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— Franks & Zalev - This Week in Family Law

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The Only Case You'll Ever Need About Contempt

***Antoine v. Antoine*, 2024 CarswellOnt 4249 (S.C.J.) — Chappel J.**

Whenever we see Justice Chappel's name on a decision, we know it probably includes a comprehensive summary of at least one area of law. And that is most certainly the case with her recent decision in *Antoine*, where she synthesized and summarized all of the principles that apply when dealing with contempt of court. Quite literally, this is the only case one must read for basic contempt of court principles.

In *Antoine*, a final Order was made in 2021. The Order included parenting arrangements for the parties' three children. In early 2024, the father claimed that the mother had breached various parts of the final Order, and he brought a motion to have the mother found in contempt. The motion came on before Justice Chappel, who tried to explain to the self-represented father that contempt is a remedy of last resort, that the test was quite onerous, and asked if he might be willing to consider alternative remedies instead of proceeding with the motion. The husband, not getting the hint, insisted on proceeding.

Justice Chappel started her analysis by discussing a number of topics, including:

> 1. The history of contempt in Canada (including *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, 1988 CarswellBC 363 (S.C.C.) and *United Nurses of Alberta v. Alberta (Attorney General)*, 1992 CarswellAlta 10 (S.C.C.)).
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> 2. The difference between contempt *in facie* ("in the face of the court") ("any word spoken or act committed within the court that obstructs or interferes with the administration of justice, or that is calculated to do so") and *ex facie* ("conduct that occurs outside of the courtroom and encompasses acts done or words spoken or published which are intended or are likely to interfere with or obstruct the fair administration of justice").
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> 3. The difference between criminal contempt, which requires "an intention to 'vilify the administration of justice,' to 'destroy public confidence therein' or 'to excite disaffection against it'", and civil contempt, where the focus is on trying "to coerce the offending litigant into obeying a court judgment or order" and cannot "be invoked for the sole purpose of punishment and deterrence."
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> 4. The procedural safeguards associated with contempt, including:
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> a. "The right to a hearing, including an oral hearing if requested";

b. "The right to make full answer and defence, including the right to counsel, to call evidence and to cross examine upon the other party's evidence"; and

c. "The right not to be compellable as a witness at the hearing[.]"

Justice Chappel then summarized and reviewed numerous cases about contempt to create a clear two-stage framework for analyzing whether the court should invoke its contempt power in a particular case.

Stage One:

At the first stage of the analysis, the court must determine whether the moving party has established all five of the following elements ***beyond a reasonable doubt:***

1. Proper notice, which ideally requires that "full particulars of the alleged contempt be clearly set out in the Notice of Motion." However, the notice requirement can also be met "if the particulars are outlined in the affidavit supporting the contempt motion."

2. The terms of the Order must be live and operative at the time of the hearing. Because the purpose of civil contempt is to compel compliance instead of to punish past non-compliance, the test for contempt will not be met if the terms of the Order have been "superseded by a court order or by a valid agreement between the parties, or if the parties have agreed not to follow the terms in question for any other reason."

3. The terms of the Order must be clear and unequivocal, as a party should not be punished for contempt "if the terms of the order are vague, ambiguous or open to different interpretation." Furthermore, as contempt is quasi criminal and requires proof beyond a reasonable doubt, "[a]ny ambiguity in the text of the order must be resolved in favour of the party who has been accused of contempt."

4. The alleged contemnor must have had actual knowledge or been willfully blind to the terms of the Order. This element can be established with proof of personal service on the alleged contemnor, or inferred from the person's conduct, but "cannot be inferred from the conduct of others, or the service of the order on persons other than the alleged contemnor."

5. The alleged contemnor disobeyed the Order. This does not require the moving party to establish "[p]roof of an intention to disobey the order, in the sense of desiring or knowingly choosing to contravene it, or an intention to bring the administration of justice into disrepute[.]" Rather, it requires them to show that the alleged contemnor did something the Order prohibited or did not do something that it required.

With respect to the fifth part of stage one (disobedience), the alleged contemnor can defend a claim of contempt by establishing the impossibility of compliance. This requires the alleged contemnor to prove, on a balance of probabilities, "that they took all reasonable measures to ensure compliance." In parenting cases, this requires "evidence showing that [the alleged contemnor] took concrete and reasonable measures to have the child comply with the order."

If the moving party fails to prove all five of these elements beyond a reasonable doubt, or if the responding party establishes that compliance was impossible, the motion for contempt ***must fail***.

Stage Two:

If the first stage of the test for contempt is met, that ain't the end of the matter. The court must then consider "whether it should exercise its discretion to decline to make a contempt finding based on the facts and circumstances of the case at hand", and "whether it should exercise its discretion to order a less severe and more appropriate remedy in favour of the moving party."

Although the court has broad discretion at the second stage, the caselaw has established a number of principles that apply when that discretion is being exercised, including that:

> • Contempt "cannot be reduced to a mere means of enforcing orders, and that it should not be routinely used as a compliance mechanism."
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> • The remedy "should be invoked cautiously, with great restraint, and as an enforcement power of last resort to address matters that are not trifling."
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> • "The complex emotional dynamics involved in Family Law disputes and the desirability of avoiding a further escalation of the conflict between the parties are factors that support restraint in use of contempt as an enforcement tool in Family Law disputes[.]"
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> • "Caution is particularly warranted before resorting to the contempt remedy in child protection cases, and in Family Law proceedings where the alleged contempt relates to parenting terms, due the challenge in these cases of reconciling the importance of upholding court orders on the one hand with the need to safeguard the best interests of children on the other."
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> • " . . . the sanction of contempt of court in the Family Law arena is typically reserved for cases involving defiant conduct that is at the most serious end of the spectrum, and where it appears to be the only reasonable means of sending a message to a litigant that court orders cannot be flaunted[.]"
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> • The court must also consider "whether less severe remedies or approaches to resolve the moving party's grievances were attempted without success, and if they were not, whether less drastic options would have been more suitable to address the complaints" such as a declaration of breach, an Order requiring compliance, or an Order for costs.
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> • Other relevant considerations include: (a) "[w]hether the alleged contemnor acted in good faith in taking reasonable steps to comply with the order"; (b) "[w]hether a contempt finding would work an injustice in the circumstances of the case"; (c) "[t]he presence of exigent or extenuating circumstances which explain the breach"; and (d) "[w]hether the non-compliant conduct is significant or repetitive in nature."

The Penalty Phase

As in the criminal process, contempt proceedings are usually divided into two phases. During the first phase, the court considers whether liability has been established. If liability is established, the court then moves on to the second phase, where it considers what the appropriate penalty should be. This two-phase approach ensures that evidence that is only relevant and admissible with respect to liability is not misused during the sentencing phase and vice-versa. It also gives the contemnor an opportunity to purge his or her contempt before the penalty phase starts, which can be a mitigating factor when the court is considering the appropriate remedy.

After setting out the applicable legal principles, Justice Chappel considered the evidence in the case before her. She dismissed several of the alleged instances of contempt because the father had not properly particularized them in his Notice of Motion or Affidavit. She also dismissed a number of the allegations because the Order was ambiguous and did not clearly say what the father claimed it did, and because the father had failed to establish the allegations beyond a reasonable doubt. And, although Justice Chappel found that the mother had provided the father with notarized copies of the children's health cards, birth certificates, passports, and social insurance cards after the deadline set out in the order, the mother had ultimately provided the necessary documents, and had provided a reasonable explanation for her delay.

At that point, all that was left was a single allegation that the mother had breached the final Order by withholding the children from the father for a short period of time in January/February 2024. Although the mother admitted that she had withheld the children from the father, Justice Chappel declined to hold her in contempt because: (a) the mother "had reasonable grounds for her concerns about the safety and well-being of the children in the care of the father and his partner", and cooperated with

child protection authorities; (b) the mother had taken "appropriate steps to address her worries about the father's parenting of the children by commencing a Motion to Change the parenting terms of the order shortly after she withheld the children"; and (c) the breach was short lived, and it would not be "in the children's best interests, or in the interests of justice generally, to find the mother in contempt" in the circumstances.

Justice Chappel was also clearly less-than-impressed by the father's insistence on trying to have the mother held in contempt "as a remedy of *first* resort in the face of numerous other remedies and options open to him which would have been much more supportive of the children's best interests and avoided the escalation of conflict that this motion has caused."

Accordingly, Justice Chappel dismissed the motion and directed the parties to deal with the problems that led the father to bring the contempt motion as part of the mother's Motion to Change.

Next time, might we suggest: take the hint.

Hear This. Say That.

***Grant v. Shihan*, FC-21-00001988-0000, 2024 — Nakonechny J.**

This case involved a disputed interim parenting motion.

The parties had one child together after a brief cohabitation. They had parented the child as separated parents for his entire life. The child, S, was four-years-old. On June 26, 2023, the parties consented to an order before Justice Minnema that provided the Father with 5/14 nights with the child, with the balance spent with the Mother.

While in Florida with S and his two older sisters from a previous relationship, the Mother engaged in heavy drinking. She was found by hotel staff passed out in the lobby. When she was carried to her room she began to vomit. She had to be taken for medical care and the children spent the night with Children's Services. The Father and his two adult children from a previous relationship flew to Florida to pick up S. The other children's father also flew to Florida to pick them up.

The Mother was charged with three counts of neglect of a child without bodily harm. While in police custody she told the police that she had smoked "something" and "lost all function." She also told emergency room staff that she was a "good mom" and "never this irresponsible." A blood alcohol sample taken from the Mother at the hospital showed a blood alcohol level of 0.197.

Upon returning to Ontario, the Mother initially agreed that the children should reside temporarily with their respective fathers. The Children's Aid Society investigated at the request of the Mother and found no concerns. The Mother resumed unsupervised time with her two daughters from a previous relationship.

With S it was a different situation. The Father did not consent to the Mother resuming the normal schedule. The Mother had only virtual parenting time with the child.

There were several preliminary issues to be decided:

1. The Mother sought to rely on letters from a Nurse Practitioner and a Psychiatrist that were attached as exhibits to her Affidavit. The Father argued that they should be struck as being inadmissible.

2. The Father argued portions of the Mother's Affidavit should be struck as inadmissible hearsay.

3. The Mother had adduced an Affidavit from her criminal counsel in Florida. A part of that Affidavit was a conversation between the criminal counsel and the District Attorney regarding the Mother's charges.

The Mother had been seeing the Nurse Practitioner for 14 years at the time of the motion. The Nurse Practitioner offered opinions regarding the Mother's mental health, her ability to parent the children, risk to the children in her care and what the parenting arrangements should be. The Mother argued that this letter supported her claim that she had no substance abuse or mental health issues, and S should be returned to her primary care.

Her Honour started with the point that judges have a gatekeeping role in determining the admissibility of expert evidence: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 CarswellNS 313 (S.C.C.) at paras. 1 and 20. This was to prove important in this case. The court struck the letter from the Nurse Practitioner as being inadmissible for the following reasons:

> 1. The Mother had attached the letter as an exhibit for the truth of its contents. But the letter was hearsay. It is not proper to attach a letter from a third party to an Affidavit on a motion and expect the court to rely upon the truth of its contents without an explanation as to why it was not possible to obtain a sworn Affidavit: *Chrisjohn v. Hillier* (2021), 54 R.F.L. (8th) 126 (Ont. S.C.J.); *Berger v. Berger* (2016), 85 R.F.3L. (7th) 259 (Ont. C.A.); *Katz v. Katz* (2014), 50 R.F.L. (7th) 1 (Ont. C.A.); *Botcharova v. Kamstra*, 2018 CarswellOnt 21552 (S.C.J.).
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> 2. The Nurse Practitioner's letter represented opinion evidence, which was a problem, because none of the requirements for an expert to give opinion evidence were met in this case. Interestingly, the court refers to Rule 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on this point, when the applicable rule was Rule 20.2 of the *Family Law Rules*, O. Reg. 114/99. In any event, the letter did not meet either Rule's requirements. There was also no acknowledgement of expert's duty.

The letter was struck.

The court then considered the letter from the psychiatrist. This letter did include a declaration setting out her qualifications, scope of review documents and consultation nature. The psychiatrist stated in her letter that these statements were "true to the best of her knowledge and belief." The letter contained the psychiatrist's professional assessment that the Mother was mentally sound, free from substance abuse disorders, posed no safety risk to the children and is perfectly capable of caring for them. This was based on a 2-hour 20-minute meeting with the Mother and a review of the Mother's medical file.

Upon receipt of the psychiatrist's letter the Father's counsel immediately requested production of the clinical notes and records reviewed by the psychiatrist. This request was denied by the Mother.

The court set out that without the records on which the assessment and opinion was based, the court could not determine the weight to give the psychiatrist's statement. As a result, on a without prejudice basis pending production of the records, the psychiatrist's letter was also struck.

The court struck paragraphs in the Mother's Affidavit referring to the two letters.

The court then considered the Affidavit of the Mother's criminal lawyer. In that Affidavit, the criminal lawyer recounted a conversation she had with the State Attorney assigned to the Mother's case and statements the State Attorney allegedly made to her. This was hearsay evidence and presumptively inadmissible.

While the criminal lawyer's Affidavit met the requirement under Rule 14(19) of the *Family Law Rules*, which *allows* (but does not mandate) that a judge admit Affidavit evidence that the affiant learned from someone else where the source of the information is identified and the affiant believes it to be true, it was not admitted. The jurisprudence requires the affiant to explain why the original source of the information did not swear their own Affidavit: *Berger v. Berger* (2016), 85 R.F.L. (7th) 259 (Ont. C.A.). Here, there was no explanation as to why an Affidavit from the State Attorney was not obtained. Here, the court had no way of assessing the criminal lawyer's perception, memory, narration and sincerity (i.e. minimizing the hearsay danger) as it related to her recounting of what she was allegedly told: *R. v. Baldree*, 2013 CarswellOnt 8033 (S.C.C.). Such untested evidence must not be given more weight than it deserves, especially when determining the child's best interests. The hearsay statements were struck.

Having determined the preliminary issues, the court considered the primary issue on the motion: would the Mother's parenting time return to the *status quo* or continue to be supervised?

S had resided primarily with the Mother since his birth up until the incident in Florida. While the parties had been able to co-parent, they had a fractious relationship, a lack of trust and a tendency to "blame and accuse the other of false claims and marginalizing their relationship with the child."

The Father argued the Mother had mental health issues and was neglectful in her care of S. The Mother accused the Father of domestic abuse and alienation. Both parties made allegations that were not limited to the Florida incident.

The Mother argued that the Father was "using" the events in Florida to gain an "advantage" in the litigation. The court pointed out that the Father did not somehow orchestrate her drinking or consuming some other substance. The allegations made against the Father indicated a "lack of insight and a failure to recognize just how serious these events were."

While the court determined that the incident was more than an "error in judgment," it went on to find that supervised time with S was not in his best interests. The court set out that supervised parenting time is an "exceptional remedy" which should only be ordered where there is a real risk of harm that cannot be addressed in any other satisfactory way: *S.I. v. I.I.*, 2013 CarswellOnt 5799 (S.C.J.); and *Gerasimopoulos v. Sambirsky* (2024), 4 R.F.L. (9th) 354 (Ont. S.C.J.) (where Justice Kraft provides a summary of principles with respect to supervised access). In this case, S needed to resume having in-person time with the Mother. While the concern did not rise to the level of supervised parenting time, the court did order remote alcohol testing through Soberlink. The court ordered that the Mother's parenting time would be gradually reinstated, subject to alcohol testing.

The Father had also sought a custody/access assessment under s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12. The court determined that the test for a s. 30 assessment as described by Justice Kiteley in *Glick v. Cale* (2013), 48 R.F.L. (7th) 435 (Ont. S.C.J.), was not met in this case. An assessment is lengthy, expensive and intrusive for the child. At the time, the court determined that it was in S's best interests to normalize a parenting schedule with his mother and have him enjoy time with both of his parents. The court was not satisfied that a s. 30 assessment was necessary for the case from an evidentiary or a therapeutic perspective or that it would be in the child's best interests.

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