In the Court of Appeal of Alberta

Citation: JLZ v CMZ, 2021 ABCA 200

Date: 20210528
Docket: 2101-0063AC
Registry: Calgary

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Between:

JLZ

Appellant

\- and -

CMZ

Respondent

Restriction on Publication

Identification Ban – See the *Child, Youth and Family Enhancement Act*, section 126.2.
No person shall publish the name or photograph of a child or of the child's parent or guardian in a manner that reveals that the child is receiving, or has received, intervention services.
NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Corrected judgment: A corrigendum was issued on July 2, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Jolaine Antonio

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J.C. Price
Dated the 12th day of March, 2021
Filed on the 15th day of March, 2021

(Docket: 4801-182850)

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Memorandum of Judgment

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The Court:

[1] Following an earlier finding that the mother had engaged in parental alienation, a case management judge ordered that the father have unsupervised parenting time with the younger of the couple's two children. The order directed the mother to take the child at a specified date and time to the reunification counsellor's office to facilitate the visit. The mother failed to do so. The case management judge held that the mother was in contempt of the order. Having regard to the circumstances leading up to and including the finding of contempt, the case management judge ordered on an interim basis that the primary care of both children be changed from the mother to the father until such time as the matter could be fully heard at the end of April. The mother appeals.

Background

[2] The parties separated in July 2019. They have two children now ages 5 and 2. Since the separation there have been continued disputes in relation to the father's parenting time. On August 13, 2020 the case management judge found the mother in contempt of two parenting orders and found that the mother had engaged in parental alienation: 2021 ABQB 229 (*QB #1*). The court directed that the parties commence family reunification therapy with the goal of achieving a parenting schedule for the father. The case management judge made a further order, setting out a schedule for the father's parenting time in the following weeks. The mother's appeal of those orders was dismissed by this court on December 4, 2020 and the parties were directed to return to the case management judge: 2020 ABCA 431. The father had had no parenting time with his children since June 2020.

[3] The parties returned to case management and on February 8, 2021, the case management judge stayed the parenting time with respect to the older child unless recommended by the reunification counsellor. With respect to the younger child, the case management judge ordered that the father have unsupervised parenting time on three dates, February 11, 19 and 25, 2021 (the "February 8, 2021 Order").

[4] The order directed: "On February 11, 2021 at 11:00 a.m., following the Reunification Counselling, the [father] shall pick up [the younger child] from Dr. Froberg's office for unsupervised parenting time and shall return her to Dr. Froberg's office at 1:00 p.m." Similar directions were made for the other dates.

[5] The mother did not take the younger child to the court-ordered parenting time on February 11, 2021. She later claimed that the younger child said things to her which indicated sexual abuse by the father. An RCMP investigation has since concluded that there was no indication of abuse.

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[6] The father brought an application for contempt. There were case management meetings on February 18 and 25, 2021 addressing the contempt application, and the ongoing RCMP investigation. Ultimately, all issues were adjourned to a case management meeting on March 12, 2021.

[7] On March 12, 2021 the case management judge found the mother in contempt and granted the father primary care of the children, pending a three-day hearing to address parenting issues tentatively scheduled for late April 2021 (the "Contempt Order"). The case management judge reviewed the history of persistent acts of contempt by the mother and concluded that it was in the best interests of both children to be removed from their mother's care. She also considered the reports of the experts who had interacted with the father and found that the father posed no risk to the children.

[8] This is the order under appeal.

Grounds of Appeal and Standard of Review

[9] The mother submits that the case management judge:

(a) Failed to follow due process;

(b) Relied on outdated, untested evidence and hearsay evidence;

(c) Decided the outcome prior to hearing the submissions;

(d) Erred in determining that the mother did not have a reasonable excuse for failing to follow the February 8, 2021 Order;

(e) Erred in issuing a parenting order as a consequence of the finding of contempt; and

(f) Incorrectly applied the best interest test in s. 16 of the *Divorce Act*, RSC 1985, c 3 (2nd Supp).

[10] The finding of contempt involves the application of a legal standard to the facts and is therefore a question of mixed fact and law reviewed for palpable and overriding error: *Demb v Valhalla Group Ltd*, 2016 ABCA 172 at para 30, citing *Alberta v AUPE*, 2014 ABCA 197.

[11] Parenting decisions are exercises of discretion. This court will only interfere if the trial judge erred in law or made a material error in the appreciation of the facts: *Van de Perre v Edwards*, 2001 SCC 60 at para 13.

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Discussion

Due Process

[12] The mother submits that the case management judge erred in failing to adjourn the March 12, 2021 hearing in order to permit *viva voce* evidence and cross-examination of the parties on their affidavits. She contends that the case management judge rushed the proceedings and failed to set out a process which led her to make a decision on contradictory evidence. Further, the contempt application could have been heard at the hearing scheduled for late April 2021.

[13] The contempt application was returnable on February 18, 2021. On that date, the mother had retained new counsel and the case management judge adjourned the application to February 25, 2021 to enable the mother to file her response affidavit and for new counsel to prepare. The contempt application was further adjourned to March 12, 2021 as a result of the RCMP investigation and a Practice Note 5 report. The mother filed her affidavit and the father filed a reply affidavit. All of this material was filed before February 25, 2021. At no time prior to the March 12, 2021 hearing did the mother seek to cross-examine the father on his affidavits.

[14] The case management judge made clear on February 25, 2021 that the contempt application would proceed on March 12, 2021. This was not a circumstance of contradictory evidence on the issue of whether the mother ought to be found in contempt. The February 8, 2021 Order was clear. The mother acknowledged that she had notice of the order and that she did not comply with it. The only remaining issue was whether the mother had a reasonable excuse for so doing. All of the evidence on this issue came from the mother. A cross-examination of the father would not have assisted.

[15] Decisions regarding adjournments are highly discretionary and attract considerable appellate deference, unless they are clearly unreasonable. We find no reviewable error in the chambers judge's decision to refuse to adjourn the hearing.

Reliance on Outdated, Untested Evidence and Hearsay Evidence

[16] There are two threads to this ground of appeal. The first is rooted in the case management judge's earlier decision which found the mother to have alienated the children. The complaint is that this finding was based upon evidence which had not been tested. The case management judge had regard to a Practice Note 7 assessment of the father prepared by Ms Glenda Lux, M.A., R. Psych.

[17] Ms Lux concluded the father could, as well or better than most other parents in the general population, adequately meet the children's needs and there were no physical or emotional risks to the children beyond those that exist in the general parenting population: see *QB #1* at para 38.

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[18] The mother submits that she ought to have had the opportunity to cross-examine Ms Lux.

[19] Ms Lux's assessment was completed in February 2020 and was provided to the court and counsel. The father relied upon this assessment in the numerous court applications since February 2020. Nothing in the record before us indicates that any of the mother's previous counsel sought to cross-examine Ms Lux. Nor did her current counsel make such a request until March 12, 2021.

[20] The second thread relates to the reports of Dr Froberg (the Reconciliation Counsellor) and a letter from Constable Stacey. Constable Stacey's letter of March 10, 2021 stated that on February 20, 2021 the mother had made a report of a disclosed event of child abuse. The RCMP opened an investigation and were assisted by the Child Advocacy Centre who interviewed the children. The letter further stated that no information was provided by either child to indicate any form of abuse. It concluded, "With no additional corroborative information we do not have any concerns at this time for the childrens['] safety with the father."

[21] The mother submits that the case management judge erred in relying upon "hearsay" evidence which was not tested by cross-examination. However, at the March 12, 2021 hearing there was no objection to the court considering the reports of Dr Froberg or the letter from Constable Stacey.

[22] The Court of Queen's Bench has instituted a series of practice notes which result in reports from professionals whose role is to assist the court in contentious family law proceedings. Relevant to this appeal are Family Law Practice Notes 5 and 7.

[23] Practice Note 5 applies to family law actions where one parent makes an allegation of child sexual abuse against the other parent. The party making the allegation is to file a completed Form 1 (Notification). Children's Services then designates a special investigator to complete Form 2 (Child Protection Screening) and assess if there are grounds for an investigation. If it is determined the matter does not warrant an investigation, a copy of the completed Form 2 will be forwarded to the appropriate justice of the Court of Queen's Bench. The rules governing Practice Note 5 provide that the reports are to be made directly to the court and the court is to use the information in determining whether to consider "changes to custody, access, parenting or contact, and whether the action should be subject to case management."

[24] After engaging the RCMP and providing them with a statement, the mother filed a Form 1 on February 22, 2021. Form 2 was ultimately completed by Children's Services and concluded the matter would not be proceeding to an investigation. It further indicated that Children's Services, Calgary Police Services, the RCMP, and Alberta Health Services were consulted. While there was insufficient information to proceed with a criminal investigation and a children's services assessment, the RCMP nevertheless decided to have the children forensically interviewed to ensure no abuse. The children were interviewed at the Calgary and Area Child Advocacy Centre on March 5, 2021 and no sexual abuse disclosures were made by either child.

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[25] Practice Note 7 relates to interventions completed by parenting experts for families experiencing conflict. The rules governing Practice Note 7 state that the purpose of such an intervention is twofold. First, to have a parenting expert report back to the court and assist the court in identifying challenges specific to the family and to facilitate resolution of those challenges with the assistance of the parenting expert. Second, to bring the parenting expert under the jurisdiction and protection of the court. In this context, a parenting expert is a friend of the court who must provide an independent report to the court. Practice Note 7 further states that a parenting expert "will not provide an opinion or recommendation on parenting time, parenting responsibilities, decision making, or relocation. The Parenting Expert can, however, describe what is happening with the child(ren) and within the family dynamic."

[26] There are several types of interventions that fall under Practice Note 7. For example, a parent psychological evaluation involves the parenting expert examining if there are risk factors present that suggest the parent cannot adequately meet the child's needs. This is the type of intervention Ms Lux completed of the father in February 2020. A parent-child reunification assists parents and children to become reacquainted. We understand this to be the type of intervention Dr Froberg was retained to perform.

[27] The case management judge did not err in having regard to the reports provided by these professionals to the court or the letter from Constable Stacey. This information is contemplated by the practice notes and central to the case management judge's task of determining the best interests of the child. There is no merit to this ground of appeal.

Predetermination of the Contempt

[28] The mother submits that the case management judge had made the decision to find the mother in contempt prior to the March 12, 2021 hearing. She points to comments which the case management judge made on February 18, 2021:

> I think the -- that what we're trying to do now is address the fact that your client has now just retained new counsel, she's in contempt of my order, and trying to address what to deal -- how to address this given the fact that she's in direct contempt of this -- of the -- of my direction and order. There is absolutely nothing that I see, notwithstanding that she's had well over a week's time, she knew when she was not in compliance with my order when she was not in compliance.

[29] It is important to place these comments in context. The contempt application was originally returnable on February 18, 2021. At the February 18, 2021 case management meeting the mother's previous counsel was granted permission to withdraw from the file and an agent appeared for the mother's new counsel. There was a discussion of drafting procedural orders for the April hearing and the court turned to the application for contempt. The agent requested an adjournment and stated that the mother's affidavit could be filed quickly, and before the next scheduled case management meeting on February 25, 2021. The father's counsel expressed concern that the

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adjournment request affected the further parenting visits scheduled for February 19 and 25. The case management judge reminded the mother's counsel that the father had not seen the children since June 2020 and that the mother had not complied with the February 8, 2021 Order. There was some discussion about meetings with Dr Froberg and the case management judge made the comments referred to above. The father's counsel then outlined what her contempt application would involve, including a request to change parenting. The case management judge granted the request for an adjournment to February 25, 2021.

[30] The well-known test for reasonable apprehension of bias was described in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 20 as follows:

> ...what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that (the decision-maker), whether consciously or unconsciously, would not decide fairly. (Citation omitted.)

[31] Given the strong presumption of judicial impartiality, the test requires a real likelihood or probability of bias. The party alleging bias has a high burden of proving the claim: *Yukon Francophone School Board* at paras 25-26. Determining whether a reasonable apprehension of bias exists depends on the facts of the case. The impugned conduct must be viewed in the context of the circumstances and in light of the whole proceeding: *R v S (RD)*, [1997] 3 SCR 484 (per Cory J) at paras 114, 141, 1997 CanLII 324 (SCC).

[32] Our review of the record as a whole does not persuade us that the case management judge had already decided that the mother was in contempt. She had not received the mother's evidence with the explanation for her actions, nor had the court received the reports from the RCMP. While the case management judge's choice of words in the impugned passage is unfortunate, when placed in context we are satisfied that she intended to say that the mother was not in compliance with the order, as she has stated earlier.

Reasonable Excuse

[33] Rule 10.52(3) of the *Alberta Rules of Court*, Alta Reg 124/2010, provides:

> A judge may declare a person to be in civil contempt of Court if
>
> (a) the person, without reasonable excuse,
>
> (i) does not comply with an order, other than an order to pay money, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge.

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[34] “It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice”: *Carey v Laiken*, 2015 SCC 17 at para 38 and cases cited therein.

[35] At issue in this appeal is whether the case management judge erred in concluding that the mother did not have a reasonable excuse for failing to comply with the February 8, 2021 Order.

[36] The mother submits that she had a reasonable excuse: she says that on February 11, 2021 she was at the RCMP detachment reporting a disclosure by the younger child of sexual abuse by the father.

[37] The mother’s affidavit of February 22, 2021 deposes that on February 6, 2021 the younger child was tickling her genitals and when asked by the mother who does that to her, she replied, “Dad does.” The mother deposed to a similar disclosure on February 7, 2021 by the younger child to the grandmother.

[38] The mother further deposed that she was advised by her sister that on February 9, 2021 the sister made follow up calls to the RCMP regarding an incident on August 8, 2020 involving disclosures made by the older child and advising of the new disclosures made by the younger child. A constable replied that there was no confirmation that Child and Family Services was ever engaged on August 8, 2020. The mother further deposed that the grandmother attended the RCMP detachment on the evening of February 9, 2021 and gave a statement. Concerned with no follow up by the RCMP, the sister called the detachment again and on the evening of February 10, 2021 a constable contacted the mother and said she needed to make a statement. On February 11, 2021 a constable came to the mother’s home at 1:30 a.m. The two spoke on the phone at 2:00 a.m. and the constable advised the mother to come to the station. She did so at 4:00 a.m., spoke with the constable and gave a statement. The grandmother provided an additional statement at 7:00 a.m. The mother deposed that the constable urged her to apply for an emergency parenting order. She was mistaken about this as the RCMP suggested an emergency protection order rather than a parenting order. She remained at the detachment until approximately noon on February 11, 2021.

[39] The father’s submissions in relation to this evidence was that the mother’s actions and the timing of them was suspect. She did not contact the RCMP on the weekend when the alleged disclosures by the child were made, nor did she contact Dr Froberg at that time. At the hearing on February 8, 2021 the mother made no mention of the child’s disclosures. The record reveals that the mother and her counsel were at the hearing and did not raise concerns with the parenting order.

[40] The father’s submission regarding the mother’s intent was supported by an email exchange between the mother and Dr Froberg:

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> After the case management session on February 8, 2021, I had to consider how to move forward.
>
> For this reason, I knew I had to pursue a formal avenue, making the police report and ensuring that the information provided was detailed and accurate. I have not successfully leveraged the case management sessions as a mode of dealing with matters of safety and concern. Instead, I have been accused of "parental alienation" in interim findings, which has not been substantiated by tested evidence, and attempting to delay the process.
>
> …
>
> I did not disclose the behaviours and statements on February [8], 2021 as I have been trying to tread lightly during case management and concluded that I had to make a formal statement as I have found that any allegations (for lack of a better term) have been dismissed during case management. I was collecting information and working towards filing a formal report. Despite having previously brought concerns forward, I was not advised of the "Form 1" application as an available option. The disclosures on the weekend were very concerning and required formal action.

[41] The case management judge considered the mother's evidence and her actions. There was ample support in the record for her interpretation of that evidence: that after the February 8, 2021 Order was issued, the mother commenced a series of actions to provide her with an excuse to breach the order. The case management judge also had regard to the letter from Constable Stacey which concluded there was no basis to the allegations.

[42] We owe deference to the case management judge's interpretation of the evidence and her conclusions, absent palpable and overriding error. Her conclusion that the mother had no reasonable excuse for failing to comply with the order is supported by the record. We are not persuaded of any reviewable error in the case management judge's conclusion that the mother was in contempt of the February 8, 2021 Order.

Change of Parenting as a Consequence of the Contempt

[43] There must be consequences for the intentional breach of a court order. Contempt is used to uphold the court's dignity and process. Contempt of court cannot be reduced to a mere means of enforcing judgments; it should be used cautiously and is considered an enforcement power of last resort: *Carey* at paras 30, 36 (citations omitted).

[44] The Contempt Order stated that "as a result" of the contempt, the primary care of the children changed from the mother to the father. The father was given "interim sole care of the children" and the mother would have "no parenting time with the children of the marriage except at the sole discretion of the [father] pending the oral hearing of this matter on April 27-30, 2021."

[45] The mother submits the case management judge erred in ordering a change of parenting. We consider first whether any legislation or common law prevented the case management judge from exercising her discretion as she did.

[46] The court's discretion to impose consequences is guided by the *Rules of Court*, and its inherent jurisdiction.

[47] Rule 10.53 sets out available sanctions for contempt of court:

> (1) Every person declared to be in civil contempt of Court is liable to any one or more of the following penalties or sanctions in the discretion of a judge:
>
> > (a) imprisonment until the person has purged the person's contempt;
> >
> > (b) imprisonment for not more than 2 years;
> >
> > (c) a fine and, in default of paying the fine, imprisonment for not more than 6 months;
> >
> > (d) if the person is a party to an action, application or proceeding, an order that
> >
> > > (i) all or part of a commencement document, affidavit or pleading be struck out,
> > >
> > > (ii) an action or an application be stayed,
> > >
> > > (iii) a claim, action, defence, application or proceeding be dismissed, or judgment be entered or an order be made, or
> > >
> > > (iv) a record or evidence be prohibited from being used or entered in an application, proceeding or at trial.
>
> (2) The Court may also make a costs award against a person declared to be in civil contempt of Court.
>
> (3) If a person declared to be in civil contempt of Court purges the person's contempt, the Court may waive or suspend any penalty or sanction.

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> (4) The judge who imposed a penalty or sanction for civil contempt may, on notice to the person concerned, increase, vary or remit the penalty or sanction.

[48] Rule 10.55 specifically provides that nothing in the *Rules of Court* takes away from the superior court's inherent power to find someone in contempt: "Nothing in these rules prevents or is to be interpreted as preventing the Court, as a superior court, from exercising its inherent power to cite in contempt and punish those who disobey the Court's lawful orders or who otherwise display contempt for its process."

[49] Other than ss. 65(3)(b) and 65(6)(a) of the *Family Law Act*, SA 2003, c F-4.5, which stipulate that the court can issue a contempt order if a party fails to comply with a court order to provide the other party with financial information necessary for the determination of support, there are no specific provisions addressing contempt of court in the *Family Law Act*, the Family Law Rules under Part 12 of the *Rules of Court* or the *Divorce Act*.

[50] The rules governing civil contempt do not exclude application to parenting orders: *Saunders v Saunders*, 2017 ABQB 163 at para 10. However, courts generally exercise restraint in such cases: *Salloum v Salloum* (1994), 154 AR 65 (QB), 1994 CanLII 18355 (AB QB) at para 20.

[51] The court's discretion to order consequences for contempt must be proportionate and reflect the gravity of the offence and the personal culpability of the contemnor: *Mella v 336239 Alberta Ltd (Dave's Diesel Repair)*, 2016 ABCA 226 para 34, citing *Alberta Dental Assn v Unrau*, 2001 ABQB 315 at para 20.

[52] In Alberta, some decisions have cautioned against changing parenting as a consequence for contempt of a parenting order: *Van De Veen v Van De Veen*, 2001 ABQB 753 at paras 38-46. Other decisions have found a change of parenting to be appropriate: *Sheppard v Boyde*, 2010 ABQB 165 at para 21.

[53] In *Tremblay v Tremblay* (1987), 82 AR 24 (QB), [1987] AJ No 875 (WL), the father applied to change parenting after bringing multiple applications for contempt. The court concluded it was in the best interests of the children to live with the father, and in coming to this result commented at para 15:

> The court should not automatically change custody if the custodial parent refuses access or otherwise interferes with the development of a normal parent and child relationship between the noncustodial parent and the child of the marriage. However, where the parent refuses access, serious questions are raised about the fitness of that person as a parent. The refusal to grant access after it is ordered is a change in circumstances sufficient to satisfy s. 17(5) of the Act.

[54] Recently, in *B(RM) v B(DT)*, 2019 ABQB 826 (*B(RM) QB*) both parents brought applications to designate their respective homes as the children's primary residence. The court

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found that both parents had engaged in alienating behaviours but the father's behaviour was more egregious. The court was concerned with the father's repeated failure to comply with court orders. Ultimately, the court found it was in the best interests of the children to be in the primary care of the mother, and have no contact with the father. This change was done pursuant to an application to vary the parenting regime. In dismissing the appeal, this court stated in *B(RM) v B(DT)*, 2020 ABCA 11 at para 33:

> In a divorce, if the children's best interests are not being served by their parents, the court has a mandate to intervene. In addition, the court has a general jurisdiction, *parens patriae*, to ensure the children's best interests are met. Clearly in this case that is not happening. The court will continue to exercise its jurisdiction as necessary and expect that its orders be followed.

[55] We acknowledge that the change in parenting in *B(RM) QB* occurred in an application to vary the parenting regime; however, this court's observation reinforces the principle that if the children's best interests are not being met, a court may order a change in parenting, as long as it is in the children's best interests.

[56] There is no consensus across Canada as to resort to a change in parenting in these circumstances. Some courts have used a change in parenting as a consequence for contempt: *JS v JW*, 2005 ONCJ 329 at paras 17-28; *Wong v Barnard*, 2010 MBQB 64 at paras 51-64; *AU v TC*, 2018 NSFC 9 at paras 41-43; see also *Rogers v Rogers*, 2008 MBQB 131 at paras 111-114 for a discussion on remedies for contempt of parenting orders.

[57] However, a change in parenting is viewed as an extreme remedy that should not be lightly ordered: Nicholas Bala et al, "Alienated Children and Parental Separation: Legal Responses in Canada's Family Courts" (2007) 33 Queen's LJ 79 at 128; Judy Miyauchi & Ann C Wilton, *Enforcement of Family Law Orders and Agreements: Law and Practice* (Toronto: Thomson Reuters, 1989) (loose-leaf, release 2021-01), ch 2 at 2§4(7)h (online: WestlawNext Canada). Further, the Ontario Court of Appeal has stated that a change in parenting should **not** be used as punishment for contempt: *Chan v Town,* 2013 ONCA 478 at para 6.

[58] In *Chan*, the mother was found in contempt for interfering with the father's parenting time during the March break. The court concluded the mother had manipulated one of the daughters into believing she could go on a school trip and therefore it was the mother's fault when the daughter refused to go to Whistler with the father. As a remedy, the father was given primary parenting time and decision-making authority for both children. The Court of Appeal overturned the contempt finding as the evidence did not support it, the contempt application did not have sufficient detail for the mother to know the case she had to meet, and one of the mother's affidavits had been ignored: at paras 3-5.

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[59] In addressing the remedy for contempt, the Court of Appeal held at para 6:

> Custodial arrangements of children cannot be used as a punishment for contempt. That is not to say that there may not be a circumstance where a change in custodial arrangements would be in the best interests of the child, but this is not that case. There was no motion to vary the final order for custody based on a material change in circumstances.

[60] Although the court was clear that a change in parenting is not an appropriate punishment for contempt, we do not read this decision as foreclosing the possibility that a change in parenting may be required to protect the best interests of the child when a parent fails to comply with court orders and is found in contempt. A change in parenting where required to protect the children's best interests is available, not as a punishment per se, but as a consequence of a parent who fails to comply with court orders. Failure to comply with a court order made in the children's best interests is not in their best interests. Nor is persistent failure to do so.

[61] We also refer to the following cases, which reinforce that if the court is considering a change in parenting in response to a finding of contempt, any change must be in the children's best interests: *Prekaski v Prekaski*, 2015 SKQB 76 at paras 6-7; *Chong v Donnelly*, 2019 ONCA 799 at para 11; *Ruffolo v David*, 2019 ONCA 385 at para 19; *Balice v Serkeyn*, 2016 ONCA 372 at paras 12, 17; *Soper v Gaudet*, 2011 NSCA 11 at paras 52-56.

[62] In summary, a change in parenting is available following a finding of contempt. It should be used with restraint. It must be proportionate to the gravity of the conduct and the personal culpability of the contemnor and the court must consider other, less drastic measures. The overriding principle is whether the order is in the best interests of the child. Two of the courts' fundamental obligations form the foundation of this case: the obligation to safeguard the dignity of the courts and the force of their orders, and the obligation to safeguard the best interests of children. The primary mechanism by which the courts protect children is the making of orders. A parent's wilful and repeated contempt of court orders may force the court to consider whether it can effectively maintain its *parens patriae* role while the children are in that parent's care. In rare circumstances, a change of parenting might be necessary in service of the children's best interests and the courts' ongoing obligation to protect them.

[63] In the context of parental alienation generally, although not specific to contempt, there are four options available to the court:

> Do nothing and leave the child with the alienating parent;
>
> Direct a custody reversal by placing the child with the rejected parent;
>
> Leave the child with the favoured parent and order therapy; or

> Provide a transitional placement where the child is placed with a neutral party and therapy is provided so that eventually the child can be placed with the rejected parent.
>
> *B(RM) QB* at para 112; Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 8th ed, (Toronto: Irwin Law, 2020) at 622, citing *WC v CE*, 2010 ONSC 3575 at para 129.

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[64] The mother now says she did not have notice that a change in parenting was a possible consequence for a finding of contempt. For over eight months the father had been requesting parenting time and his applications included requests to change primary parenting. Our review of the record satisfies us that it was well known to the mother that this request would be made if the court made a finding of contempt.

[65] What options were available here? There had been a previous finding of contempt and a finding that the mother had alienated her children. Despite numerous orders and court appearances to attempt to permit the father some parenting time, there had been no success. The father had participated fully in the reconciliation counselling. The court understood that it would take more time to enable parenting with the older child. Dr Froberg suggested that there could be unsupervised visits with the younger child. It was on the heels of this that the mother found another reason to prevent this visit.

[66] The imposition of a fine was unrealistic in light of the earlier contempt order which imposed costs. After considering that option the case management judge commented that, "as it is continuing and persisting, and in pure consideration of the best interests of the children, other relief needs to be ordered beyond costs."

[67] We observe that imprisonment was unrealistic and would still have resulted in the mother losing the primary care of her children.

[68] It bears repeating that this was not the first breach of a court order directing some parenting time to the father and not the first finding of contempt. The father completed every step imposed upon him: a Practice Note 7 assessment, drug and alcohol testing, reconciliation counselling with Dr Froberg: *QB #1* at para 42. At each stage, his attempt to have some parenting time was opposed. The case management judge was sensitive to the situation of the older child who was experiencing difficulty in the reconciliation counselling with the father and was careful to order parenting only with the younger child. While a change of parenting as a consequence for contempt of a court order should be rare and used with restraint, in our view the case management judge did not have other realistic options in this case. At the end of the day the question is whether the case management judge's decision to change the primary care of the children was in their best interests.

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Best Interests of the Child

[69] The recent amendments to the *Divorce Act* came into force on March 1, 2021. Section 7.2 addresses the protection of children from conflict and provides that a party to a proceeding shall, to the best of their ability, protect any child of the marriage from conflict arising from the proceeding.

[70] Section 16 addresses the best interests of the child and makes clear that in making a parenting order the court shall take into consideration only the best interests of the child: s. 16(1). The primary consideration is the child's physical, emotional and psychological safety, security and well-being: s. 16(2). Section 16(3) directs that in determining the best interests of the child, the court shall consider all factors related to the circumstances of the child and lists a number of factors that should be considered. Among the factors are the spouse's willingness to support the development and maintenance of the child's relationship with the other spouse and the ability and willingness of each parent to communicate and cooperate on matters affecting the child: ss. 16(3) (c) and (i).

[71] Another factor to consider is family violence. Section 16(3)(j) provides:

> In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including…
>
> (j) any family violence and its impact on, among other things,
>
>> (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
>>
>> (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child;

[72] Section 16(4) sets out factors relating to family violence, including whether there is a pattern of coercive and controlling behaviour in relation to a family member; and the physical, emotional and psychological harm or risk of harm to the child: s. 16(4)(b) and (d).

[73] In determining the best interests of the child, the court must not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order: s. 16(5).

[74] The case management judge had regard to these factors. With respect to s. 7.2 she found that rather than protect the children from conflict, the mother had done the opposite. With reference to s. 16(2), the case management judge was concerned that the mother's actions negatively impacted the physical, emotional and psychological safety and well-being of the children.

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[75] She stated that she had considered all of the best interest factors listed in s. 16(3) but in particular she considered the family violence factor in s. 16(3)(j). After reviewing ss. 16(4) and (5) she concluded:

> In this case, I deem that the past contact of [the mother] in relation to the children – and most recently, in the unsubstantiated allegations that were made, following a direct order that I made, without having raised any of those concerns to the Court or to counsel, and waiting until the day that access was to occur, is past conduct which I deem to be harmful to the children. And all of the subsequent conduct that occurred thereafter in relation to attempting to substantiate those unsubstantiated allegations.

[76] The mother submits that the case management judge failed to apply the full scope of the best interest factors, and that she appeared to have applied the factors only to the mother. She points to events in the past which she says are indicative of family violence on the father's part. The record reveals that during the period leading up to the application in August 2020 and in attempted visits with the father in August and September of 2020, the father was angry and the agency tasked with facilitating the visits was concerned. The case management judge was aware of this history. The mother's submission that the case management judge failed to specifically address this in her decision on March 12, 2021 is largely a complaint about insufficient reasons. When the proceedings are reviewed as a whole and the March 12, 2021 decision placed in context, we are not persuaded that the case management judge failed to consider the father's history.

[77] The mother's remaining submissions are focussed on the weight which the case management judge gave to other factors. The mother contends that the case management failed to give sufficient weight to the children's ages, the bond with their mother, and the fact that the mother had been the primary parent since the separation. It is not our role to reweigh these factors. The case management judge was fully familiar with these factors and was concerned about how to best facilitate the children's transition from their mother's care to the father.

[78] We are satisfied that the case management judge considered the best interests of these children and that she did so with regard to the *Divorce Act* and the entire record. We dismiss this ground of appeal.

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Conclusion

[79] We are not persuaded of any reviewable errors in the case management judge's decision. The appeal is dismissed.

Appeal heard on May 4, 2021

Memorandum filed at Calgary, Alberta
this 28th day of May, 2021

Authorized to sign for: Paperny J.A.

Rowbotham J.A.

Authorized to sign for: Antonio J.A.

Appearances:

D.P. Castle
T. Kelm
for the Appellant

P.L. Pritchett
for the Respondent

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Corrigendum of the Memorandum of Judgment

References to Ms Lux as Dr Lux have been removed and corrected to read as Ms Glenda Lux, M.A., R. Psych. and Ms Lux.