NOVA SCOTIA COURT OF APPEAL
Citation: *A.M.G. v. C.J.K.*, 2024 NSCA 62

Date: 20240626
Docket: CA 526342
Registry: Halifax

Between:

A.M.G.

Appellant

v.

C.J.K.

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	March 19, 2024, in Halifax, Nova Scotia
Subject:	Principles of contempt in family proceedings; Sentencing for contempt in family proceedings; retroactive child support
Cases Considered:	*McLean v. Sleigh*, 2019 NSCA 71; *R. v. G.F.*, 2021 SCC 20; *Michel v. Graydon*, 2020 SCC 24; *Hickey v. Hickey*, [1999] 2 S.C.R. 518; *White v. Bradley*, 2024 NSCA 44; *Ward v. Murphy*, 2022 NSCA 20; *Donner v. Donner*, 2021 NSCA 30; *Carey v. Laiken*, 2015 SCC 17; *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151; *Soper v. Gaudet*, 2011 NSCA 11; *Godin v. Godin*, 2012 NSCA 54; *Ruffolo v. David*, 2019 ONCA 385; *Moncur v. Plant*, 2021 ONCA 462; *Chong v. Donnelly*, 2019 ONCA 799; *Turenne v. Turenne*, 2024 MBCA 18; *T.G. Industries Ltd. v. Williams*, 2001 NSCA 105; *Keinick v. Bruno*, 2012 NSSC 218; *Colucci v. Colucci*, 2021 SCC 24.

Summary:

The parties are the parents of two children. At the time of their separation in 2014, the parties agreed the children would spend equal time in the home of each parent. This arrangement was incorporated into a Corollary Relief Order ("CRO") in 2017.

After nearly six years of alternating parenting time, in March, 2020 the children stopped going to the respondent's home. They were 13.5 and nearly 12 years of age at that time. Shortly thereafter the respondent filed an application to vary in which he sought to enforce his shared parenting time as set out in the CRO.

The appellant also filed an application to vary in which she sought to change the parenting arrangement. Her affidavit asserted the two children were refusing to spend equal time with their father, and instead, wished to reside primarily with her and have parenting time with him on a less structured basis. The appellant requested the parties retain joint custody of the children, but that they be in her primary care.

In June 2020, the respondent filed a Notice of Motion for Contempt Order, in which he alleged the appellant was in contempt of the CRO. He asserted his contact with the children had terminated and the appellant was engaging in parental alienation. He further expressed grave concern for the well-being of the children given the "incompetence" of the appellant as a parent.

What ensued was a series of court appearances, multiple submissions, the ordering of a Voice of the Child Report, a Custody and Access Assessment with a Mental Health Component, two settlement conferences, two interim orders which altered the parenting arrangements on a without prejudice basis, and an Amended Notice of Motion for Contempt, all amid the Covid-19 pandemic. Unfortunately, all these steps and the resulting passage of time did not lessen the family's strife.

The respondent's motion for contempt was heard on February 27, 2023, just short of three years after he first alleged the appellant was failing to follow the parenting order. The hearing judge found the appellant guilty of seven of 13 alleged counts of contempt.

A sentencing hearing was held five months later. After hearing the submissions of counsel, the hearing judge imposed:

- A fine of $60,963 against the appellant payable to the respondent. This was calculated as being the quantum of child support the respondent would have been obligated to pay the appellant up to the time the children attained 19 years of age;

- The fine was to be satisfied by terminating the respondent's obligation to pay prospective child support;

- 350 hours of community service (100 hours for each year the appellant was found to be in contempt) to be completed within 24 months of the date of the sentencing order; and

- A suspended sentence of 90 days imprisonment.

The appellant's application to vary was subsequently heard three months after the sentencing (nearly three and a half years after it was filed) utilizing by agreement the evidence offered by the parties on the contempt motion. As part of her application, in addition to seeking a change of the equal time parenting arrangement, the appellant had requested a retroactive variation of support based on an undisclosed increase in the respondent's income, as well as the fact that since March 2020 the children were in her sole care. By the time the application was heard, the respondent consented to a variation removing any

reference to parenting time between himself and the children but argued he should not pay retroactive support.

Although the hearing judge calculated the amount of retroactive child support owing by the respondent as being $29,874.00 based on the financial evidence presented to him, he declined to award it. At the same time, the hearing judge declined to grant costs in relation to the application to vary but awarded the respondent costs in the amount of $3,500.00 arising from the contempt proceeding.

On appeal, the appellant challenged the validity of the contempt findings and the sentence imposed. She further asserted the hearing judge erred in dismissing her claim for retroactive support, and said the costs awarded against her should be set aside.

By way of cross-appeal, the respondent took issue with aspects of the hearing judge's conclusions. In particular, the respondent argued the hearing judge erred when he found the appellant not guilty of five allegations of contempt. Further, the respondent asserted the hearing judge misapplied the principles of sentencing resulting in a penalty that did not properly reflect the seriousness of the appellant's misconduct. Finally, the respondent argued the hearing judge erred in his cost determination and asked this Court to replace it with an award of costs in his favour of $33,140.24.

Issues:

(1) Did the hearing judge identify and apply the correct legal principles in assessing whether the appellant was guilty of contempt and were the reasons he provided sufficient?

(2) Did the hearing judge identify and apply the correct legal principles in sentencing the appellant for contempt and were the reasons he provided sufficient?

(3) Did the hearing judge err in dismissing the appellant's application for retroactive child support?

(4) Should the hearing judge's costs award be varied by this Court?

Result: The appeal is allowed and the cross-appeal is dismissed.

The hearing judge did not apply the correct legal principles when assessing whether the appellant's behaviour constituted contempt. As such, all the findings of contempt were set aside.

Given the above determination, the sentence levied against the appellant was vacated.

Although the hearing judge properly ascertained the quantum of retroactive child support owing by the respondent, he erred in declining to award it due to what he deemed to be the appellant's contemptuous behaviour and the hardship occasioned by the respondent's legal fees.

The Court directed that the costs ordered payable by the appellant in the court below be returned to her forthwith.

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Appellant

v.

C.J.K.

Respondent

Judges:	Farrar, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	March 19, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed and cross-appeal dismissed with costs, per reasons for judgment of Bourgeois, J.A.; Farrar and Van den Eynden, JJ.A. concurring
Counsel:	Patrick J. Eagan, for the appellant/cross-respondent Allison Kouzovnikov, for the respondent/cross-appellant

Reasons for judgment:

[1] The appellant, Ms. G.,[1] and the respondent, Mr. K., are the parents of two children. At the time of their separation in 2014, the parties agreed the children would spend equal time in the home of each parent. This arrangement was incorporated into a Corollary Relief Order ("CRO") in 2017.

[2] After nearly six years of alternating parenting time, in March, 2020 the children stopped going to the respondent's home. They were 13.5 and nearly 12 years of age at that time. Shortly thereafter the respondent filed an application to vary in which he sought to enforce his shared parenting time as set out in the CRO.

[3] On April 2, 2020, the appellant also filed an application to vary in which she sought to change the parenting arrangement. Her affidavit asserted the two children were refusing to spend equal time with their father, and instead, wished to reside primarily with her and have parenting time with him on a less structured basis. The appellant requested the parties retain joint custody of the children, but that they be in her primary care.

[4] In June 2020, the respondent filed a Notice of Motion for Contempt Order, in which he alleged the appellant was in contempt of the CRO. He asserted his contact with the children had terminated and the appellant was engaging in parental alienation. He further expressed grave concern for the well-being of the children given the "incompetence" of the appellant as a parent.

[5] What ensued was a series of court appearances, multiple submissions, the ordering of a Voice of the Child Report, a Custody and Access Assessment with a Mental Health Component, two settlement conferences, two interim orders which altered the parenting arrangements on a without prejudice basis, and an Amended Notice of Motion for Contempt, all in the midst of the Covid-19 pandemic. Unfortunately, all of these steps and the resulting passage of time did not lessen the family's strife.

[6] The respondent's motion for contempt was heard on February 27, 2023, just short of three years after he first alleged the appellant was failing to follow the parenting order. In an oral decision rendered April 25, 2023 the hearing judge,

[1] Given the sensitivity of the information contained in this decision regarding the children of the marriage, I have chosen to anonymize the parties.

Justice Robert M. Gregan, found the appellant guilty of seven of 13 alleged counts of contempt.

[7] A sentencing hearing was subsequently held on July 26, 2023. After hearing the submissions of counsel, the hearing judge imposed:

- A fine of $60,963 against the appellant payable to the respondent.[2] This was calculated as being the quantum of child support the respondent would have been obligated to pay the appellant up to the time the children attained 19 years of age;

- The fine was to be satisfied by terminating the respondent's obligation to pay prospective child support;

- 350 hours of community service (100 hours for each year the appellant was found to be in contempt) to be completed within 24 months of the date of the sentencing order; and

- A suspended sentence of 90 days imprisonment.

[8] The appellant's application to vary was subsequently heard on October 17, 2023, nearly three and a half years after it was filed, utilizing by agreement the evidence offered by the parties on the contempt motion. As part of her application, in addition to seeking a change of the equal time parenting arrangement, the appellant had requested a retroactive variation of support based on an undisclosed increase in the respondent's income, as well as the fact that since March, 2020 the children were in her sole care. By the time the application was heard, the respondent consented to a variation removing any reference to parenting time between himself and the children but argued he should not pay retroactive support.

[9] Although the hearing judge calculated the amount of retroactive child support owing by the respondent as being $29,874.00 based on the financial evidence presented to him, he declined to award it. At the same time, the hearing judge declined to grant costs in relation to the application to vary, but awarded the respondent costs in the amount of $3,500.00 arising from the contempt proceeding.

[2] The respondent had requested a fine of $250,000.00.

[10] On appeal, the appellant challenges the validity of the contempt findings and the sentence imposed. She further asserts the hearing judge erred in dismissing her claim for retroactive support, and says the costs awarded against her should be set aside.

[11] By way of cross-appeal, the respondent takes issue with aspects of the hearing judge's conclusions. In particular, the respondent says the hearing judge erred when he found the appellant not guilty of five allegations of contempt. Further, the respondent asserts the hearing judge misapplied the principles of sentencing resulting in a penalty that did not properly reflect the seriousness of the appellant's misconduct. Finally, the respondent argues the hearing judge erred in his cost determination, and asks this Court to replace it with an award of costs in his favour of $33,140.24.

[12] The appeal and cross-appeal were heard on March 19, 2024. At the conclusion of the hearing the panel reserved its decision but ordered the penalty imposed by the hearing judge stayed pending the release of the Court's decision.

[13] For the reasons set out below, I am satisfied the hearing judge's finding of contempt was fatally flawed and should be set aside, along with the sentence imposed. Additionally, I am of the view the hearing judge's decision to decline granting the retroactive child support was tainted by the outcome of the contempt motion. I am further satisfied the costs awarded against the appellant in relation to the contempt hearing ought to be set aside. In short, I would allow the appeal and dismiss the cross-appeal.

Procedural and Evidentiary Background

[14] As noted earlier, the children were in the joint care of their parents by virtue of a CRO. It had incorporated a separation agreement entered into between the parties in 2014. The "Parenting Plan" outlined therein established the parties would have "joint legal custody" of the children, with equal parenting time on a rotating week schedule. Shared parenting continued on that basis for six years.

[15] On March 15, 2020, the respondent was scheduled to pick up the children for his week of parenting time. The children did not go with him.

[16] On March 18, 2020, the respondent filed an application to vary in which he sought to enforce his parenting time as set out in the CRO.[3] There was no mention of the respondent seeking a finding of contempt at that time. He explained his reason for the application as follows:

> I write to verify that I was refused the scheduled custody on my children as detailed in the supplied separation agreement. [Ms. G.] indicated that the kids did not want to come with me and refused to get them ready to go with me and did nothing to support me in having my scheduled custody.
>
> I called the Police and they said the kids verified that they did not want to come, and they could not remove them from her home.
>
> The children are both minors and do not have the ability or right to make this decision. It is additionally against the Children Bill of Rights which states "The right to not choose sides or be asked to decide where they want to live".

[17] On April 2, 2020, the appellant through her legal counsel, filed her own application to vary. She requested the children remain in the joint custody of both parties, but the existing order be changed to reflect they were in her primary care. In her supporting affidavit, the appellant acknowledged the children did not go with their father as scheduled on March 15th, but provided the following additional evidence:

> 7. For the last few years, I have been engaged in a constant struggle with the children to try to ensure that I continued to respect the terms of the February 2017 Order.
>
> 8. Not long after [Mr. K.] and I separated in the spring of 2014 and I left the matrimonial home, I purchased a home only about a block over from the matrimonial home, in order that I could better accommodate the shared parenting agreement between [Mr. K.] and I which has been in place since early 2015.
>
> 9. It has been readily apparent to me – as I have observed and the children have vocalized – at least over the past few years, that the children have been experiencing a greater and greater degree of anxiety and stress owing to the requirement that they continue to split their time between my and [Mr. K.'s] home.

[3] Although entitled an "Application to Vary", the respondent was not seeking a change to the existing order. He simply sought to have it enforced.

> 10. [Mr. K.] and I have extremely different parenting styles, with his extremely disciplined and strict and my more fluid and accommodating to the circumstances.

[18] The appellant further described the children's pre-existing mental health challenges, including anxiety and depression, and the professional treatment they had been receiving. She advised that the older child, J., had recently indicated his sexual orientation was for same-sex relationships and had been encountering bullying at school as a result. Her affidavit set out the events of March 15th, asserting the respondent's choice to engage the police had caused upset to the children:

> 40. I texted [Mr. K.] shortly before his regular March 15, 2020, parenting time with the children and told him that the children were refusing to go with him, despite my admonitions, and that I could not make them leave the house. I told the children that they would be grounded if they did not leave with their father, but they did not care.
>
> 41. [Mr. K.] came to my home later that day with the police, and he demanded that the police speak with the children to confirm their intention not to leave my home. I understand that the children told the police that they would not go with [Mr. K.].
>
> 42. The children are terrified to the point that, when they are sitting in the living room, they jump up and run to their bedrooms anytime there is a knock at the door or noise from outside, as they are afraid they will be made to go back to their dad's and he will make them pay for standing up to him.
>
> 43. I do want the children to participate in therapy to improve their relationship with their father, however, I am not certain that I can make them attend. Both children are greatly upset as a result of the police being called to our home.

[19] The parties had telephone conferences with Justice Hunt on April 7 and 21, and May 19, 2020. On May 19th, the court ordered, with consent of the parties, that:

> 1) The parties and the children shall participate in family reunification counselling with Dr. Mike Buckley, or such other therapist or counsellor as may be agreed by the parties, and they shall cooperate with and adopt any recommendations as may be proposed by the professional.

[20] On June 15, 2020 the respondent filed a Notice of Motion for Contempt Order with supporting affidavit in which he expressed his concerns regarding the ongoing lack of contact with his children and made allegations the appellant was engaged in parental alienation. The affidavit further contained considerable hearsay attributable to third parties. The respondent expressed his concern regarding the appellant's conduct as follows:

> [Ms. G.] is displaying her inability to provide positive and capable parenting. The fact that [Ms. G.] is either unwilling or incapable of facilitating my parenting time, a phone conversation, providing proof of the wellbeing of the children, or offering updates on their critical health issues, is incompetent and unconscionable behaviour.
>
> [Ms. G.'s] behaviour is akin to a domestic abusive spouse. [Ms. G.] is exercising complete influence and control and has isolated the children from their family. She has completely alienated and estranged the children from me and my side of the family including their grandparents, aunt and uncle and cousins.
>
> [Ms. G.] has clearly demonstrated that her parenting approach and actions is being deeply detrimental to the children.

[21] In June 2020, the younger child, born a biological female, advised they were transgender and wished to be referred to by a new name, D. This was preceded by the child, under psychiatric care for an extended period, expressing anxiety and on one occasion suicidal ideation.

[22] On June 19, 2020 the appellant filed a motion seeking a Voice of the Child Report. As the respondent opposed the motion, it was set for hearing via telephone conference on July 7, 2020. After hearing submissions from the parties, Justice Hunt ordered a Voice of the Child Report. Further, although the respondent wanted to proceed with the motion for contempt at that time, the court set an in person hearing date of October 8 and 9, 2020 and provided filing dates for any additional materials in support of the motion for contempt and the appellant's application to vary. Justice Hunt directed the Voice of the Child Report to be completed by September 21, 2020, in advance of the hearing.

[23] The Voice of the Child Report was filed with the Court on August 26, 2020.[4] The assessor spoke with both parties in advance of meeting with the

[4] At the eventual hearing of the motion for contempt, the parties agreed the Voice of the Child Report could be entered into evidence without the necessity of the author testifying.

children and reviewed the court file. The assessor described his interaction with the children as follows:

> I met with [Ms. G.], [J.] and [A.], (hereinafter referred to as [D.]) at their home in […]
>
> We began our discussion with my explanation of my role as a social worker appointed by the court to convey their wishes to the court about parenting and with whom they wishes to reside or visit.
>
> In the presence of their mother they explained that she had told them of my visit and its purpose. I clarified that only the court could settle these matters, not myself, them or their parents.
>
> **From the beginning of our meeting it was apparent that they were genuinely confident in expressing their views both with their mother present and with me alone.**
>
> [Ms. G.] excused herself while [J.], [D.] and I conversed. They were informed and mature about their opinions on the reopening of school. [J.] offered "if the teachers are concerned about containing the virus, what about students and their concerns".
>
> **In the course of our interview the children appeared to be at ease and showed no signs of feeling threatened. They both participated freely, and I believe told the truth.**
>
> **With each taking part, they described how they "hated" visiting their father and how their mother had to "force" them to go. They said that they could not recall any happy times with him.**
>
> **When asked to give specifics [J.] mentioned that he did not have enough to eat but his father would not give more food. He said that he felt his father did not think their opinion counted and he never asked for one.**
> [D.] said that [Mr. K.] was controlling and unreasonable about bedtime hours and meals.
>
> Both appeared to agree that "we don't like him, but he is our dad". They offered that their mother regularly asks "do you want to go to your dad's home. If you want to you can go." [J.] commented that he would be afraid he (dad) would keep us there.
>
> (Emphasis added)

[24] The assessor set out the following conclusions:

> Noting that the primary focus of this report is to convey the wishes and preferences of the children to the court, it is clear from the fore going, that neither [J.] nor [D.] wish to spend time or visit their father, [Mr. K.].
> According to them, as stated in the interview, they have negative feelings regarding their association with their father.
>
> They clearly stated that they are contented living with their mother **and stated that they refuse to visit their father even though they said he had reminded them of the conditions of the Court Order for Shared Custody**.
>
> From my interview with [J.] and [D.], without their mother present, I believe that they were truthful, **and their feelings were expressed without being coached, bribed or coerced.**
>
> (Emphasis added)

[25] On September 4, 2020, the respondent filed an affidavit in support of his motion for contempt. He confirmed he had not seen the children nor had telephone contact with them since the last court appearance. The respondent further confirmed that on several additional occasions, he had requested the RCMP to attend at the appellant's home to undertake checks of the children given his concerns about their wellbeing. He confirmed he had continued to go to the appellant's home on each occasion he was scheduled for parenting time with the children, but the appellant failed to provide him with the children. The respondent also expressed concern the appellant was not providing him with information regarding the children's medical or psychiatric treatment. The respondent's affidavit contained significant amounts of hearsay attributable to third parties.

[26] In anticipation of the hearing of the contempt motion and her application to vary, the appellant filed an affidavit on September 18, 2020. In response to the assertions contained in the respondent's affidavit, the appellant stated:

> 4. In response to paragraph 4 of [Mr. K.'s] Affidavit, I remain unable to convince the children to see their father, given their wishes as expressed in the Voice of the Child Report.
>
> 5. [Mr. K.] insists that I am responsible for instilling in the children their opposition to seeing him, however, I am not, and have tried my best to encourage them to have some relationship with [him]. I am deeply concerned, however, that, given [Mr. K.'s] behaviour, it may not be in the children's best interest to see him under the present circumstances.
>
> 6. I feel badly for [Mr. K.], but he has continued to attend at the home pursuant to the existing Order, expecting the children to go with him, however, as a result,

the children have become more and more fearful of him and entrenched in their beliefs.

7. After I had to have [Mr. K.] served by the RCMP in or about May 2020 with a *Protection of Property Act* Notice as he was coming onto my property repeatedly banging on the door looking for the children, and frightening them and myself.

8. [Mr. K.] continues to park on the street every weekend, at his former pick up times, alternating Saturdays and Sundays, blocking my driveway and honking his horn for long periods – usually at least 10 or 15 minutes, upsetting the children even more. The children are simply terrified of him now and will not speak to [Mr. K.]; they are extremely anxious about this upcoming Court hearing and tell me that they can't wait for the stress to end.

9. In further response to paragraph 4 of [Mr. K.'s] Affidavit, I cannot communicate in person or on the phone with [Mr. K.] because of his extremely negative, aggressive and belittling attitude toward me. I initially tried where possible to communicate with him via text, however, I have had the same aggressive and belittling experience with that form of communication and I had to block him.[5]

. . .

11. I have, since March 2020, told [Mr. K.] that he can communicate with the children via text, but it rarely happens.

12. [D.] texted [Mr. K.] in June to tell him that he had decided to identify as a male. [Mr. K.] responded by telling [D.] to call him, but [D.] told [Mr. K.] that he was not comfortable with talking on the phone. [Mr. K.], to the best of my knowledge, declined to continue text communication with [D.].

. . .

15. In response to paragraph 5 of [Mr. K.'s] Affidavit, [Mr. K.] is permitted access to the children's medical and school information directly with his existing Court Order, where that access is not constrained by the children's treating professionals obligations for patient confidentiality.[6]

16. In further response to paragraph 5, [Mr. K.] has used RCMP wellness checks unnecessarily as he has never had cause to believe that the children were in any

[5] The appellant attached to her affidavit a number of text messages which supported her claim the respondent had engaged in a manner of communication with her that was indeed negative and belittling.
[6] The CRO incorporated the following term of the agreed Parenting Plan: "6. Either parent may request and obtain information regarding the health, education and general well-being of the children, including, but not limited to, access to daycare, school and medical reports, and has the right to obtain copies of all medical, educational and religious records pertaining to the children directly from third parties".

> danger, and it severely upsets the children every time it happens – which has been on about **8 or 9 occasions this summer**.
>
> 17. The children have spoken to the officers that attend our residence for these "wellness checks" on each occasion, independently, outside of the house normally, and not in my presence. The children have, each time, told the police emphatically that they are fine but do not want to see their father.
>
> 18. For the first few months of [Mr. K.'s] attendance at our house after the children decided to remain with me, they hid in their rooms when [Mr. K.] was parked outside honking the car horn and texting me to make them come out.
>
> (Emphasis added)

[27] In her affidavit the appellant further confirmed the children were engaged in counselling as previously ordered by Justice Hunt, and as directed, she was also participating in individual counselling sessions. The appellant also advised the younger child had seen their family doctor and was awaiting a referral to a neurologist given their recent development of tics.

[28] Neither the contempt hearing nor the appellant's application to vary was heard on October 8 and 9, 2020 as scheduled. The respondent, previously self-represented, retained counsel shortly beforehand and requested an adjournment.

[29] Telephone conferences were held with Justice Hunt on November 4 and 20, 2020 to reschedule the hearing. The parties agreed to participate in settlement discussions and to hold the rescheduling of the hearing in abeyance. As a result, a settlement conference was held on December 8, 2020 at which time the parties agreed to the terms of an "Interim Without Prejudice Order" that varied the terms of the parenting agreement and adjourned the continuation of the settlement conference to February 9, 2021. That order provided: "[Ms. G.] is the primary caregiver and provides the primary residence for the children".

[30] The parties reconvened the settlement conference on February 9, 2021 at which time the parties agreed to a "Second Interim Parenting Order" which provided the respondent with specified parenting time with the children. Further, as a result of the settlement conference, Justice Hunt on his own motion, ordered a custody and access assessment be undertaken which would contain a consideration as to "whether one or both parents may have a mental illness, or mental disability, that may negatively affect his/her ability to provide appropriate care for one or both children, or act in their best interests".

[31] The record demonstrates that following the settlement conferences, the children began having parenting time with the respondent. On the heels of the December 8th conference, the older child visited on December 12th and the younger on December 13th. Visits continued throughout December and into January. The respondent had in person parenting time with the children together on February 9, 11, 15, 16, 18, 20, 23 and 25, 2021 and March 2, 4, 6, 9, 11 and 16, 2021.

[32] Additionally, the respondent saw the older child alone on March 18, 20, 23, 25 and 30, 2021. The younger child did not participate in one on one visits with the respondent after January 19, 2021 but, as noted above, did continue to go to visits with their sibling.

[33] At the request of the respondent, the parties attended a telephone conference with Justice Hunt on May 7, 2021. At that time, the respondent expressed concerns regarding the timeliness of obtaining the ordered assessment and that his parenting time with the children had stopped in March. The contempt motion and application to vary were adjourned without date pending receipt of the assessment. This was Justice Hunt's last involvement with the file.

[34] The "Custody/Parenting Time Assessment", completed by Robert S. Wright, and James Dubé, was filed with the court on August 16, 2021. At the contempt hearing Mr. Wright was called as an expert witness by the respondent and the assessment report was introduced into evidence. It is helpful to highlight aspects of the assessment. In terms of the purpose of the assessment, the writers noted:

> It is unnecessary to reiterate material from the Affidavits and file materials here. From Court, school, medical records, interviews and observations, it can be said that the assessment was ordered for the following reasons:
>
> - Concerns that [Ms. G.] has alienated [Mr. K.] from their children.
> - Concerns that one, or both, parents struggle with mental health or substance use disorders that affect their parenting capacity.
> - Concerns about the mental health of [D.K.] and that it has deteriorated as a result of the above-mentioned alienation, if it has occurred.

[35] The writers, while identifying the conflict between the parents as the major stressor in the family, were of the opinion that parental alienation was <u>not</u> at play:

> On observation and by all reports, the most pressing stressor that is present in the lives of the members of this family is the conflict between parents. **The issue of**

> **parental alienation was thoroughly canvassed and considered in preparation of this report. We will note that while several people expressed suspicions and concerns in this regard, they offered no specific examples of [Ms. G.'s] behaviours or events that would strongly support their suspicion.** We will address their sources of concern here. We will also provide some insight about how to address these concerns. Both parents share responsibility for making changes to their relationships to ensure these suggestions are followed. **But we find it quite difficult to conceptualize this context as deliberately and methodically orchestrated by one parent or the other.**
>
> (Emphasis added)

[36] The writers offered insight regarding trans-identities and the parenting of youth undergoing transition:

> . . . [S]omeone in transition during their adolescent development is bound to be distressed at times, physically, mentally, emotionally, and socially. It is never the case that "the problem" is the transition; the problem with transitioning is always that the people and structures around the transitioning person are unable or unwilling to support that person's transition. It is also a problem that society in general is hostile to gender non-conforming persons. . . People often underestimate the effect of stigma and marginalization on trans-identified individuals. These things cause a great deal of mental distress and can indeed cause experiences that look like mental disorder. The onus is on parents and caregivers to compensate for the various structural influences in a transitioning person's life. This compensation must be completely independent of the feeling or desires of the parents; the child's development must be the most important consideration.
>
> . . .
>
> When visiting [Mr. K's] home, we observed him misgender [D.] several times. [D's] room was still decorated in stereotypical female colours and décor. Though [Mr. K.] explained that he kept the room as is to give [D.] the ability to choose and decorate the room as they see fit, we fear that this messaging may be lost on [D.], and that the room may signal a lack of approval or support. We would encourage [Mr. K.] to consider that one major issue between him and [D.] is his inability to support [D.'s] transition. This is not a hopeless situation by any means, and simply requires some education and professional support. And we use the language of inability because we do not think that [Mr. K.] is simply refusing to accept or acknowledge the transition; he obviously loves his child very much and wants what is best, he just needs more practice and to apply real effort to extinguishing the mindset that he has a daughter.

[37] With respect to the younger child's mental health concerns (and the question of whether the alleged parental alienation caused it), the writers observed:

> [D.] is a young person in gender transition. They would undoubtedly require a great deal of support for this. We reviewed records of mental health and school professionals who describe [D.] as struggling but not at imminent risk of serious mental disorder or other problems. Collaterals interviewed were concerned about [D.'s] well-being, which is fair. [D.] seems to be experiencing a developing Tic disorder, which is often indicative of stress or trauma. [D.'s] attendance in school has been problematic as well. On reviewing the file materials and after interviews, we are left with the impression that [D.] is a youth who has not been adequately supported in transition. [D.] is behaving in ways that we would expect when someone is "coming out" as trans. Adverse effects on mental health, attachment disruptions, and even the presence of the Tic disorder and other physical ailments could be due to the stress of transitioning. We also observed that during moments of acute stress and anxiety [D.] seems to experience selective mutism, the inability to communicate verbally. That [D.] is experiencing some performance issues in school and at home is not surprising and would suggest that more support is needed.
>
> . . .
>
> It would be wrong to blame [D.'s] problems solely on the stress that is caused by the conflict that is occurring between their parents. Though it is critical for parents of trans kids to learn to co-parent powerfully to offset and not contribute to the stresses of transitioning.

[38] The writers provided important insight regarding the parenting ability of both the appellant and the respondent:

> Our observations about parenting ability have been alluded to and are less direct. **[Ms. G.] is overprotective and may allow the children to be too dependent on her, and this is likely due to her own patterns of codependency and her anxiety about [D.'s] specific needs.** It seems she has a pattern of not firmly setting boundaries with her children that would support [Mr. K.'s] parenting time with his children and allow their children to be fully present with their father. Mental Status Examinations and other interviews did not offer any other potential risks to the children. [Ms. G.] is a capable parent.
>
> **[Mr. K.] can be quite set on his views and insists on a particular way of living.** This was evident on observation and by all reports. In some people, this rigidity can become oppressive and even abusive. Collaterals interviewed referred to such problematic behaviour. **We certainly found [Mr. K.] to be firm in his beliefs and argumentative at times. But we did not observe anything that would reach a threshold of being considered a risk to the children. With**

> **one exception**: [Mr. K.] misgendered [D.] many times throughout the assessment process and has yet to address the fact that [D.'s] room is still decorated as it was before their transition. [Mr. K.] and collaterals also described [D.] as "needing help". This may communicate that [D.'s] transition is perceived as the main source of adverse mental health. **We would be concerned about how such a perception might affect [Mr. K.'s] relationship with his children.** We stress that it is our impression that this is not being done through malice. We would suggest that [Mr. K.] and his adult supports seek help in learning how best to support [D.'s] transition.
>
> (Emphasis added)

[39] The writers made a number of recommendations, including that the "existing custody and parenting time order be maintained, with 50/50 custody and parenting time for each parent being respected". The order in place at that time was the "Second Interim Without Prejudice Consent Order".[7] Particular services were recommended for the parties and the children. The writers were of the view that both the appellant and respondent needed to find ways to be more supportive of each other:

> We do not believe that either parent is sustaining a willful campaign to undermine the relationship between the children and their co-parent. **We find that [Ms. G.'s] "rush to rescue" her children from the tensions that exist in their relationship with their father is unwarranted and that she should find ways to develop the capacity to be a more supportive co-parent. We also find that the pressured way in which [Mr. K.] characterizes [Ms. G.'s] behaviour as indicative of a mental illness and describes her as toxic and manipulative is unwarranted and that he should find ways to develop the capacity to be a more supportive co-parent.**
>
> (Emphasis added)

[40] With respect to the enforcement of any eventual order made by the court, the writers observed:

> **The children do have a reasonable degree of autonomy in this matter, and it would be nearly impossible to force them to comply. Nor would it be desirable.** However, we do think that both parents can be more reasonable and assertive in encouraging the compliance of the children.
>
> (Emphasis added)

[41] Following the filing of the above assessment report on August 16, 2021, it would appear the parties' next contact with the court was a telephone conference

[7] That order provided the parties were in the joint custody of the parties, however, the children were in the primary care of the appellant, with specified parenting time for the respondent.

held on January 11, 2022.[8] This was the hearing judge's first involvement with the matter. The appellant declined to participate in further settlement discussions and the respondent pressed to have the contempt hearing set down. Due to the Essential Services Model in place,[9] a hearing could not be scheduled at that time. The matter was adjourned to March 8, 2022.

[42] On March 8, 2022, the respondent requested the contempt hearing be set down. In doing so however, his counsel advised he was no longer seeking to enforce his ordered parenting time. Counsel advised:

> My Lord, I think it's fair to say that my client is simply looking for the most efficient way to conclude matters at this stage. So the matters have been live for two years. At this point, after thousands of dollars and a ton of emotional energy invested into all of these proceedings, **he's throwing in the towel on parenting time.** And so where that leaves us, we . . . is with three live issues, the contempt, the issue of child support, and the issue of costs.
>
> (Emphasis added)

[43] The contempt hearing was scheduled for September 26, 2022. The parties agreed the evidence on the contempt motion would be used in relation to the appellant's application to vary. In advance of the scheduled hearing, the parties filed updated affidavit evidence as well as written submissions.

[44] Despite having made clear he was no longer seeking to enforce parenting time with the children, on July 12, 2022, the respondent filed an Amended Notice of Motion for Contempt Order that served to expand the allegations of contempt against the appellant. The specific contents of the Amended Notice will be set out later in these reasons.

[45] Unfortunately the scheduled hearing did not proceed on September 26, 2022 because of a catastrophic storm which had caused significant damage to powerlines and other infrastructure in the region. The hearing was adjourned on the court's motion, and eventually rescheduled for February 27, 2023. Additional affidavit evidence and submissions were once again filed.

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[8] There is no explanation in the record as to why it took five months to have the matter brought back before the court.

[9] In response to the Covid-19 pandemic, the Courts of Nova Scotia put in place various restrictions which affected the hearing of matters.

[46] On April 25, 2023 the hearing judge provided oral reasons in which he found the appellant guilty of contempt in relation to seven of the 13 grounds alleged by the respondent. In concluding his reasons, the hearing judge directed that Ms. G. "is to be given an opportunity to attempt to purge that contempt prior to proceeding to the penalty phase".

[47] On May 15, 2023 the appellant, through her counsel, set forth a proposal to purge her contempt, where possible. Of note, the appellant proposed:

> With respect to counts 4 and 10, [Ms. G.] believes that the children should be speaking to and seeing their father. [Ms. G.] does not believe that she can promise to the Court that the children will re-attend for therapy as she would be inviting a further contempt finding from the Court. [Ms. G.] believes that, if she and [Mr. K.] had a better co-parenting relationship, or any relationship for that matter, it might show the children that their father is interested in a relationship with them on their terms. **[Ms. G.] proposes that she and [Mr. K.] participate in such therapy. [Ms. G.] will continue to encourage the children to have a relationship with their father. She encourages [Mr. K.] to write to the children and she will undertake to ensure that they read it and encourage a response**. [Ms. G.] encourages [Mr. K.'s] niece, who had a positive relationship with the children, to reach out to her in an effort to have her communicate with the children.
>
> (Emphasis added)

[48] The appellant further provided an apology to the court and the respondent for her failure to immediately provide her address when she had moved with the children in October, 2020.

[49] The respondent replied to the proposed purging of the contempt by way of correspondence dated May 29, 2023. In short, the respondent was of the view it was both too late and impossible for the appellant to purge her contempt. He was critical of the court process and the time it took to have the matter resolved and advised of his need to have the proceedings completed. With respect to the appellant's suggestions, he advised the court in his written submissions:

> - If the children want to communicate with their Aunt, Uncle and Cousins they have been, and remain, free to do so.
>
> - **[Mr. K.] is not interested in continuing to pursue a relationship with his children, or [Ms. G.] at this time. The children and [Ms. G.] have made their wishes clear. [Mr. K.] respects that. That should be the end of it.**
>
> (Emphasis added)

[50] The sentencing hearing was held on July 26, 2023 and the sentence pronounced the same day. The hearing judge directed the parties to return on October 17, 2023 to consider the appellant's application to vary, her claim for retroactive child support and costs. Filing deadlines were provided for updated financial information and submissions.

[51] The appellant filed a Notice of Appeal on August 28, 2023 in which she challenged the hearing judge's findings of contempt and the resulting sentence. The respondent filed a Notice of Cross-Appeal on September 25, 2023 in which he submitted the hearing judge erred in finding the appellant not guilty of certain allegations of contempt and that he failed to properly apply the principles of sentencing.

[52] On October 5, 2023, the appellant through her counsel wrote to the hearing judge suggesting that, in light of an appeal having been brought, the outstanding issues be postponed pending receipt of a decision from this Court. In correspondence of October 6, 2023, the respondent expressed strong disagreement with the outstanding issues being delayed. Given the recently filed financial information, the respondent submitted the hearing judge was well-placed to render findings on the outstanding issues – costs arising from the contempt hearing and the appellant's claim for retroactive child support.

[53] The October 17th hearing proceeded. Each party was provided the opportunity to file additional post-hearing written submissions on the issues of the claim for retroactive child support and costs. Both did so.

[54] On November 27, 2023 the hearing judge dismissed the appellant's claim for retroactive support, and awarded costs to the respondent on the contempt motion in the amount of $3,500.00. The hearing judge declined to award costs on the variation application.

[55] On December 15, 2023 the respondent filed an Amended Notice of Cross-Appeal in which he submitted the hearing judge erred in awarding minimal costs in relation to the contempt motion and sought the cost award be varied from $3,500.00 to $33,140.24. On December 15, 2023 the appellant filed an Amended Notice of Appeal in which she sought to challenge the hearing judge's determination regarding the retroactive child support, and the award of costs.

Issues

[56] Having considered the grounds pled in the amended appeal and amended cross-appeal, the submissions of the parties, and the record, I would re-state the issues for determination as follows:

1. Did the hearing judge identify and apply the correct legal principles in assessing whether the appellant was guilty of contempt and were the reasons he provided sufficient?

2. Did the hearing judge identify and apply the correct legal principles in sentencing the appellant for contempt and were the reasons he provided sufficient?

3. Did the hearing judge err in dismissing the appellant's application for retroactive child support?

4. Should the hearing judge's costs award be varied by this Court?

Standard of Review

[57] The standard of review engaged when considering a finding of contempt and a resulting sentence was set out in *McLean v. Sleigh*, 2019 NSCA 71. In short, the normal appellate standards of review apply to a hearing judge's finding of contempt. With respect to sentencing, appellant intervention will only be warranted where a hearing judge has erred in principle in a way that impacted the sentence, or the sentence was demonstrably unfit (paras. 30 and 31).

[58] In reviewing for sufficiency of reasons, the Supreme Court of Canada in *R. v. G.F.*, 2021 SCC 20, noted:

> [69] This Court has repeatedly and consistently emphasized the importance of a functional and contextual reading of a trial judge's reasons when those reasons are alleged to be insufficient . . .Appellate courts must not finely parse the trial judge's reasons in a search for error . . . **Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review.** As McLachlin C.J. put it in *R.E.M.*,[10] "[t]he foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of

[10] *R. v. R.E.M.*, 2008 SCC 51.

> counsel and the history of how the trial unfolded": para. 17. And as Charron J. stated in *Dinardo,*[11] "the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues": para. 31.
>
> [70] This Court has also emphasized the importance of reviewing the record when assessing the sufficiency of a trial judge's reasons. This is because "bad reasons" are not an independent ground of appeal. **If the trial reasons do not explain the "what" and the "why", but the answers to those questions are clear in the record, there will be no error:** *R.E.M.,* at paras. 38-40; *Sheppard*,[12] at paras. 46 and 55.
>
> (Emphasis added; citations omitted)

[59] Child support awards are highly discretionary, and the hearing judge's findings and inferences of fact may not be disturbed absent an error on an extricable question of law, a palpable and overriding error, or a fundamental mischaracterization or misapprehension of the evidence (*Michel v. Graydon*, 2020 SCC 24 at para. 34; *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 11).

[60] The standard of review in assessing a hearing judge's award of costs is well-known. Cost awards are within a judge's discretion. This Court will not interfere with a cost determination absent an error of law or an injustice. See *White v. Bradley*, 2024 NSCA 46 at para. 18; *Ward v. Murphy*, 2022 NSCA 20 at para. 28; and *Donner v. Donner*, 2021 NSCA 30 at para. 60.

[61] I will apply the above principles in my analysis of the issues.

Analysis

> *Issue 1 - Did the hearing judge identify and apply the correct legal principles in assessing whether the appellant was guilty of contempt and were the reasons he provided sufficient?*

[62] I address the above question in four parts. First, I will address the legal principles that govern a trial judge's determination of an allegation of civil contempt, particularly in family matters. Second, I will set out the allegations made against the appellant in the Amended Notice of Motion for Contempt, including a notation of the hearing judge's conclusion in relation to each. Third, I will discuss how the hearing judge erred in reaching his findings of contempt and

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[11] *R. v. Dinardo*, 2008 SCC 24.
[12] *R. v. Sheppard*, 2002 SCC 26.

why they must be set aside. Fourth, I will explain why the hearing judge's determination the appellant was not guilty of contempt in relation to other allegations do not justify this Court's intervention.

i) Legal principles

[63] Motions for civil contempt, including those arising in family law matters, are governed by *Civil Procedure Rule* 89. Several aspects of the Rule are of note:

- The procedure set out in Rule 89 for the hearing of motions can be modified by a judge but only if the modifications can "be adapted to the requirements of the Canadian Charter of Rights and Freedoms for a criminal or penal proceeding" (Rules 89.01(2)(b) and 89.12(2)).

- The contents of a motion for contempt are prescribed in the Rule, and must include a statement that the alleged contemnor carries the presumption of innocence and the right to silence.

- Rule 89.07 requires the setting of "the earliest available date" for hearing, and recognizes the alleged contemnor has "the right to a speedy hearing".

- A judge may vary or discharge an order for contempt.

[64] In addition to the above, courts have undertaken to define the substantive contents of civil contempt. The most recent statement of the law from the Supreme Court of Canada is found in *Carey v. Laiken*, 2015 SCC 17. There, a lawyer was alleged to be in contempt by releasing trust funds contrary to the terms of a *Mareva* injunction.

[65] Writing for the Court, Justice Cromwell identified three elements which, if proven beyond a reasonable doubt, could give rise to a finding of civil contempt:

1. The existence of a clear and unequivocal order setting out what should or should not be done (at para. 33);

2. The alleged contemnor had actual knowledge of the order (at para. 34), and

3. The alleged contemnor must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (at para. 35).

[66] With respect to satisfying the first element, it is important for the judge to be convinced the order is clear. Justice Cromwell stated:

> [33] The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done": *Prescott-Russell*,[13] at para. 27; *Bell ExpressVu*,[14] at para. 28, citing with approval *Jaskhs Enterprises Inc. v. Indus Corp.*, 2004 CanLII 32262 (Ont. S.C.J.), at para. 40. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: *Pro Swing*,[15] at para. 24; *Bell ExpressVu*, at para. 22. **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**: *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463, at para. 21.
>
> (Emphasis added)

[67] Cited by Justice Cromwell, the reasons in *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151 are of assistance in underscoring the importance of considering the clarity of the order. The Saskatchewan Court of Appeal noted:

> [20] In *Baumung*,[16] the Court referred to numerous authorities to illustrate the statement that "**in order to ground a contempt finding, a court order must be clear or, to put the point in another way, that an ambiguity in an order should be resolved to the benefit of the alleged contemnor**" (at para. 27). Similarly, in *Sonoco Ltd. v. Local 433, Vancouver Converters of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers* (1970), 13 D.L.R. (3d) 617 at p. 621, the British Columbia Court of Appeal wrote: "persons enjoined ought to be able to tell from the order what they may not do without having to decide whether they are acting lawfully or not." **Further, the very clarity of the court order must be proven beyond a reasonable doubt before a finding of contempt will be sustained** (see: *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at p. 224).
>
> (Emphasis added)

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[13] *Prescott-Russell Services for Children and Adults v. G.(N.)* (2006), 82 O.R.(3d) 686.
[14] *Bell ExpressVu Limited Partnership v. Torroni*, 2009 ONCA 85.
[15] *Pro Swing Inc. v. Etta Golf Inc.*, 2006 SCC 52.
[16] *Baumung v. 8 & 10 Cattle Co-operative Ltd.*, 2005 SKCA 108.

[68] It is also essential to note that even where all three elements have been established beyond a reasonable doubt, a judge retains a discretion to not make a finding of contempt. Justice Cromwell explained:

> [36] The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders . . . If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect" . . . As this Court has affirmed, "contempt of court cannot be reduced to a mere means of enforcing judgments. . . **Rather, it should be used "cautiously and with great restraint"**. . . It is an enforcement power of last rather than first resort.
>
> [37] For example, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt. . . While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, **I wish to leave open the possibility that 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.**
>
> (Emphasis added; citations omitted)

[69] A number of appellate courts, including this one, have recognized particular nuances come into play when allegations of contempt are made in family matters, particularly those involving high-conflict parenting disputes.

[70] In *Soper v. Gaudet*, 2011 NSCA 11, grandparents were found to be in contempt of an access order because their grandchildren had not been returned to the care of their mother. Writing for the Court, Justice Farrar found the hearing judge failed to provide the alleged contemnors with the protections afforded by the law. Nor did she consider whether the terms of the order were clear and unequivocal, and if the evidence demonstrated the grandparents acted or failed to act contrary to those terms. The contempt finding and the resulting penalty were set aside on appeal.

[71] The following principles are evident in Justice Farrar's reasons:

- contempt is a criminal or quasi-criminal proceeding that must be treated with the seriousness that comes with such a proceeding, including procedural and substantive protections for the alleged contemnor;

- restraint should be exercised in finding a party in contempt in family proceedings;

- the terms of the order must be examined closely to determine whether the evidence establishes, beyond a reasonable doubt, the alleged contemnor has acted in contravention of it;

- the failure of a hearing judge to consider the best interests of the children in finding a parent in contempt constitutes an error of law.

[72] The principles set out in *Soper* were re-affirmed in *Godin v. Godin*, 2012 NSCA 54. In setting aside a finding of contempt due to the hearing judge reversing the burden of proof, Justice Saunders noted the importance of utilizing the power of contempt sparingly and with "a strict application of proper procedures" (at para. 70).

[73] Given the then-recent introduction of Rule 89, Justice Saunders set out a framework to assist judges hearing contempt motions in the context of family disputes. After setting out factors closely mirroring those in *Carey*, he added (at para. 94):

> . . .[I]n deciding whether the actions of the alleged contemnor were wilful, deliberate, and contemptuous, or whether a reasonable doubt arises on the evidence with respect thereto, **the judge will likely wish to consider such things as the alleged contemnor's explanations for his or her conduct; the efforts made to ensure compliance; and whether there were obstacles not of the alleged contemnor's making, or other reasons which might provide an adequate excuse to the charge**.
>
> (Emphasis added)

[74] Decisions from other appellate courts post-*Carey* also demonstrate although that decision is recognized as setting out the necessary elements of civil contempt, other factors necessarily apply when considering allegations of contempt in the context of family proceedings. This includes as a paramount consideration the best interests of the children (*Ruffolo v. David*, 2019 ONCA 385; *Moncur v. Plant*, 2021 ONCA 462). Further, the failure of a hearing judge to explicitly consider whether they should exercise their discretion to decline making a finding of contempt, constitutes an error of law (*Chong v. Donnelly*, 2019 ONCA 799).

[75] It is also clear hearing judges must take care that their reasons for making a finding of contempt are sufficient. In *Turenne v. Turenne*, 2024 MBCA 18, Justice Mainella explained:

> [20] Second, **given the exceptional nature of contempt, the exact nature of the alleged contempt must be articulated with some specificity by a motion judge** (see *Van Easton v Wur*, 2020 MBCA 82 at para 8 [*Van Easton*]). Restraint and caution are the watchwords for a court exercising its extraordinary power of contempt, especially in the family law context (see *Campbell*[17] at para 32; *Paton v Skymkiw*, 1996 CanLII 17988 at para 27 (MBKB) [*Paton*]).
>
> [21] As noted in *Van Easton*, **"when contempt proceedings are used, care must be taken [by the motion judge] to articulate exactly the nature of the contempt, as well as the 'what' and the 'why' of the decision"** (at para 8; see also *Delichte v Rogers*, 2018 MBCA 79 at paras 29-30). The necessary clarity required for a finding of contempt is not present here.
>
> (Emphasis added)

[76] What can be taken from the above review? Firstly, the directions given by this Court in *Soper* and *Godin* have not been displaced.[18] Indeed, those decisions were quoted with approval by Justice Cromwell in *Carey*.

[77] Further, motions for contempt in family matters where children are involved, engage the following analytical framework:

1. Prior to the commencement of a contempt motion, the judge should consider:

   - whether the requirements set out in Rule 89 have been met by the applicant, and the alleged contemnor has received the necessary protections;

   - whether the Notice of Motion for Contempt Order clearly sets out the provisions of the order(s) relied upon as well as the behaviour alleged to be contemptuous. The allegations against the contemnor must be specific. It is the allegations pled in the Notice of Motion that govern the hearing of the contempt motion and any resulting sentencing;

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[17] *Campbell v. Campbell*, 2011 MBCA 61.

[18] Before the hearing judge, the respondent had argued, incorrectly, that the test in *Carey* prevailed, and other factors, notably the best interests of the children were irrelevant to a finding of contempt.

- given the quasi-criminal nature of contempt proceedings, if a judge is not satisfied the above requirements have been met, the motion for contempt, in most instances, should be dismissed at the outset, and

- contempt hearings should in the normal course, be set for "the earliest possible date" as alleged contemnors have the right to a speedy hearing. As such, adjournments for an applicant to remedy defects in the pleadings should only be granted if the judge is satisfied it is in the best interests of the children to do so, or in the face of extraordinary circumstances;

2. After hearing the evidence and submissions, the judge must be satisfied the applicant has established beyond a reasonable doubt, the terms of the order upon which the alleged contempt is based are clear and unequivocal. To make a finding of contempt, the judge must be satisfied on the criminal burden of proof, the alleged contemptuous act or omission was either clearly mandated or clearly prohibited by the terms of the order. As explained in Soper, this requires the wording of the order to be carefully examined and assessed against the behaviour alleged to be contemptuous;

3. The applicant must prove and the judge must be satisfied beyond a reasonable doubt the alleged contemnor had actual knowledge of the order upon which the contempt is alleged;

4. The applicant must prove and the judge must be satisfied beyond a reasonable doubt the alleged contemnor intentionally did the act the order prohibits or intentionally failed to do the act the order compels. As noted in Godin, an alleged contemnor can advance a defence which may give rise to reasonable doubt as to whether their actions were intentional. This may include "the alleged contemnor's explanation for his or her conduct; the efforts made to ensure compliance, and whether there were obvious obstacles not of the alleged contemnor's making, or other reasons which might provide an adequate excuse to the charge";

5. Even if the above requirements have been satisfied, a finding of contempt cannot be made unless the judge is satisfied doing so is in the best interests of the children. The failure to consider the best interests of the children constitutes an error of law. A judge who finds a party in contempt should explain why the finding is, in the circumstances before them, in the children's best interests;

6. And finally, a hearing judge has the discretion to decline to make a finding of contempt. This step is intended to reflect that contempt, particularly in family disputes, should be used rarely. A judge's failure to consider exercising this discretion, is an error of law.

[78] Judges, lawyers, parties and society at large expect court orders to be followed. A failure to do so strikes at the very foundation of the rule of law and the administration of justice.

[79] However, the above review also demonstrates the practical challenges of advancing and hearing an allegation of contempt in family disputes, particularly where children are involved. In my view, the struggle arises primarily from the imposition on an applicant to prove the essential elements on the criminal standard, and the judge's obligation to ensure *Charter* protections are afforded to the alleged contemnor. Although it is easy to outline the requirements for a finding of contempt, applying them in highly charged and emotional proceedings is anything but.

ii) The allegations of contempt

[80] In his Amended Notice of Motion for Contempt filed July 12, 2022, the respondent alleged the appellant had breached provisions of four separate orders, specifically, the CRO, the Order for Counselling, and the two interim without prejudice consent orders.

[81] The respondent's motion provided a description of the conduct he alleged was contemptuous (the findings made by the hearing judge have been added for ease of reference):

1. On March 15, 2020, [Ms. G.] unilaterally changed the parties' parenting arrangements from one which joint and shared on an equal basis with [Mr. K.] since their separation in May 2014, to one where [Mr. K.] had no ability to parent his children at all. [Mr. K.] has rarely seen or heard

from his children in the past 27 months; he has not seen or heard from [D.] since March 16, 2021, nor seen or heard from [J.] since March 30, 2021. (Found not guilty)

2. On April 14, 2020, [Ms. G.] prevented [Mr. K.] from attending at her home to pick up the children for his parenting time by having her lawyer send him a Protection of Property Act Notice which was later served on him at his home by an RCMP officer. (Found not guilty)

3. [Ms. G.] was offered four different alternate locations for pick up or drop off of the children after the Protection of Property Act Notice was sent to him, but [Ms. G.] refused to meet at those locations, and she did not herself offer any alternatives. (Found not guilty)

4. [Ms. G.] refused to facilitate telephone access with the children. (Found guilty of contempt)

5. In or around June 2020, [Ms. G.] got a dog who would bark incessantly at [Mr. K.] when he would attend across the street from her home to pick up the children for his parenting time. (Found not guilty)

6. In or around October 2020, [Ms. G.] moved with the children and did not provide her new address until December 11, 2020. (Found guilty of contempt)

7. [Ms. G.] did not consult with [Mr. K.] about [D.'s] non-emergency health-care, that being, [D.'s] mental health challenges since March 2020 and gallbladder surgery in the Fall of 2020. (Found guilty of contempt)

8. [Ms. G.] did not consult with [Mr. K.] about a serious discipline problem, that being, [J.] being caught stealing in the Fall of 2020. (Found guilty of contempt)

9. [Ms. G.] did not consult with [Mr. K.] about [J.'s] non-emergency health-care, that being recent chiropractic care. (Found guilty of contempt)

10. [Ms. G.] sabotaged the Court-Ordered family reunification therapy by sharing a report written by the clinicians with the parties' children which resulted in the children refusing further services. (Found guilty of contempt)

11. [Ms. G.] has rarely to never followed the Court-Ordered specified parenting time for [Mr. K.]. [Mr. K.] has not seen either child in over a year. (Found not guilty of contempt)

> 12. [Ms. G.] has not transported the children to [Mr. K.'s] home for the beginning of his parenting time in more than a year. (Found not guilty of contempt)
>
> 13. [Ms. G.] has refused to follow any of the recommendations arising from the Court-Ordered Custody and Access Assessment with a Mental Health Component. (Found guilty of contempt)

[82] I now turn to the allegations of error in the hearing judge's reasons.

iii) Flaws in the contempt findings

[83] From his reasons[19] it is clear the hearing judge was aware of the essential elements of contempt as set out in *Carey* and the heightened burden on an applicant due to its quasi-criminal nature. He also correctly observed the framework in *Carey* requires a judge to consider whether he or she ought to exercise their discretion to make a finding of contempt even if the first three elements are met.

[84] Although the hearing judge correctly stated the principles set out in *Carey*, I am satisfied he did not properly apply them. Further, he did not recognize that findings of contempt in relation to parenting orders require additional considerations. There are three fatal flaws in the hearing judge's reasons which render all of the contempt findings unsupportable.

[85] First, the hearing judge did not properly apply the first *Carey* element. In rendering his decision, the hearing judge said:

> Here, through her counsel, [**Ms. G.] has not challenged the first and second elements** required in *Carey v. Laiken*, rather clearly acknowledges . . . **and acknowledges that there was an order in place** and that she was aware or knew of the order, however, maintains that there has been no intention breach.
>
> (Emphasis added)

[86] The bolded words are problematic. Although it was never in dispute there were four orders relevant to the contempt application, that is not what needed to be proven. The mere existence of an order is insufficient to ground a finding of contempt. The respondent was required to prove beyond a reasonable doubt the

[19] The hearing judge's reasons were delivered orally and are unreported.

provisions of the orders he relied upon were clear and unequivocal and required the appellant to do something she did not do, or clearly prohibited her from doing something she did do.

[87] I have carefully reviewed the record including the evidence of the appellant and the submissions made on her behalf. Although she never disputed the existence of the four orders (or that she was aware of them), the appellant did not acknowledge that the terms of the orders being relied upon encompassed the behaviour complained of.[20] Given the criminal burden of proof on an applicant (here the respondent) to establish this element, and the presumption of innocence, any such acknowledgment would have to be explicit and unequivocal.

[88] As the appellant did not make any such acknowledgement, the hearing judge erred in principle in concluding otherwise. As a result of this error, the respondent was excused from meeting this necessary element on each of the allegations he advanced and the appellant's presumption of innocence was improperly displaced.

[89] The second flaw in the hearing judge's analysis was the absence of any mention or consideration of the children's best interests. This is a necessary consideration in all allegations of contempt involving children. The failure of the hearing judge to consider and then explain why the findings of contempt were in the children's best interests, notably where the respondent was no longer seeking enforcement of the parenting order, constituted an error of law which infected all of his determinations of guilt.

[90] Finally, although the hearing judge quoted from *Carey* in terms of the final discretionary element, he did not apply it to the matter before him. The hearing judge's failure to consider whether he ought to exercise his discretion constituted an error of law.

[91] For the above reasons, I am satisfied the findings of contempt should be set aside.[21]

iv) Arguments raised on the cross-appeal

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[20] To the contrary, the appellant had argued before the hearing judge, and on appeal, that she could not be found to be in contempt in relation to count 13 because there was no court order which required her to follow the recommendations set out in the Wright/Dubé Report. She is factually and legally correct.

[21] As argued by the appellant on the appeal, there were other errors in the hearing judge's findings of contempt in relation to the specific counts. However, it is not necessary to address these given the above conclusion.

[92] In his cross-appeal, the respondent submits the hearing judge erred in concluding the appellant was not guilty of contempt in relation to counts one, two and three. Although set out earlier, it is helpful to repeat them here:

> 1. On March 15, 2020, [Ms. G.] unilaterally changed the parties' parenting arrangements from one which joint and shared on an equal basis with [Mr. K.] since their separation in May 2014, to one where [Mr. K.] had no ability to parent his children at all. [Mr. K.] has rarely seen or heard from his children in the past 27 months; he has not seen or heard from [D.] since March 16, 2021, nor seen or heard from [J.] since March 30, 2021.
>
> 2. On April 14, 2020, [Ms. G.] prevented [Mr. K.] from attending at her home to pick up the children for his parenting time by having her lawyer send him a *Protection of Property Act* Notice which was later served on him at his home by an RCMP officer.
>
> 3. [Ms. G.] was offered four different alternate locations for pick up or drop off of the children after the *Protection of Property Act* Notice was sent to him, but [Ms. G.] refused to meet at those locations, and she did not herself offer any alternatives.

[93] In finding the appellant not guilty of contempt in relation to those allegations, the hearing judge said:

> From my review of the evidence as it relates to these three counts, I find that [Ms. G.] was not guilty for the following reasons**. I find that the inability of [Mr. K.] to spend time with the children was a constellation of factors, including, number one, [Mr. K.'s] own actions and admissions in insisting on wellness checks, police involvement, and requests for a peace bond**.[22]
>
> Secondly, I note that there was a level of breakdown in the relationship between [Mr. K.] and the children to the point where therapy was required. **Clearly, maintaining the 50/50 shared parenting was not possible and, therefore, not intentional.** I, therefore, find her not guilty on counts one, two, and three.
>
> (Emphasis added)

[94] The respondent also challenges the hearing judge's conclusion that findings of contempt were not made out in relation to counts 11 and 12, which alleged:

> 11. [Ms. G.] has rarely to never followed the Court-Ordered specified parenting time for [Mr. K.]. [Mr. K.] has not seen either child in over a year.

[22] It was the appellant that sought a Peace Bond against the respondent.

> 12. [Ms. G.] has not transported the children to [Mr. K.'s] home for the beginning of his parenting time in more than a year.

[95] In finding the appellant not guilty in relations to those counts, the hearing judge explained:

> Based on all of the evidence, and having acknowledged the breakdown in the relationship between the parent and child, I find that . . . and given the dynamic that **it was impossible for the schedule to be followed**, and, therefore, that **the breach by [Ms. G.] as it relates to those counts was not intentional** and I, therefore, find her not guilty in relation to counts 11 and 12.
>
> (Emphasis added)

[96] The respondent asks this Court to set aside the hearing judge's conclusions and enter findings of contempt on all five of the above counts. I would decline to do so because:

- Although brief, from his reasons it is clear the hearing judge found there were factors, other than the appellant's conduct, that contributed to the children's refusal to go with their father. The evidentiary record amply supports the children's reluctance to see their father became entrenched as a result of the respondent's own unfortunate behaviour which continued for a number of months. Additionally, the Voice of the Child Report and the Wright/Dubé Report demonstrated the children were mature and expressing their own opinions, countering the respondent's repeated accusation of parental alienation. Further, the Wright/Dubé Report highlighted that the respondent's approach to D.'s gender transition was potentially detrimental to his relationship with the children. Indeed, in relation to compelling the children to participate in reunification attempts, those writers opined that "it would be nearly impossible to force them to comply", nor would it be desirable to do so. Based on the evidence, there is no reason to conclude the hearing judge erred in his assessment of the appellant's lack of intent regarding the breach of the orders; and

- The respondent has not demonstrated, or even argued, that a finding of contempt in relation to the above counts would be in the best interests of the children. The best interests of the children is the paramount consideration in determining whether a finding of

> contempt (provided the other elements have been met) is appropriate. Here, I am far from satisfied it would be, and therefore would not impose such a finding.

[97] For the reasons outlined above, I would set aside all of the findings of contempt entered against the appellant by the hearing judge. I would also dismiss the respondent's cross-claim in relation to the hearing judge's determination in relation to counts 1, 2, 3, 11 and 12 set out in the Amended Notice of Motion for Contempt Order.

> *Issue 2 - Did the hearing judge identify and apply the correct legal principles in sentencing the appellant for contempt and were the reasons he provided sufficient?*

[98] Because the findings of contempt have been set aside, the sentence imposed by the hearing judge must meet the same fate.

[99] I could end my discussion here. However, I am of the view that setting out the principles relevant to sentencing for contempt may provide useful guidance. Additionally, there is further value in addressing the appellant's assertion the fine imposed and the set-off against prospective child support constituted separate errors in principle.

i) Legal principles

[100] *Civil Procedure Rule* 89.13 address the penalties that may be ordered following a finding of contempt. It provides:

> **89.13 (1)** A contempt order must record a finding of guilt on each allegation of contempt for which guilt is found and it may impose a conditional or absolute discharge, a penalty similar to a remedy for an abuse of process, or any other lawful penalty including any of the following:
>
> (a) an order that the person must abide by stated penal terms, such as for house arrest, community service, or reparations;
>
> (b) a suspended penalty, such as imprisonment, sequestration, or a fine suspended during performance of stated conditions;

> (c) a fine payable, immediately or on terms, to a person named in the order;
>
> (d) sequestration of some or all of the person's assets;
>
> (e) imprisonment for less than five years, if the person is an individual.
>
> **(2)** A contempt order may provide that a penalty ceases to be in effect when the person in contempt causes contemptuous behavior to cease, or when the person otherwise purges the contempt.
>
> **(3)** A contempt order may provide for, or a judge may make a further order for, the arrest and imprisonment of an individual, or sequestration of the assets of a corporation, for failure to abide by penal terms, fulfill conditions of a suspended penalty, or comply with terms for payment of a fine.

[101] Because of the quasi-criminal nature of contempt, the sentencing process and the imposition of penalty must be consistent with those arising in the criminal setting.

[102] In *T.G. Industries Inc. v. Williams*, 2001 NSCA 105, Justice Cromwell set out a non-exhaustive list of relevant factors in sentencing a contemnor at para. 38:

- the diligence of the alleged contemnor in attempting to comply with the order;
- whether there was room for reasonable disagreement about what the order required;
- the fact that the alleged contemnor did not benefit from the breach of the order;
- the extent of the resulting prejudice to the appellant and,
- the importance of execution orders being taken seriously by all affected by them.

[103] Where children are involved, this Court has also directed that a sentencing judge must consider and be satisfied the sentence imposed is in the best interests of the children (*Soper* at para. 57).

[104] In *Keinick v. Bruno*, 2012 NSSC 218, Justice Forgeron adopted the following principles relevant to sentencing for contempt in family matters:

> [14] In **Rogers v. Rogers**, 2008 MBQB 131, Little J. completed an extensive review of case law before commenting on penalty considerations, in the family context, including the following:
>
> a) **The penalty should ensure compliance** to preserve the integrity of the administration of justice;
>
> b) The penalty should reflect an element of deterrence, both general and specific;
>
> c) **Sentences should not reflect a marked departure from those imposed in similar circumstances**;
>
> d) Restraint is always appropriate, given the twin objectives of protecting the best interests of children and the administration of justice. There is, however, a presumption that the current order is in the child's best interests and should be obeyed;
>
> e) A fine is appropriate in some circumstances, as are costs, **provided such are at a level which would not negatively impact on the welfare of the children**;
>
> f) The sentence must be proportional to the gravity of the wrong doing;
>
> g) Imprisonment should only be imposed in cases that are the most serious and deliberate of disobedience;
>
> h) The penalty must be assessed in light of the number of breaches, and the duration over which such breaches have occurred;
>
> i) The penalty should reflect the presence or absence of remorse, and whether an apology has been transmitted to the court, and to the other party;
>
> j) **All sentences for contempt in family law should have regard for the children's best interests**;
>
> k) A recognition that victims of contempt include not only the applying party, but also the children who have been prevented from spending time with the nonoffending parent; and

> l) Penalties are often multifaceted and can include incarceration, discharges, suspended penalties, costs, fines, and parenting courses.
>
> (Citations removed; Emphasis added)

[105] I endorse the above principles, and add further that on sentencing, the contemnor's purging of the contempt is a mitigating factor (*McLean* at para. 76).

ii) The fine imposed

[106] The appellant argues the fine imposed against her reflected an error of law, namely, it was contrary to the best interests of the children.

[107] I am satisfied the hearing judge did not consider the best interests of the children in imposing a fine against the appellant. Although in his reasons he noted the imposition of a fine of $250,000 as sought by the respondent would be "devastating", he undertook no analysis as to the impact on the children of the quantum of the fine he levied. As noted in *Keinick*, "a fine is appropriate in some circumstances, as are costs, provided such are at a level which would not negatively impact on the welfare of the children". The hearing judge's reasons do not demonstrate he satisfied himself of this factor, and constitutes an error of law.

iii) Set-off of fine against prospective child support

[108] The appellant further argues on appeal that once a fine had been ordered, the hearing judge also erred in setting it off against prospective child support.

[109] The respondent counters that the hearing judge was entitled in the circumstances to relieve him from paying ongoing child support as a means of securing payment of the fine. In his factum he argues:

> 50. [Mr. K.] further submits that the learned trial judge did not err in law by allowing [Ms. G.'s] fine to be offset by [Mr. K.'s] prospective child support. In ***Barkhouse v. Wile***,[23] this Honourable Court held that a judgement (*sic*) for costs can be set-off in whole or part against child support provided that it would not adversely affect a dependent child. [Mr. K.] submits that a fine is no different from a judgement (*sic*) for costs and here, as in ***Barkhouse***, there was no evidence that the set-off would adversely impact the children.

[23] 2014 NSCA 11.

[110] *Barkhouse* is of no assistance to the respondent. In that instance, a father sought set off an award of costs of $2,125.00 against ongoing child support being paid to the mother. The evidence demonstrated one child was presently living with the father, and the second, who resided with the mother was employed and would be leaving her care to attend university in the near future. In deciding the trial judge had not erred in granting a set-off, Justice Bryson noted:

> [20] Certainly, as a general rule, setting off a spousal debt against child support is undesirable and is to be avoided. However, the circumstances of a particular case may dictate otherwise. Accordingly where:
>
> (a) the debt involved – costs here – was incurred in connection with the support claim;
>
> (b) there is no reasonable prospect that the payor spouse will collect costs from the defaulting payee spouse;
>
> (c) **there would be no adverse impact on the children involved**;
>
> (d) it would not otherwise be inequitable to order a set-off
>
> then it may be appropriate to set-off some or all of child support against costs associated with litigating that issue. **However, the burden of establishing no adverse impact on the children should rest with the spouse seeking set-off.** In such cases it will be a matter of discretion for the trial judge, considering the foregoing principles, to decide if, and to what extent, set-off should be ordered.
>
> (Emphasis added)

[111] In the present instance, there is no indication the hearing judge contemplated whether his order setting-off the fine against prospective child support would have an adverse impact on the children. Further, it was the respondent's obligation in seeking a set-off to adduce evidence the children would not be adversely effected by the loss of prospective child support. The respondent did not do so.

[112] In calculating the amount of the fine, the hearing judge had determined the respondent was obligated to pay child support of $1,616.00 monthly based on his income. However, the hearing judge did not consider whether the loss of this amount on a monthly basis until the children turned 19 would have an adverse impact on them. He erred in law in not doing so.

[113] For the reasons set out above, I would set aside the sentence imposed by the hearing judge.

Issue 3 - Did the hearing judge err in dismissing the appellant's application for retroactive child support?

[114] In her application to vary filed in April, 2020, the appellant sought a change to the parenting arrangement, as well as a variation of the child support payable by the respondent to reflect she sought (and had *de facto*) full time care of the children, and that his income had increased since the CRO was issued in 2017. By virtue of the two subsequent without prejudice interim orders, the parties had agreed the children were in the primary care of the appellant. However, the level of ongoing child support remained as if the children were in a shared parenting arrangement.

[115] The application to vary was not addressed by the court until after the contempt and sentencing hearings had been concluded, three and a half years later. By that point, the prospective child support, found to be $1,616.00 per month, had been set-off by virtue of the contempt sentence. However, retroactive support was still a live issue.

[116] What the appellant sought in terms of retroactive support was an award calculated on what the respondent should have paid based on his current income and reflecting the children were in her full care up to the date of the sentencing – July 26, 2023. The appellant acknowledged the respondent had been paying support, calculated on the basis of a shared parenting arrangement, which needed to be credited to him in any retroactive quantum awarded.

[117] As noted earlier, the respondent did not contest the change to the parenting arrangements, but did assert the appellant's claim for retroactive child support ought to be dismissed.

[118] In the Endorsement released November 27, 2023, the hearing judge set out his decision regarding the appellant's claim for retroactive support as follows:

> DECISION:
> On the issue of retroactive support, the court determines **that in light of the substantial award with respect to the contempt**, that for reasons that will be set out, retroactive child support is not warranted.
>
> (Emphasis added)

[119] The hearing judge set out the positions of the parties as follows:

> Mr. Eagan in submissions argues that child support underpayment was made by [Mr. K.] as of April of 2020, when the children were residing full time with [Ms. G.], and when [Mr. K's] income increased.
>
> The parties were operating under the court order of Hunt, J, following judicial settlement conference, which on a without prejudice basis, ordered [Mr. K.] to pay child support in the amount of $850.00 per month.
>
> Therefore, the issue of whether the table amount of $850.00 was appropriate based on [Mr. K.'s] income remained a live issue.
>
> [Mr. K.] argues that the retro amount should not be awarded because;
>
> 1. **The contempt of [Ms. G.] throughout the proceedings.**
>
> 2. [Mr. K.] had been abiding by the court order, including continuing to pay the $850.00 per month as the court ordered.
>
> (Emphasis added)

[120] In his analysis, the hearing judge first determined whether retroactive child support was outstanding in the circumstances. He concluded it was, and set the amount at $29,874.00. Then he turned to whether the respondent ought to be ordered to pay it:

> The court now has the benefit of the updated statement of income and tax information. I therefore find as follows:
>
> 1. The appropriate income for [Mr. K.] was $119,100.00.
>
> 2. [Mr. K.] has acknowledged the variation of the order as it relates to parenting time and decision making for the children and acknowledged that there is no parenting relationship with the children at the present time and that they are in the day-to-day care of [Ms. G.] and as stated that he had an increase in income.
>
> 3. Therefore, retroactive child support for income of $119,100.00 would produce a table amount of $1616.00 per month, times thirty-nine months , totalling $63,024,00. However, under the order of Hunt, J, [Mr. K.] paid $850.00 a month for thirty-nine months, which totals $33,150.00. This would leave on the face of it arrears of $29,874.00. However, in my view this is not the end of the analysis because:
>
> 1. The court was satisfied that a fine in excess of $60,000.00 and in lieu of the fine child support termination was appropriate. **Therefore, the**

> **court already determined an appropriate amount as it relates to the penalty for [Ms. G.]**.
>
> 2. I accept from the submissions of counsel for [Mr. K.] that he has incurred substantial legal fees whereas Mr. Eagan on behalf of his client confirmed that [Ms. G.] was not paying legal fees.
>
> 3. In light of legal fees incurred by [Mr. K.], to award retroactive support in the amount sought of $29,000.00 on top of his legal fees would be unfair.
> **Significantly, it would also defeat the rational of the $63,963.00 fine that was levied against [Ms. G.] as of part of the penalty of the contempt proceeding**. I therefore decline to award retroactive support.
>
> (Emphasis added)

[121] The framework for addressing a claim of retroactive child support was re-affirmed by the Supreme Court of Canada in *Colucci v. Colucci*, 2021 SCC 24. There, Justice Martin set out the following analytical steps:

> [114] It is also helpful to summarize the principles which now apply to cases in which the recipient applies under s. 17 to retroactively increase child support:
>
> a) The recipient must meet the threshold of establishing a past material change in circumstances. While the onus is on the recipient to show a material increase in income, any failure by the payor to disclose relevant financial information allows the court to impute income, strike pleadings, draw adverse inferences, and award costs. There is no need for the recipient to make multiple court applications for disclosure before a court has these powers.
>
> b) Once a material change in circumstances is established, a presumption arises in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the application to vary. In the increase context, because of informational asymmetry, effective notice requires only that the recipient broached the subject of an increase with the payor.
>
> c) Where no effective notice is given by the recipient parent, child support should generally be increased back to the date of formal notice.
>
> d) The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The D.B.S.

factors continue to guide this exercise of discretion, as described in Michel. If the payor has failed to disclose a material increase in income, that failure qualifies as blameworthy conduct and the date of retroactivity will generally be the date of the increase in income.

e) Once the court has determined that support should be retroactively increased to a particular date, the increase must be quantified. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the Guidelines.

[122] In terms of setting the quantum of a retroactive award, Justice Martin stated:

> [109] If retroactive variation is appropriate, quantum is governed by the statutory scheme that applies to the award (*D.B.S.*, at para. 126). In this case, the *Guidelines* apply in determining the quantum of support. The *Guidelines* leave some space for discretion, such as when there is undue hardship within the meaning of s. 10. As in the prospective context, the court may also impute income under s. 19 of the *Guidelines*, such as where the payor has been intentionally under-employed or has unreasonably deducted expenses from income. Blameworthy conduct by the payor may be considered in setting interest or costs (*Michel*, at para. 119, per Martin J.).
>
> [110] Full and complete disclosure is required to quantify the appropriate amount of support for the period of retroactivity, just as it would be when quantifying prospective support (*Brown*,[24] at para. 20). The onus is on the payor to show the extent to which their income decreased during the period of retroactivity (*Templeton*,[25] at para. 65). If the payor fails to provide all relevant evidence required for the court to fully appreciate their true income during any part of the period of retroactivity, the court may draw an adverse inference against the payor (*Templeton*, at para. 67). The payor must also make complete disclosure of their current financial circumstances if seeking a periodic payment plan or temporary suspension on hardship grounds.

[123] From his reasons, it is clear the hearing judge determined there was a material change in circumstances, and identified the respondent's level of income for *Guideline* purposes. It is also apparent the hearing judge identified the commencement of when increased support became payable and the duration - 39 months. The hearing judge quantified the amount. None of these findings have been challenged on appeal by either party and I am satisfied the hearing judge's analysis to that point was compliant with *Colucci*.

---

[24] *Brown v. Brown*, 2010 NBCA 5.
[25] *Templeton v. Nuttall*, 2018 ONSC 815.

[124] The hearing judge then went on to consider whether the retroactive support he had identified should ultimately be paid. He considered two factors: primarily, the fine he had imposed for contempt, and secondarily, the respondent's legal fees. In my view, in placing emphasis on further penalizing the appellant, and accepting the respondent's legal fees as a reason to eliminate the retroactive support, the hearing judge erred in principle.

[125] *Colucci* makes clear the quantification of a retroactive award must follow the *Federal Child Support Guidelines* (or relevant provincial legislation). Discretion to vary from the "table amount" must find its foundation in the *Guidelines*. There is nothing in the *Guidelines* that invites a judge to decrease or eliminate the quantum of support otherwise payable due to the objectionable behaviour of a payee parent. In any event, this Court's determination that the contempt finding and sentence must be set aside now removes the hearing judge's first justification for declining to order the retroactive support.

[126] The only remaining consideration is the legal fees incurred by the respondent. In his submissions to the hearing judge, the respondent asserted the payment of retroactive support would constitute a hardship:

> Finally, in terms of the hardship that a retroactive award might entail, [Mr. K.] points to the legal fees that he has incurred to date, and will continue to incur into the future given [Ms. G.'s] appeal, which are now in excess of $35,000. Unlike [Ms. G.], whom Mr. Eagan has advised the Court is not paying legal fees, [Mr. K.] is paying his legal bills. He is not getting a free ride. Just as he has dutifully paid his child support, he has dutifully paid his legal fees.

[127] In my view, the hearing judge erred in considering the legal fees incurred by the respondent as a factor justifying a decrease, or in this case a total elimination, of the retroactive child support he had found to be owing. As *Colucci* notes, the quantum of support can be varied should a payor establish undue hardship under s. 10 of the *Guidelines*.

[128] However, the respondent neither pled undue hardship as is required by s. 10(1), nor did he file the necessary documentation to support such a claim. Even if he had pled undue hardship, *Civil Procedure Rule* 59.22(1) required the respondent to file a Statement of Income, a Statement of Expenses and a Statement of Undue Hardship Circumstances. He filed only a Statement of Income, but it

was incomplete - it did not include copies of his income tax returns filed with the Canada Revenue Agency for the last three years, as required.

[129] In light of the above, the hearing judge erred in excusing the respondent from the payment of the retroactive support because of the purported hardship arising from his legal fees.

[130] I would allow this ground of appeal. Having established a change in circumstances, the respondent's income, the date of retroactivity and the quantum of support unpaid, the hearing judge erred by considering what he had found was contemptuous behaviour by the appellant and the respondent's purported hardship to eliminate payment of the retroactive award.

[131] Based on the above, the respondent shall pay to the appellant retroactive support in the amount of $29,874.00, said amount incurred from April 1, 2020 to July 26, 2023.

Issue 4 - Should the hearing judge's costs award be varied by this Court?

[132] The hearing judge considered what costs consequences should arise on both the contempt hearing and the application to vary.

[133] The hearing judge found that success was mixed on the application to vary, and determined each party should bear their own costs. In his cross-appeal, the respondent challenges this finding.

[134] With respect to costs arising in relation to the motion for contempt, the respondent had argued appropriate costs payable by the appellant were $33,140.24 representing 80% of his legal fees. The hearing judge declined to accept that proposition, instead concluding costs of $3,500.00 payable over two years in monthly instalments, was appropriate. On cross-appeal, the respondent asks this Court to increase the costs awarded to the sum he originally claimed.

[135] Given the determinations made in relation to the previous issues, I would deny the respondent's request to increase the costs awarded to him on the contempt motion. I would further decline to set aside the hearing judge's determination regarding the costs arsing from the variation application.

[136] I would dismiss this ground of appeal. Given the finding of contempt against the appellant will be set aside, it follows that the costs of $3,500.00 ordered against her be also struck. If she has made payment to the respondent of all or a portion of the cost award, those funds shall be returned to her forthwith by the respondent.

Concluding Observations

[137] Notwithstanding what are already lengthy reasons, I think it is important to make several observations.

[138] Before bringing a motion seeking a finding of contempt, parties and their counsel should fully consider the ramifications of commencing this quasi-criminal proceeding. An applicant carries higher procedural and substantive burdens, and an alleged contemnor must be afforded protections much different than respondents in family matters. It is essential for pleadings seeking a finding of contempt to be clear, specific and comprehensive.

[139] In high-conflict parental disputes, parties and their counsel must be rigorous about proving the allegedly contemptuous behaviour meets the necessary legal elements to be found contemptuous beyond a reasonable doubt. Parents can act poorly and make bad decisions, however, not all such behaviour is contemptuous. That behaviour must be proven to be contrary to the express terms of an order on the criminal standard of proof to ground a finding of contempt.

[140] In high-conflict parenting matters where contempt is alleged, hearing judges must also be vigilant. When emotions run high, so do allegations and strong opinions, some of which may not be grounded in the evidence. Judges must look past overbroad and vitriolic allegations of wrongdoing or supposed admissions of guilt, and instead carefully focus on the legal requirements and whether the evidence adduced has met the necessary standard of proof to support a finding of contempt.

[141] In high-conflict parenting disputes, the primary objective of a contempt motion should be the enforcement of an existing order. Where enforcement is not sought and the purpose of the motion is to punish an opposing party, a hearing judge may decline to hear the motion, and must be satisfied proceeding in such circumstances will be in the best interests of the children.

[142] These reasons should not be read as endorsing that children can decide whether they wish to see a parent or participate in services or their views will provide a defence to a claim of contempt. That would be much too broad a generalization. Many factors may come into play when considering whether the views/refusal of a child should constitute a reasonable excuse or defence to an allegation of contempt. The age of the children, their maturity, the conduct of both parents, and expert evidence may be of assistance to a judge in making such a determination, in addition to other factors which may be relevant in the particular context.

[143] With respect to these parties, these reasons should also not be read as a global endorsement of the appellant's behaviour, nor a demonization of the respondent. From my review of the entirety of the record, covering nearly four years, it is apparent both of these parents made mistakes which negatively impacted upon the relationship between the children and their father.

[144] The past cannot be changed, but the future can hold an opportunity for J. and D. to have two parents in their lives. I noted the appellant had suggested the respondent write letters to the children, and she would encourage them to read them. I would encourage the respondent to consider reaching out in this fashion to the children in an attempt to open preliminary lines of communication. I further encourage the appellant to remain open to facilitating such contact in the future. Undoubtedly there are wounds in this family, but the passage of time and small overtures may start a healing process.

Disposition

[145] In summary, I would allow the appeal. As a result of the findings herein, an order will issue to the following effect:

- The respondent's cross-appeal is dismissed;
- The findings of contempt made against the appellant are vacated;
- The sentence imposed by the hearing judge is vacated, including the set-off against prospective child support;
- Based on an annual income of $119,099.00, commencing August 1, 2023, and continuing on the first day of each month thereafter until

varied by formal agreement of the parties or court order, the respondent shall pay child support for the two children of the marriage to the appellant in the amount of $1,616.00;

- The respondent shall pay retroactive child support to the appellant of $29,874.00, said amount calculated as including the 39 month period from April 1, 2020 to July 26, 2023; and

- The costs order against the appellant in the amount of $3,500.00 is set aside, and the respondent shall forthwith reimburse to the appellant any of those costs she has paid him to date.

[146] The appellant has requested costs if successful on appeal in the amount of $2,000.00, inclusive of disbursements. She has been successful, and the amount requested is reasonable. I would order the respondent to forthwith pay costs on appeal to the appellant in the amount of $2,000.00, inclusive of disbursements.

Bourgeois, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A