

CITATION: Townsend v Marti, 2023 ONSC 5223
COURT FILE NO.: FS-17-21504
DATE: 20230915

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Dirk Townsend, Applicant

AND:

Isabel Bernaus Marti, Respondent

BEFORE: M. Kraft, J.

COUNSEL: The Applicant, in person

Dana Cohen, for the Respondent

HEARD: September 14, 2023

ENDORSEMENT

Nature of the Motion

1. This is a contempt motion brought by the applicant father seeking to find the respondent mother in contempt of paragraph 5(d) of the order of Nakonechny, J., dated January 3, 2020 (“Nakonechny order”), which states “*Both parties are entitled to chose up to one extracurricular activity per term per child without the consent of the other parent required.*” Essentially, the father wants the mother to be found in contempt of the Nakonechny order because she will not agree to facilitate and/or transport the parties’ 14-year-old son to Select Hockey games and practice on her scheduled parenting time.
2. The mother’s position is that there is no contempt and the father’s motion should be dismissed.

Issues to be Determined

3. The issues I must determine are:
 - a) Whether the mother has deliberately and willfully breached paragraph 5(d) of the Nakonechny order, proven beyond a reasonable doubt?
 - b) If the answer to a) is yes, what is the remedy for the mother’s contempt?
4. To determine whether the mother is in contempt, the factual and litigation background of the parties is relevant.

Factual and Litigation Background

5. The parties were in a long-term common law relationship. They have two children, B. and A. B. is in Grade 12 and A. is in Grade 9. The parties separated in July 2015.
6. The mother lives in the Danforth neighbourhood. She is a musician and a choir director. She works on Tuesday and Wednesday nights when the children are in the care of the father, for 2 hours on Monday nights, for part of the season, and on Friday nights, she gives piano lessons out of her home.
7. The father lives in the Parkdale neighborhood. He is self-employed. The father does not own a car, but he can drive. He chooses not to take a taxi/Uber and generally rides his bicycle or takes the TTC. He does not drive the children to or from any of their activities, or between the parties' homes.
8. In 2017, the parties settled their parenting issues by way of a Consent to a Final Order ("2017 Consent") at a case conference before Croll, J. The Order was never taken out, but it was filed with the court. Among other things, the 2017 Consent provides as follows:
 - (1) The parties share joint custody of the two children (now referred to as joint decision-making responsibility for the major decisions that impact the children);
 - (2) The parties were to immediately appoint a Parenting Coordinator ("PC") for a term of not less than 3 years and the PC was to have oversight and arbitral powers over any parenting issues that arise;
 - (3) The children were to reside with the parents on a 50/50 schedule. They reside with the mother every Monday and Thursday; with the father every Tuesday and Wednesday, and in each parent's care in alternate weekends from Friday to Monday morning;
 - (4) The parties were not to speak to the children about any parenting dispute or engage in discussions about the parenting issues with the children or with each other in the presence of the children (including at exchanges). The parties were not to speak to the children until there is an agreement or a decision by the PC.
 - (5) The parties were to keep the children in their "current extracurricular activities" and they were "*free to register the children for additional activities on his or her own weekdays*" (for the mother, that was Mondays and Thursdays and for the father, that was Tuesdays and Wednesdays). Any other activities, (i.e., new activities that overlap on the other parent's time, or on weekend time), were to be agreed upon or

addressed with the PC and the dispute was not to be discussed with the children until it was resolved. [Emphasis added].

9. Three years later, in 2020, the parties resolved their financial issues, the terms of which were incorporated into the Nakonechny order. Paragraph 5 of the Nakonechny Order under the heading “Child Support” provides:

“The children’s special and extraordinary expenses are:

.....

- (d) *Extracurricular activities as agreed upon in writing (and if no agreement, both parties are entitled to choose up to one extracurricular activity per term per child without the consent of the other parent required)....*

.....Any disputes about special and extraordinary expenses, including payment of these expenses may be addressed by the Parenting Coordinator”.

10. The parties appointed Sheila Gibb to act as their PC for a term of 2 ½ years. The parties agree there have been disputes about extra curricular activities since 2020 every year. More of the disputes centred around payment for the children’s s.7 expenses. In all arbitrations, the father was unsuccessful. Both parties gave evidence that significant funds were spent by them on the PC process, upwards of \$30,000.
11. At the end of the PC’s 2 ½ term, the father refused to continue to retain Sheila Gibb.
12. Since 2017, each parent has had his/her choice activity in which the children have been enrolled, as follows:
- (1) The mother’s “choice” activity is choir. Both children sign in a high-level choir known as Young Voices Toronto. They practice on Thursdays evenings and the mother takes them to choir practice, since they are in her care on Thursdays. The choir also has performances which fall on both parents’ times and which both parents do attend. The choir also travels in alternate years, giving the children the opportunity to perform overseas and in the United States.
 - (2) The father’s “choice” activity for the children is hockey. The children were playing house league hockey with the Parkdale Flames at the time the 2017 Consent was signed. House league hockey takes place on Saturdays and Sundays, and generally on other weekday nights. Even though this activity falls on the mother’s times, she agreed to their ongoing participation in house league hockey and has facilitated the children’s involvement in hockey. This was her agreement, even though the children play hockey in Parkdale and the games and practice are generally quite far from her home.

13. In the Fall of 2022, the oldest child, B. decided that he wished to participate in Select hockey with the Parkdale Flames. He was in Grade 11 at the time. Given his maturity and age, B. made arrangements to get himself to and from practices and games through carpools and TTC when the mother was not able to drive him there. Last year, in the 2022-2023 season, B. had 28 Select hockey games (1-2 games each week), most of which took place on weeknights, and an additional practice each week. This was in addition to house league which took place on 18 Saturday mornings and 12 Sunday mornings. There were many weeks when B. was playing hockey 4-5 times.
14. In October 2022, the father unilaterally enrolled A. in curling which was every Wednesday and Sunday. He did not tell the mother he had done this until after he had discussed with A. and committed to the league. The Sunday curling overlapped with house league hockey and the mother's parenting time. On October 14, 2022, the parties had an arbitration with Sheila Gibb about the children's extra-curricular activities. The father lost the arbitration, and the mother was awarded costs. After Ms. Gibb released her decision, the father advised the mother that he would not re-retain her as the PC, since her 2 ½ year term expired on October 15, 2022 and that he was dissatisfied with her services. Sheila Gibb was never asked to arbitrate about A.'s enrollment in Select Hockey.
15. Four days after the arbitration, on October 18, 2022, the father sent the mother an email he had received from a Select Hockey coach on October 16, 2022, inviting A. to play on the team. In his email, the father advised the mother that he had already spoken to A. and he was enrolling him on the Select Hockey team. The Select team had one additional practice each week, on Friday nights, when the mother teaches piano. As well, A. would have an additional 1-2 games a week, in addition to the house league games every Saturday and Sunday from November to March/April. Given the distance between the mother's home in the Danforth and the hockey which takes place in Parkdale, A.'s participation in Select Hockey would require lengthy travel, 4-5 times a week, often on school nights.
16. The mother immediately advised the father that she would not be able to assist in getting A. to any of his games and practices, during the week, given her work schedule. The father was content with A. taking the TTC, on his own with his hockey bag, to games and practices. At the time, A. was 13 years old. There were no available carpools since the hockey takes place in Parkdale, the father's neighbourhood, and the mother lives in the Danforth neighbourhood. It was not agreeable to the mother that A. travel on his own on the TTC, at his age, with a hockey bag to and from his Select Hockey games and practices. She did not feel it was safe or in his best interests to do so.
17. Despite the mother's objection, she submits that the father enrolled A. in the Select hockey, told A. he would be joining the team and took A. to the first two practices, which fell on his parenting time with A. The mother contacted the coach of the Select Hockey team by email. Her evidence is that she did so to understand the commitment involved and to determine if A. could remain on the team if his missed some games and practices. The father's evidence is that the mother told the coach, A. would not be able to participate. Whatever the case, the coach of

the Select Hockey team sent an email to both parents on October 25, 2022, advising that A. could not join the team unless he was committed to getting to all games and practices, as it would be unfair to his teammates, otherwise.

18. On November 8, 2022, the father's prior counsel, Eric Sadvari, wrote to the mother's counsel and the mother directly, stating that the father had consulted him. Mr. Sadvari's letter stated that if the mother did not commit to the Select Hockey for A., the father would return the matter to court. Ms. Cohen responded for the mother advising that the mother was not able to commit to facilitate or take A. to Select Hockey for the 2022/2023 season. The mother never heard from the father after this letter.
19. Four months later, in March 2023, the father advised the mother that he wanted A. to join the same Select Hockey team with the same coach for the 2023/2024 year, to start in October 2023. The mother told the father, again, that she could not facilitate getting A. to and from his Select Hockey games and practices and that she was concerned as well, since A. would be starting high school and it may be too much for him, along with his schoolwork and choir. Notwithstanding this, the mother told the father she would consider the Select Hockey for the 2023/2024 year if the father would commit to accompanying A. to and from practices and games from the mother's home when she was unable to do so. She made it clear that she did not feel it was safe or age-appropriate for A. to be travelling alone at night, across the city, by TTC with a heavy hockey bag, at age 14. The father would not take responsibility for driving A. to and from practices and games when the mother is unable to do so. Again, the father expected A. to get himself to and from his Select Hockey games and practices on the TTC with his hockey bag without an adult. When the mother would not agree, the father threatened to bring this contempt motion.
20. On April 12, 2023, the father served the mother with a Notice of Contempt, returnable on April 27, 2023. The contempt motion was then adjourned to May 9th, 2023.
21. The contempt motion did not proceed on May 9th, 2023, because the father failed to file a Factum or a motion confirmation form and the motion was struck from the list.
22. The father did not take steps to return the contempt motion until September 14, 2023, even though this has created a time urgency since the Select Hockey season is imminent.

ANALYSIS

23. Civil contempt is a quasi-criminal proceeding. To find a party in contempt of court, the leading cases advise that three elements must be found:
 - (1) The order that was breached must state clearly and unequivocally what should and should not have been done;
 - (2) The party who disobeys the order must do so deliberately and willfully;

(3) The breach of the order must be proven beyond a reasonable doubt; *Carey v. Laiken*, [2015] 2 S.C.R. 79, at paras. 32-25.

24. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language, or if external circumstances have obscured its meaning: *Ruffolo v. David*, [2019] O.J. No. 2427 (Ont. C.A.).
25. The contempt remedy is one of last resort. It should not be sought or granted in family law cases where other adequate remedies are available to the allegedly aggrieved party. Contempt findings should only be made sparingly where conferences to try to resolve access problems or motions for enforcement have failed. The remedy is not available where clear routes were available to the moving party to seek to vary or enforce terms of the order: *Hefkey v. Hefkey*, [2013] O.J. No. 1697 (Ont. C.A.).
26. Within the context of a family law dispute, the court should also take into account and exercise its discretion based on the best interests of the child. Any ambiguity in the text of the order should be resolved in favour of the person accused of contempt. A failure to comply with an order of the court will not be contempt if there are genuine, unresolved issues between the parties with respect to the manner in which it is to be carried into operation. *Ruffolo v. David*, [2019] O.J. No. 2427 (Ont. C.A.).
27. After the three criteria from *Carey v. Laiken* are established beyond a reasonable doubt, the judge must then consider whether she should exercise her discretion to decline to make a finding of contempt. A judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case. It is especially important for courts to consider the discretion to impose a contempt finding in high-conflict matrimonial cases: *Chong v. Donnelly*, [2019] O.J. No. 5048, 2019 ONCA 799 (Ont. C.A.).
28. In this case, the order the father claims the mother has breached is paragraph 5(d) of the Nakonechny order which, states that both parties are entitled to choose up to one extracurricular activity per term per child without the consent of the other parent required. As has been the case since the 2017 Consent, the father's "choice" activity for the children has been hockey and the mother's "choice" activity for the children has been choir. The father's argument is that his "choice" activity for the 2023/2024 year is "Select Hockey" and that he does not require the mother's consent. The father argued that the Nakonechny order replaced or supercedes the 2017 consent, which consent required the parties to consent before he/she enrolls the children in new extra-curricular activities that overlap with the other parent's parenting time or on the weekends.
29. I am not persuaded that the Nakonechny order replaced the 2017 Consent. Rather, I find that the 2017 Consent dealt with the parenting aspects of extra-curricular activities and the Nakonechny order dealt with the cost of the extra-curricular activities since it was a financial

agreement. The 2017 Consent specifies that the children are to be kept in their “current” extracurricular activities and that *any new activities that overlapped on both parties’ times, or weekend times, were to be agreed upon or addressed with the PC and that the dispute would not be discussed with the children until resolved.* At the time the 2017 Consent order was entered into the father’s “choice” activity was hockey and the mother’s “choice” was choir. Those same activities remain relevant for the children now. I find that the enrollment of the children in Select Hockey is a “new” activity, in that, it requires more participation than house league which was limited to Saturdays and Sundays, and therefore, requires more overlap on both parents’ parenting time, not only on the Saturdays and Sundays, but also on other weeknights. As such, pursuant to the 2017 Consent, the parties have to reach an agreement about A.’s enrollment in Select Hockey and, if they cannot reach an agreement, they are to address it with the PC.

30. Even if the father is correct that the Nakonechny order replaces the 2017 Consent, which I do not find that he is, paragraph 5(d) of that order specifically, states that if there a dispute about special and extraordinary expenses, including payment of these expenses, they may be addressed by the PC. As a result of this additional language, the operation of the Nakonechny order is unclear because one the one hand, the Nakonechny order states a party can enroll a child in an extra-curricular activity *without the consent* of the other party, and on the other hand, it contemplates how the parties are to address any disputes that arise in connection with an extracurricular activity dispute.
31. I do not find that the mother has breached the Nakonechny order on the following basis:
- (1) Paragraph 5(d) does not unequivocally state that the mother’s cannot dispute the children’s enrollment in Select Hockey. While, on the one hand, the subparagraph states that if the parties cannot agree in writing on the children’s extra-curricular activities in writing, both parties are entitled to choose up to one extracurricular activity per term per child without the consent of the other parent required, it also states later in paragraph 5, that if there are any disputes about extraordinary expenses, including payment of them, these dispute are to be addressed by the PC. It is not clear, therefore, whether the mother is entitled to dispute the father’s “choice” extra-curricular activity, particularly, since the order contemplates how extracurricular activity disputes are to be resolved. Further, since I find the 2017 Consent to be operative, given that Select Hockey is a “new” activity in that it requires far more commitment than House League hockey and it overlaps with the mother’s parenting time, more than just the Saturdays and Sundays, as House League hockey does, her agreement is required, in my view, before A. can be enrolled;
 - (2) I do not find that the mother disobeyed an order or that if she did, she did so deliberately and willfully. She and the father disagree about whether both the 2017 Consent and the Nakonechny order continue to operate. I have found that both orders are operative. Accordingly, I do not find that the mother has deliberately and

voluntarily breached the Nakonechny order. The mother clearly tried to reach a resolution with the father about how A. could be transported to and from Select Hockey when he proposed the new activity but the father would not agree to take responsibility for A.'s transportation on her time when she was unable to facilitate his attendance. This attempt on her part leads me to believe that the mother was not willfully breaching the terms of any order.

- (3) If I am wrong that the mother has not breached the Nakonechny order, I do not find that the breach has been established by the father beyond a reasonable doubt.
32. If I am wrong and the mother is in contempt of the Nakonechny order, then the last step in a contempt motion is for me to decide whether I would exercise my discretion to decline to make a finding of contempt.
33. Although it is not necessary that I take this additional step, since I have not found the three elements of contempt, if I am wrong and the mother is clearly in contempt, I would exercise my discretion and decline to impose a contempt finding because in my view, it would work an injustice in the circumstances of this case.
34. During the motion, the Court asked the father which of the orders outlined in Rule 31(5) of the *Family Law Rules*, O. Reg. 114/99 (“*FLRs*”) he seeks the court to make. He confirmed that he did not want the court to order the mother to be imprisoned, pay a fine, pay an amount as a penalty, or pay costs. Rather, the father wants the mother to facilitate A.'s attendance in all Select Hockey practices and games and pay for the cost of this extra-curricular activity. Given the remedy the father wants, I do not find that the father is truly seeking a finding of contempt. I do not believe that he has framed his motion correctly. The father is truly asking the court to enforce the terms of the Nakonechny order while ignoring the 2017 consent and decide that A. should be enrolled in Select Hockey even though the parties' 2017 Consent and the Nakonechny order clearly state that any disputes the parties have about extra-curricular activities are to be addressed by the PC. I cannot do so, given the clear terms of both the 2017 Consent and the Nakonechny order regarding parenting disputes.
35. Regrettably, the parties cannot avail themselves of a PC about the issue of A.'s enrollment in Select Hockey, because the father declined to renew the services of Sheila Gibb as the PC and no new PC has been appointed. This means, there is no PC currently involved with the family.
36. I note that in his confirmation form, the father for the first-time, stated that whenever A. is to arrive that the mother's home later than 10 p.m. after a Select Hockey game, he proposes to send A. via taxi or other car service if no other adult is able to accompany him. This offer, however, requires the mother to pay her share of the costs of this car service for as long as A. is under 16, meaning for another 2 years. Then, surprisingly, at the end of the motion, *after both parties had made submissions*, the father stated that he would be willing to meet A. at the subway in Parkdale and accompany him from the subway station in Parkdale to the arena and accompany A. back on the TTC back to the mother's home. This last-minute proposal on the

father's part still requires A. to take the subway on his own from his mother's home, with a heavy hockey bag, on nights where there are practices and games when the mother cannot drive him. These two last minute offers to resolve the issue of A.'s enrollment and participation in Select Hockey came long after the mother was put to the legal costs of preparing responding motion material which was incorrectly framed by the father. Further, neither of the father's proposals were agreeable to the mother, since A. would still have to travel alone on the subway in the evenings, at age 14, with a heavy hockey bag without adult accompaniment.

37. It was incumbent on the father to let the mother know how he would facilitate A.'s participation in the Select Hockey league far in advance of the motion, let alone prior to the motion being argued, or at the end of both parties' submissions. The father had ample opportunity between April 2023 and today, to schedule a case conference or ask the mother to participate in an alternative dispute resolution process. He chose not to do so. The father could have availed himself of unbundled legal services to obtain advice about how to frame the relief he sought in this motion. He failed to do so. The father had the advice of counsel through most of these proceedings and clearly understood why and how counsel could have been helpful. Finally, the father could also have offered to pick up and drop off A. at the mother's home and accompany him on the TTC, to ensure that he attended his Select Hockey games and practices if A.'s participation in the Select Hockey league was of such significant importance to him as he submitted. The father did not do so.
38. It is clear that these parties cannot reach an agreement on what is in A.'s best interests in terms of Select Hockey. It is also clear that the parties do not agree on whether it is in A.'s best interests to travel by TTC at night, at age 14, with a heavy hockey bag unaccompanied. Finally, even if the mother were to agree to an arrangement where the father would partially accompany A. on the TTC home only, there is no way for her to enforce such an order or ensure his compliance with such an order. This is particularly the case because of the nature of ancillary parenting orders and because there is no PC in place.
39. In view, pursuant to rule 2(5) of the *FLRs*, I am permitted to promote the primary objective of the rules by encouraging and facilitating the use of alternatives to the court process and making orders to help the parties to settle their cases. As such, I am ordering the parties to appoint a PC immediately, and in the interim, given the time sensitive nature of this decision, attend an urgent case conference.

ORDER

40. Accordingly, I make the following order:

- (1) The respondent's father's contempt motion is hereby dismissed;
- (2) The parties shall attend an urgent case conference on Thursday, September 21, 2023 at 12:00 p.m., to address whether they can reach agreement about A.'s participation in Select Hockey. Case conference briefs are not necessary, but the parties shall file

their positions as part of their Confirmation forms and refer to the contempt motion materials in the place of conference briefs;

- (3) The parties shall submit the names of three Parenting Coordinators of their choice to my attention, only after they have attended the urgent case conference if the issue of Select Hockey for A. is not resolved, and I shall choose one of the proposed PC's. In addition to providing the court with the names of the PCs, the party shall advise of the availability of each PC to take on this matter. The PC shall be retained by the parties for at least 1 year.
- (4) Pending a resolution of the dispute over whether A. shall be enrolled in Select Hockey, the father shall not commit to A. being on the Select Hockey team.
- (5) The parties shall serve and file costs submissions of no more than 3 pages, not including offers to settle or a Bill of Costs within 14 days of the release of this Endorsement. Any reply submissions shall be no more than 1 page and shall be served and filed within seven days of being served with a party's costs submissions.

September 15, 2023

M. Kraft, J.