates how three different judges tried to educate, persuade and to some extent remind this parent of her legal and moral obligations and make a real effort to comply with the order," he said. "That doesn't mean calling the police and dragging the child away to see her father. But it does mean parents requiring children to do things that they say they don't want to do sometimes, like going to school."

Toronto family lawyer Andrea Himel said a court would consider non-compliance of an access order if, for instance, the child involved were in fear of being abused by a parent and expressed that concern in an "independent, consistent and strong" manner. The views and preferences of adolescents "typically carry increasing weight as kids mature" in court, but there must be a "valid reason" for resistance to an order before a court would consider it. "But when an access order is made, parents are obliged to follow it."

Ms. Godard's case returns to the motion judge who will determine the sanction for contempt.

The possible penalties include a fine, transferring custody and imprisonment — although the latter option seems unlikely for a variety of reasons, such as traumatizing the daughter, and the court would more likely consider ordering counseling to "get the family relationship back on track," said Himel.

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