[2022] JMSC Civ. 36

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2018HCV04736**

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| **BETWEEN** | **OLDRIAN BENITO OTTLEY** | **CLAIMANT** |
| **AND** | **SIMONE ROXANNE BROWN** | **DEFENDANT** |

**IN OPEN COURT**

**Mr. Lemar Neale instructed by Nealex for the applicant**

**Mrs. Denise Senior Smith instructed by Oswest Senior Smith and Co for the respondent.**

**February 3, 2022 and March 24, 2022**

**Contempt of court – failure to give access to child -- whether respondent in contempt of court**

**PETTIGREW, J**

## BACKGROUND

**[1]** The claimant filed a Fixed Date Claim Form on November 28, 2018. He filed an Amended Fixed Date Claim Form on the 15th of October 2019 seeking joint custody of his minor child with day to day care and control to himself and

reasonable access to the defendant who is the mother of the child M. M was born on February 16, 2011.

**[2]** On October 16, 2019, Pusey J made interim orders which granted the applicant access to M in the following terms:

> 4. *Liberal access to the father specifically on alternate weekends starting October 25, 2019 with adjustments for Mother's Day, Father's Day and birthdays. The father may pick up the child on Friday evenings and return her to school on Monday mornings.*
>
> 5. *Access also on half major school holidays with alternate Christmas holidays.*

**THE APPLICATION**

**[3]** The basis for this Notice of Application for Court Orders (NOAFCA) filed on November 5, 2021, is the allegation that the respondent ceased to comply with the orders of the court since March 22, 2021.

**[4]** In his NOAFCA, the applicant sought a declaration to the effect that the applicant is in contempt of court and consequently, an order that she be committed to prison for a period of six months or for such period as the court shall determine, as well as an order that her assets be confiscated. As an alternative to an order for the confiscation of the respondent's assets, the applicant asked that the respondent pays a fine.

**THE ISSUE**

**[5]** The single issue which arises for determination is whether the respondent who is also referred to as the defendant is in contempt of court.

**THE LAW**

**[6]** Rule 53.1 of the Civil Procedure Rules empowers the court to commit a person to prison or to make an order confiscating assets for the failure to comply with an

order requiring that person to do an act, whether within a specified time or by a specified date.

**[7]** Rule 53.9 deals with the exercise of the power referred to in 53.1. Rule 53.9 (2) provides:

*In addition to the powers set out in rule 53.10, the court may*

*(a) Fine the contemnor;*
*(b) Take security for good behaviour;*
*(c) Make a confiscation of assets order;*
(d) *Issue an injunction*

**[8]** Rule 53.10 sets out the procedure for making such an application and in particular speaks to the requirement for personal service of the Fixed Date Claim Form or the Notice of application on the person sought to be punished. It is also required that the grounds of the application be stated. In the case of **Hon Gordon Stewart OJ v Senator Noel Sloley Sr et al** [2011] JMCA 28 Morrison JA remarked that:

> *Section 2 of Part 53 deals with the more general power of the court to commit for contempt. The only pre-condition to the bringing of an application for an order to commit for contempt under this section (leaving aside for the moment the issue of whether the contempt alleged was committed within proceedings or not) is that the claim form or the application, stating the grounds of the application and accompanied by a copy of the affidavit in support, must be served personally on the person sought to be punished (rule 53.10 92)).*

**[9]** The applicant gave evidence that the respondent and her attorney-at-law were present when the orders were made and that they were served with the perfected formal order on October 22, 2019. The respondent did not take issue with the question of service. She admitted that she was served with the order that the applicant is seeking to enforce.

**[10]** In **Stewart Brown investment Ltd et al v National Import Export Bank of Jamaica Ltd et al,** [2020] JMCC Comm. 36 Laing J considered the question of whether it was necessary for the applicant to show mens rea on the part of the respondent in deciding whether there was contempt of court. The issue was raised in a context where the breach of an injunction was being considered but the observations are equally applicable to the present circumstances. He stated at paragraphs 61, 62 and 64:

> 61. In **Forest v LaCroix,** Valin J of the Ontario Supreme Court of Justice at paragraph 15 cited with approval Chadwick J in 884772 **Ontario Ltd v SHL Systemhouse Inc.,** [1993] O.J. No 1488 (Gen. Div.) that in order for the test relating to contempt of court to be satisfied, the following requirements must be met: (a) the order itself must be clear and unequivocal and not open to various interpretations; (c) in order to satisfy the criminal nature of the contempt proceedings, the party disobeying the order must do so in a deliberate and wilful fashion; and (c) in considering the evidence as to whether there has been a deliberate breach of the court order, it must be proven beyond a reasonable doubt. The approach in this case is therefore in keeping with the line of authority which I have accepted as accurately reflecting the law relating to the mental element to be applied to contempt proceedings. To the extent that it may be suggested that the African cases to which my learned brother Anderson J referred have imported a requirement that the failure to comply with the order must have been done in bad faith for there to be contempt, I do not accept that position, these cases being merely persuasive in any event.
>
> 62. Certainty of the Order is not in dispute and it is not ambiguous on its face. There is no ambiguity or vagueness which can avail EXIM to justify the use of the Notice in construing its terms. I have earlier in this judgment explained why the argument that the Order is too wide given the background of the proceedings is not accepted by the Court. However, I appreciate that the Order as framed in the context of the proceedings up to that point, may have initially led EXIM and its Counsel to have adopted a position which was misconceived in law.
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> 64. It is also settled law that the breach of an order, to constitute a contempt, has to be proved beyond a reasonable doubt. The Courts have repeatedly stated this, see for example the English Court of Appeal case of Re **Bramblevale Ltd**. [1969] 3 WLR 699 in which the Court held that a contempt of court is an offence of a criminal nature involving the liberty of the subject and therefore having regard to the gravity of the charge, guilt must be proved beyond reasonable doubt. Lord Denning M.R. also stated

> that where there are two equally likely possibilities before the court, it is not right to hold that the offence of contempt is proved beyond reasonable doubt.

**[11]** Mrs. Senior Smith relied on the case of **Perna v Foss** 2015 ONSC 5636 where it was said that:

> *The cases state that the civil contempt remedy is one of last resort and that great caution must be exercised when considering contempt motions in family law proceedings. Contempt remedies should not be sought or granted in family law cases where other adequate remedies are available to the alleged aggrieved party. Any doubt must be exercised in favour of the person alleged to be in breach of the order. (see* ***Prescott Russell Services for Children and Adults*** *(2006) 2006 CanLII 81792 (ON CA)* ***Hefkey v Hefkey*** *2013 ONCA 44…"*

**[12]** It was also extracted from that case that in order for the court to be satisfied that there has been contempt, there are three elements that must be established

(a) The order must be clear and not subject to different interpretations;

(b) The acts stated to constitute the contempt must be wilful rather than accidental;

(c) The events of contempt must be proven beyond a reasonable doubt.

**THE EVIDENCE**

**The applicant**

**[13]** The applicant gave evidence that on February 18, 2021, the Fixed Date Claim Form came on for trial before Nembhard J. but the trial did not proceed. He said

that both parties arrived at an agreement which was approved by the court. The approved agreement was to be reduced to a consent order.

**[14]** The applicant also said that his attorney-at-law prepared and sent the draft consent agreement and order to the defendant's attorney-at-law and requested M's Jamaican Passport number in order to finalize the consent agreement and order but the defendant's attorney-at-law did not provide a response.

**[15]** He gave further evidence that an email was sent to the defendant's attorney-at-law on March 29, 2021 with a reminder that Pusey J's orders were still operating, and that the Easter Holidays were approaching and a request that suitable arrangements be put in place to facilitate access to M. By letter dated April 27, 2021, the affiant said his attorney-at-law enquired about the consent agreement and order and informed the defendant's attorney-at-law that he has not had access to M since March 22, 2021.

**[16]** The applicant said that in response to the March 29, 2021 email, a legal assistant at the offices of the defendant's attorney-at-law informed him that they would seek instructions from their client and advise further. According to the applicant, no further response was forthcoming until May 5, 2021, when the defendant's attorney-at-law by letter, sought to explain why he had not had telephone access to M.

**[17]** The further evidence of the applicant was that he received no further response from the defendant's attorney-at-law and he was still not given access to M. Accordingly, on August 9, 2021, he said his attorney-at-law again wrote to the defendant's attorney-at-law requesting access to M and suggesting that an alternative person be used as an intermediary. He also stated that he requested the defendant to state what monies he had outstanding. The applicant stated there was also no response to this letter.

**[18]** According to the applicant, the defendant has been using the protection order which was discharged on November 3, 2021, to deny him access to M. He gave

further evidence that this was not the first time that the defendant has breached the order. He made reference to a breach by the defendant on March 27, 2020 whereby she refused him access to M and used as an excuse the government's measures to contain the spread of COVID-19. The applicant stated that he applied to the court to direct the defendant to comply with the court's order but did not pursue the application, as the defendant started to comply.

**[19]** He stated that even though the interim protection order was in place, the parties were able to derive a mechanism where he could get access to M. That is, M's godmother, uncle and aunt would act as intermediaries between the parties.

**[20]** In his affidavit in response to the defendant's affidavit, the applicant asserted that he did not refuse possible candidates to facilitate the pick-up of M since the defendant did not make any suggestion of possible candidates. He stated that on November 28, 2021, he met with M briefly in Cross Roads as Mrs. Gordon M's godmother, had informed him that M wanted to see him. He indicated that this meeting was unplanned and without the defendant's prior knowledge.

**[21]** It was revealed in cross examination that the applicant had access to M sometime on the weekend prior to the hearing. He also admitted that he had access to M for Christmas and New Year's of 2021/2022.

**[22]** The applicant revealed in cross examination that after Pusey J's order, M was to be picked up by him from school. When asked who should have facilitated access to M between March 2021 to September 2021, he said M should have been picked up from school as face to face interaction was taking place during that period. The applicant agreed that he made no mention in his affidavit that face to face classes were taking place at M's school during this period.

**[23]** When the applicant was asked if he had access to M just after covid-19 commenced in February 2020 up to March 2021 he at first said he didn't think so. However, when pressed, he admitted that he did.

**[24]** The applicant denied the defendant's assertion that M had called him wanting to spend the heroes weekend and that he had told her he could not accommodate her. He said that he and M did not discuss Heroes weekend but that M was aware that he was overseas because he had spoken to her via cell phone. The applicant further stated that a previous interim consent order required him to provide M with a phone so that he could have liberal access to her at any time without interference from the defendant.

**The respondent**

**[25]** The respondent in her affidavit conceded that there was an agreement by consent but states that the applicant agreed before the consent agreement was signed, to pay sums outstanding for the maintenance of M pursuant to the order of Pusey J, provide proof of these payments and pay the monthly maintenance sums. She further stated that the applicant has only been paying the monthly sums and that to date, he has not paid up his portions of the sums due for M's educational expenses that were incurred, proof of which she said has been provided to him.

**[26]** The respondent expressed that the applicant's attorney-at-law requested the draft consent order from her attorney-at-law and the request was fulfilled. She stated further that after this was done, she enquired of her attorney-at-law whether the applicant had paid the outstanding maintenance sums and was informed that they had received no documentation from the applicant's attorney-at-law.

**[27]** The respondent gave further evidence that her attorney-at-law communicated with the applicant's attorney-at-law about the issue which needed to be resolved before the execution of the consent agreement.

**[28]** It was also her evidence that the applicant was allowed access to M on November 28, 2021 and again on December 12, 2021. The defendant denied using the protection order as an excuse to deny the applicant access to M.

However, she said she will not put herself in danger to suit his needs. The defendant admitted that the applicant was not given access to M in March 2020 but asserted that she compensated the applicant for that time by giving him access to M for most of the Summer holidays. She also said she gave him access for the first part of the Christmas holidays but the defendant returned her early.

**[29]** The respondent further told the court that from the time the new orders were given, up to the time of Mrs. Gordon's departure, M would visit the applicant two consecutive weekends. Also, that during Mrs. Gordon's absence, M had telephone contact with the applicant, although there were times when M, of her own free will, would stop communicating with him. The defendant said she only restricted M from communicating with the applicant once, when she found out that he had authorised M's use of a social media platform which she had prohibited, and which the applicant had encouraged M to keep as a secret.

**[30]** The defendant stated that she at no time intentionally breached the court order by deliberately withholding M from the applicant. She explained that on October 16, 2019 before Pusey J there was suggestion of possible candidates if one person was not available, and the parties were only able to agree on M's godmother.

**[31]** Further, she stated that she has never prevented M from going to visit the applicant, but that she allowed her to do so whenever she wanted as long as it can be accommodated, even when it is outside of the boundaries of the order.

**[32]** She emphasized that there was no party that they could agree on to facilitate access when Mrs Gordon was absent. She stated further that when Mrs. Gordon returned to the jurisdiction on the 14th of August, she was not in Kingston for an extended period of time. Further, the defendant proposed giving up Easter, Summer and Christmas holidays to the applicant to substitute for the time the applicant was without physical access to M.

**[33]** When asked in cross examination if she agreed that the applicant did not have access to M from March 2021 to December 2021, she said that he did not have physical access but he had access via phone. The defendant agreed that one of her reasons for not being able to facilitate access was the existence of an interim protection order. She also agreed that after the discharge of the protection order, three weeks would have passed before the applicant saw M on November 28. She also agreed that between November 3 and November 28, there would have been two alternate weekends.

**[34]** When asked if the applicant's failure to pay maintenance was the reason for not signing the consent order, the defendant said it was not. She was shown her affidavit and the question was repeated, her response was "*the order was not perfected so I was not provided with anything to sign."*

**Assessment of the evidence**

**[35]** Upon reading the affidavits of the parties and hearing them under cross examination, the court was struck by the degree of animosity between two parents who together conceived a child with the resulting responsibility to raise her.

**[36]** The respondent stated that she remained fearful that the applicant would hurt her and despite her attempts, no suitable solution was found to facilitate visitation. The applicant said that in the letter he proposed alternative methods of complying with the court order in light of an interim protection order which the defendant obtained against him in December 2018. It is noted that the evidence showed that the order was discharged only in November of 2021. This court was not made aware of the precise terms of the order as it was not exhibited in these proceedings. From the evidence of both parties, it appeared to have at least severely limited the direct interaction between them. It was revealed during the course of the evidence that the respondent was not permitted to be at any place where the respondent was.

**[37]** Mrs Senior Smith elicited from the applicant in cross examination that he had access to M during Christmas 2021 and New Year 2022. It is to be noted that this was subsequent to the service of the present application on the respondent. It is not clear whether this access was facilitated through Mrs. Gordon. I believe it is a fair assessment when Mr. Neil said that the respondent facilitated access then only because she was served with the present application, service of which was effected on the 8th of December 2021. In any event, the obvious is that there was no complaint made in respect of this period.

**[38]** The many letters and email communication from the applicant's attorney-at-law to the respondent's attorney-at-law are demonstrative of a great deal of effort on the part of the applicant to put in place arrangements to see and spend time with M. Effort was made through email to the respondent's attorney-at-law to make arrangements for the Easter holidays of 2021. The applicant's evidence is that there was no response except to say that contact would be made with the respondent for her to give instructions in that regard. The respondent has not countered this assertion. There was further communication I on April 27, 2021 complaining about the lack of physical access since March and lack of telephone access since April 13.

**[39]** There was a response from the offices the respondent's attorneys dated May 5, 2021, explaining that the respondent has not prevented the applicant from having telephone access and that she encouraged M to speak to the applicant but that any inability to communicate with M by that medium, was as a result of M's lack of desire to communicate with the applicant. There was in fact communication from the respondent to her attorney-at-law to that effect. That communication also indicated that the reason M did not want phone access was because the respondent had threatened M that he would send the police for her on the Easter weekend. There was further communication on June 14th and then on August 9 from the applicant's attorney-at-law to the respondent's attorney-at-law. There was no other response to the applicant's communication.

**[40]** The three proposals mentioned in the June 14 letter as being put forward by the applicant were: the respondent conveying M to the applicant's gate by the guard hut and the applicant letting M into the premises, there was the suggestion of them meeting at a neutral place where M could walk from one vehicle to another, there was also the proposal of the parties meeting at KFC on Red Hills Road with one Roderick being the intermediary, and then the suggestion that he could use the assistance of the police to pick up M. It is to be noted that the suggestions were not communicated directly to the respondent by the applicant but through M. It seems clear to me however, that the various suggestions were communicated to the respondent by M. I say that because of the respondent's responses in cross examination.

**[41]** When asked if access could have been facilitated by using the means proposed in the June 14 letter especially item number 3 without breaching protection order, the defendant said she would not have subjected her child to being picked up by the police. When asked if she agreed that this method would not have breached the protection order she agreed that it would not have breached it. When asked by counsel if she acceded to the proposal in the April 27, 2021 letter she said she did not. She also agreed that after she and M recovered from Covid-19 she could have facilitated access. It is evident then that she was well aware of what counsel was referring to, and she made no protestations that the information had not been communicated to her at the relevant time. Yet there was no response to any of the applicant's suggestions.

**[42]** It was the respondent's evidence that she was in a quandary with respect to visitation for the Easter Holidays. She said the appointed person, Mrs. Sandra Maureen Gordon was not in the island and the applicant was advised of Mrs. Gordon's unavailability for pick up and drop off. The Defendant agreed that nowhere in her 2 affidavits did she say that Mrs Gordon was not available between August and November when she came back. It would have been quite easy for the respondent to include that information in one of the two affidavits filed by her in this application.

**[43]** Even if I have doubts as to the truthfulness of this assertion, it is evident that Mrs. Gordon is someone with whom the applicant was or could have been in contact with during the period. He did not say whether he contacted Mrs. Gordon or attempted to contact her. The respondent's evidence that in the May 5, 2021 letter, her attorney-at-law addressed the defendant's concerns to the suggestions made by the applicant and proposed that the parties have discussions regarding the outstanding issues must be viewed in the light of the contents of that letter to which she refers. The only outstanding matter to be discussed that was raised by the respondent's attorney-at-law in that letter, was the outstanding maintenance payments. Reference to an undertaking on the part of the applicant to address certain outstanding issues encapsulated in the consent order which he blatantly refused to do could only be a reference to outstanding maintenance payments.

**[44]** The respondent's evidence that in August 2021 she and M contracted Covid-19 and so she could not send M to the applicant is reasonable excuse but one which can account for a relatively short period. She said that after isolation, they were then faced with no movement days. Those factors did not prevent her from communicating with her attorney regarding the applicant's proposals.

**[45]** The respondent stated in her affidavit that she was uncomfortable with the person whom the applicant suggested for pick-up and drop-off. There is no suggestion however, that this position was communicated to the applicant.

**[46]** Her evidence that at a previous hearing, the applicant refused possible candidates suggested by her to facilitate drop offs and pick-ups as he did not have a cordial relationship with them, and her assertion that her suggestion of a neutral third party was rejected, cannot form an answer to queries or suggestions made by the applicant after the court hearing when he had begun to experience difficulties getting visitation.

**[47]** When the respondent was asked if she could have facilitated access on movement days, she said it could have been facilitated, provided somebody was available to assist with drop-off and pickup. Again, there was no real response to

the suggestions put by the applicant. What is quite evident is an atmosphere of unwillingness by the respondent to be cooperative or in any way innovative so as to prevent the substantive order for access to the applicant from being frustrated.

**[48]** Finally, it is to be noted that after this application was filed, the applicant had physical access. It was not made clear in the evidence if it was Mrs. Gordon's availability that made that access a reality.

**[49]** Although the respondent emphasized that there was no party that they could agree on to facilitate access when the godmother was absent, it may be garnered from the totality of the evidence that there was no effort on her part to make any alternative arrangement. The respondent has not in my view, offered any satisfactory explanation as to why during the extended period between March and November 2021, she could not at any time have participated in discussions to facilitate alternative arrangements in order for the applicant to have physical access to M in keeping with the order of the court. It is noted that when he did in November, it was not with her prior knowledge and/or agreement. Her evidence was that she learned of the interaction in November after the fact and that she did not have a problem.

**[50]** It is evident that the applicant was making efforts to have arrangements in place but to no avail. Even though the respondent denied in cross examination that her failure to participate in making arrangements to facilitate the exchange of M had any causal relationship with his failure to pay sums alleged to be outstanding for maintenance, it did not escape the court's notice that she made the assertion and sought to explain at length that the applicant owed sums in respect of maintenance. Those observations however are not definitive of the application.

**[51]** The order of Pusey J, envisaged that the exchange would take place at school. This court recognizes the fact the word 'may' was utilized it stating that the transfer of M would take place at school. Ordinarily, the use of the word 'may' would indicate that the pick up at school was merely an option. However, in my view, it is not to be treated in the circumstances as expressing a possibility or an

option. I say that in a context where it must have been known that there existed a protection order and a great degree animus between the parties. The order did not entail any specific arrangements as to how the exchange would take place when school was not in session. It would not have been envisaged by the court or anyone else, that there would be a change of circumstances such as was created by the onset of the Covid 19 pandemic.

**[52]** I accept the respondent's evidence that the arrangement for exchange at school was rendered unworkable upon the onset of the pandemic and the attendant disruption of regular face to face attendance at school. I reject the evidence of the applicant that there was regular face to face attendance at school during the period March to September of 2021. I believe it is open to this court to take judicial notice of the fact that many schools including those at the primary and preparatory level imparted the lessons remotely to the students during that period. The applicant gave no affidavit evidence that M's school was operating on a face to face basis. It was only in cross examination that he sought to say that school was operating on a face to face basis. In the absence of some tangible proof such as a letter or other information from the school that children were attending in person, this court is not prepared to accept that that in fact occurred.

**[53]** There was therefore no formal arrangement in place to facilitate the exchange of M after March of 2020 when school was not operating on a face to face basis. It is noted that the main complaint is that the respondent failed to adhere to the court order as at March 2021. However, the applicant also said that he was refused access on March 27th, 2020 and that he had filed an application in May of 2020 but had not served it upon the respondent since she began to comply with the order.

**[54]** The court order however, also envisaged access to the applicant on occasions when school would not have been in session. Order number 5 gave access for

half of major school holidays and alternate Christmas holidays. It was not spelt out how such access was to be facilitated in terms of the exchange.

**[55]** Looking at the orders of the court, the involvement of M's godmother was an arrangement finalized out of court between the parties. It became clear however from the evidence of both parties that some discussion took place in court about a third party facilitating the exchange between the applicant and the respondent, although no such arrangement was embodied in any of the orders made. It is also the evidence of both of them that Mrs. Gordon facilitated the process. The applicant disagreed that Mrs. Gordon's involvement was initiated based on any agreement between himself and the respondent. He said that he was the one who held the discussions with Mrs. Gordon to facilitate the exchange on occasions when M was out of school. The respondent's evidence that Mrs. Gordon left the jurisdiction between March and August 2021 and that after her return to the jurisdiction in August of 2021, she was not in Kingston, was not effectively challenged by the applicant.

**[56]** Being mindful that this is a case of civil contempt, and in light of the learning derived from **Stewart Brown investment Ltd et al v National Import Export Bank of Jamaica Ltd et al** and **Perna v Foss**, I now consider whether the conduct of the respondent amounts to contempt. It cannot be seriously disputed that there was a period when the respondent was totally uncooperative and made no effort whatsoever to facilitate the applicant having contact with M. I cannot however say that there was very clearly a deliberate and sustained decision to flout the order of the court. I say this against the background that the order did not only entail the fact of the applicant having access, but it also directed how access was to take place. Except for the order that M was to be picked up at school on Fridays and returned on Mondays, there was no definitive order in place as to how precisely the access should be facilitated when school was not in session.

**[57]** I am not oblivious to the efforts on the part of the applicant to make alternative arrangements through his attorney-at-law but any such arrangement if it had been made, would have been outside of the terms of the orders made as far as the pickup and drop off of M was concerned. Such arrangement would of course have prevented the order for access from being frustrated. I am mindful of the requirement that the act/s constituting the breach must be wilful. The animus between the parties and the existence of the protection order were sufficiently problematic. These problems were compounded by the advent of Covid 19 and the consequent imposition of remote methods of teaching and learning in schools, the latter being important because it was at school that the exchange would take place. The unavailability of Mrs. Gordon even further compounded the problem. It would be fair to say that the advent of the pandemic presented the need for the parties or either of them to make a new application before the court in order to facilitate the weekly access in circumstances where the respondent was not cooperating with the applicant's efforts to work out some other agreement through his attorney-at-law.

**[58]** The aspect of the order regulating the transfer of M was effectively frustrated after March of 2020. There was only an informal arrangement in place via the involvement of Mrs. Gordon. The Learned Judge had left it open to the parties outside of when school was in session to make their own arrangements for the transfer of M. Based on the orders made, there would not have been many occasions when the parties would be required to make other arrangements, since the order was also that M should spend half of school holidays with the applicant. It is often the case that parents are able to make arrangements for the transfer of children outside of a specific order of the court regulating precisely how it is to be done.

**[59]** The relationship between the parents in this instance is such that flexibility in the arrangement for transfer cannot be the order of the day. This is not a situation where it could be said that the terms of the order were not clear. It is however the changed circumstances that rendered the order unworkable in the absence of

cooperation between the parties. The changed circumstance is a factor that weighs heavily in this instance. This is a very borderline case and the civil contempt remedy should be one of last resort especially in family law proceedings. In any case involving a child the welfare of the child is of paramount importance and unless the circumstances are very clear and unequivocal, a sanction that can only serve to cause further and possibly permanent divide should be avoided. I decline to find that he respondent was in contempt as the respondent's conduct did not rise to the level of inexcusable behaviour required.

**[60]** I reiterate that the respondent is not blameless. The respondent must be made aware that orders of the court are not to be taken lightly and that it is expected that there will be full cooperation in order to facilitate compliance with the orders in the future and that any disobedience of the orders on her part without there being clear justification, will be met with the appropriate sanction. The orders of Pusey J made on October 16, 2019 remain in force until further orders are made.

**[61]** So as to ensure that the applicant does not experience the difficulties that he encountered in the past, it is ordered that the applicant and the respondent shall cooperate fully with each other in agreeing on a mutually convenient point for the transfer of M between them on occasions when school is not operating on a face to face basis or on any occasion when the transfer is to occur other than at school.

**[62]** The application is dismissed. In all the circumstances, the respondent is not deserving of costs. Each party will bear his/her own costs.

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**Pettigrew-Collins, A.**
**Puisne Judge**