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An Access Order is Not a Suggestion

A case comment on the Court of Appeal for Ontario decision in *Godard v. Godard*[1]

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The Court of Appeal's recent decision in *Godard* has sent a firm message to parents: access orders are not simply a suggestion. A parent's failure to facilitate court-ordered access could give rise to a finding of contempt. Indeed, in *Godard*, the Court of Appeal upheld Justice Tremblay's finding that the mother was in contempt due to her failure to do all that she could to attempt to comply with the access order. Simply put, the access order required the mother to deliver the child to the paternal grandparents' home[2] and the mother's failure to do so contributed to a finding of contempt.

In *Godard*, the mother had demonstrated a prior pattern of frustrating the father's access to the child, S., who was 12 years of age at the time of the father's contempt motion. In fact, in a prior court order, Justice Cornell noted that he had "serious concerns that the [mother] is engaged in a pattern of behaviour designed to alienate [S.] from her father". No doubt guided by that concern, Tremblay J. noted the following undisputed facts in his decision in the father's contempt motion:

- The [father] last had access to his daughter, S., the weekend of January 10-12, 2014, that is more than a year ago at the time of the hearing of [the] motion;
- S. was 11 years old at the time of the last period of access, 12 years old at the time of the alleged contempt of the court order by the [mother] and recently turned 13 years old;
- S. is under the impression that she could decide, starting at the age of 12, whether she wished to continue with access to the [father];
- S. does not want to have access with the [father] for undetermined reasons and refuses to attend; and
- The [mother] was aware of

> [access order] and understood its terms.[3]

In the context of those facts, Tremblay J. found that the mother had "effectively abdicated her parental authority on the issue of access" by allowing the child to decide if access would take place. Justice Tremblay took great issue with this approach and went on to find the mother in contempt. The mother appealed.

There were three issues on appeal, one of which was Tremblay J.'s finding that the mother had deliberately and wilfully breached the access order. It was the mother's position that since Tremblay J. accepted that the child did not want to see her father and that the mother had made some efforts to facilitate the court-ordered access, Tremblay erred in finding deliberate and wilful disobedience and consequent contempt. The Court of Appeal disagreed. The Court offered the following helpful comments:

> "Although a child's wishes, particularly the wishes of a child of S.'s age, should certainly be considered by a court prior to making an access order, once the court 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. As stated by the motion judge, Ontario courts have held consistently that a parent "has some positive obligation to ensure a child who allegedly resists contact with the access parent complies with the access order": [references omitted]
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> No doubt, it may be difficult to comply with an access order, especially as children get older. Parents are not required to do the impossible in order to avoid a contempt finding. They are, however, required to do all that they reasonably can. In this case, the motion judge inferred deliberate and wilful disobedience of the order from the [mother's] failure to do do [sic] all that she reasonably could: she failed to "take concrete measures to apply normal parental authority to have the child comply with the access order".[4]

The Court of Appeal went on to remark that the mother did not go beyond mere encouragement to attempt any stronger forms of persuasion. By deferring the decision to the child about whether access would proceed, the mother failed to take the steps necessary to avoid a finding of contempt. While the Court recognizes that physical force is inappropriate, a parent must not abdicate the decision to the child and must, at a minimum, engage in strong forms of persuasion.

The Court's decision is also instructive for lawyers when it comes to drafting provisions with respect to access. In particular, an access provision should clearly and unequivocally state not only the access to which the access parent is entitled, but also the steps the residential parent is required to take in order to facilitate that access. For example, in *Godard*, the mother was required to deliver the child to the paternal grandparents' home "on Fridays at 6:30 p.m. at 137 Gough Street in Kapuskasing". Incorporating an obligation on the part of the residential parent into a consent order or separation agreement will likely increase the likelihood of a finding of contempt in the event the agreed upon access does not proceed.

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1 *Godard v. Godard, 2015 ONCA 568.*

2 Pursuant to the Order of MacDonald J. dated November 3, 2014, which order was made on consent of the parties.

3 *Godard, supra*, at para. 10.

4 *Godard, supra*, at paras. 28 and 29.

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