SUPREME COURT OF YUKON

Citation: *ENAG v JSP*, 2025 YKSC 32

Date: 20250605
S.C. No. 22-B0065
Registry: Whitehorse

BETWEEN:

E.N.A.G.

PLAINTIFF

AND

J.S.P.

DEFENDANT

Before J.P.L. McDermot J.

Counsel for the Plaintiff	Victoria H. Morrissey
Appearing on his own behalf	J.S.P.
Children's Lawyer	Norah Mooney

REASONS FOR DECISION

OVERVIEW

[1] This matter was first brought before the court as an application for a contempt order brought by the Defendant, J.S.P. He brought the motion on March 10, 2025, and requests a finding of contempt concerning the failure of E.N.A.G. to provide telephone parenting time pursuant to the final order in this matter made by this Court on January 16, 2024. E.N.A.G. says that there are many other instances where the Plaintiff, E.N.A.G. had breached the final order in this matter, but wished to concentrate on the telephone and video parenting time. The contempt issue was argued on May 15, 2025, by Zoom.

[2] This contempt application is the latest of numerous applications brought in this matter by the parties involving their son, R. who is 12 and their daughter, L. who is 8. The Plaintiff is the mother of the children, the Defendant, the father. The parties went through a trial of their parenting claims with Chief Justice Duncan of this Court in late 2023; on January 16, 2024, she made a final order giving the Plaintiff final custody of the children as well as decision-making authority subject to consultation with the Defendant. The Plaintiff was given the right to move with the children to New Brunswick after July 8, 2024. She now resides near Saint John. The Defendant was given the right to eight weeks of parenting time per year with both children as well as "telephone or video calls up to two times per week once the children moved to New Brunswick."

[3] When the final order was made in January 2024, R. was already estranged from the Defendant. He had not seen or had contact with R. since August 2023. Up until the time that the children moved to New Brunswick, the Defendant continued to see L. and he had telephone and video parenting time thereafter. However, he says that he has not spoken with L. since September 2024. Although the children have advised through their lawyer that they do not wish contact with the Defendant, he does not take any responsibility for this; he blames the Plaintiff's alienation of the children for those views and preferences. He says that this alienating behaviour, combined with the Plaintiff's lack of disciplining the children for their failure to take the phone calls, puts the Plaintiff in contempt of the final order for parenting time.

[4] E.N.A.G. says that the children absolutely refuse to participate in phone or video calls with the Defendant. She was clear in her materials, as well as at the case conference held on February 3, 2025, that she would not "follow the children around

with a videocall" to facilitate the parenting time; nor would she discipline the children for failing to speak with their father. She relies upon the children's therapists and the children's lawyer who are consistent in their views that to force parenting time would be harmful to the children and to any remnant of their relationship with the Applicant.

[5] It is to be noted that Chief Justice Duncan, when rendering her decision in this matter in January 2024, refused to insert a provision in her order that the parenting time would be at the discretion of the children.

[6] The order contemplated a review of parenting time at a case conference a month subsequent to the order and prior to the move to New Brunswick, but the high conflict nature of this matter precluded that. This review does not appear to have taken place. The parties did argue a further application in June 2024; the Plaintiff asked to move early and the Defendant asked for an assessment of the children pursuant to s. 43 of the *Children's Law Act*[1] as well as a stay of the January 16, 2024 final order. Both applications were dismissed in their entirety[2] and the Plaintiff was permitted to proceed with her move to New Brunswick as originally ordered. Even though not requested in his Notice of Application, the Defendant renewed at the hearing of this contempt application his request for an assessment; because it was not requested in his Notice of Application or discussed at the case conference, I ruled that the matter was not properly before the Court as there was no new application for an assessment returnable at the hearing of this matter.

[7] On March 18, 2024, I conducted a Judicial Case Conference with the parties, who were then both self-represented. At that time, I adjourned the Defendant's

[1] SY 2002, c 31.
[2] See *ENAG v JSP*, 2024 YKSC 32

contempt application to a date in May (set by the Trial Coordinator as May 15, 2025) to allow E.N.A.G. to obtain counsel for the hearing.

[8] At that case conference, both parties expressed that they each wanted to bring a motion to vary the January 14 final order. Both agreed that there was a change in circumstances which would warrant a change in the order. E.N.A.G. wants to bring an application to vary the order to restrict the Defendant's parenting time based upon the allegations of abuse made by the children and based upon their views and preferences not to have contact with their father. The Defendant, J.S.P. wants to raise the allegations of parental alienation that he says he has ample proof of and presumably request a change in primary care to address those issues.

[9] Prior to commencing a motion to change, an initial issue is therefore where any application to vary the order would take place, Yukon or New Brunswick. I directed that this issue as well be argued at the application.

[10] Therefore, the two issues before the Court were as follows:

i) Is the Plaintiff in contempt of the parenting time provisions of the final order of Duncan C.J. dated January 16, 2024?

ii) What is the proper venue of the application to vary the order which both parties wish to bring?

[11] J.S.P. filed, well after the hearing, a casebook and an outline. He told the trial coordinator that I had requested that he do so at the hearing of the application. That is incorrect; I did ask for a citation of a case that he referred to in argument and he said that he would provide that after the hearing. I did not request that the provide an outline

or case book after argument and after the party responding to the contempt motion, the Plaintiff, had already filed their own outline.

[12] The filing of this material was improper. All material to be used by the Court should have been before the Court at the hearing and the responding party, the Plaintiff, should have had an opportunity to respond to the Defendant's materials as the Defendant has an ongoing onus to prove the contempt beyond a reasonable doubt. As these materials were not properly before the Court, I have not reviewed them or taken them into account in making this decision.

[13] For the reasons set out below, I have determined that the contempt motion must be dismissed as the allegations of contempt were not proven beyond a reasonable doubt. I have also determined that the venue for the application to change is to be in New Brunswick, where the children now reside.

CONTEMPT ISSUES

[14] J.S.P. says that he can prove numerous breaches of the order by the Plaintiff. He says that the Plaintiff has failed to keep him informed as to major decisions or to provide him with the eight weeks of parenting time mandated under the final order. However, he chose, for this application, to limit the claim for contempt to the failure by the Plaintiff to facilitate telephone and video parenting time under the order. He says that E.N.A.G. has breached paragraph 9 of the final order which reads as follows:

> The Defendant shall have access with the Children by telephone or video calls up to two times per week after the Children relocate to New Brunswick.

[15] He therefore requests that the Plaintiff should be held in contempt of paragraph 9 of the final order of Chief Justice Duncan dated January 16, 2024. He requests a financial penalty for ongoing breaches of the order.

[16] The test for civil contempt is as set out by the Supreme Court of Canada in *Carey v Laikin*, [2015] 2 SCR 79 ("*Carey*") at para. 33 *et sequent*:

i) The court must find "that the order alleged to have been breached 'must state clearly and unequivocally what should and should not be done': para. 33

ii) The court must also find that "the party alleged to have breached the order must have had actual knowledge of it": para. 34; and

iii) Finally, the court must also find that "the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels": para. 35.

[17] For the third step, the Supreme Court discussed what type of intention is necessary to find an intentional breach of the order. To sum up, all that needs be proven is an intentional act. The claimant need not prove that the alleged contemnor specifically intended to breach the order; he need only show that the act or omission was intentional in nature. There is no need to prove contumacious intent.

[18] Finally, because civil contempt is a quasi-criminal remedy, the onus of proving contempt is the criminal onus of proof, beyond a reasonable doubt. As with the onus on the Crown in a criminal matter, that onus always rests with the claimant and never changes. It further extends to proof of the third element, that the act or omission was intentional: see *Jackson v Jackson*, 2016 ONSC 3466 ("*Jackson*") at para. 67; in other

words, the claimant must prove an intentional breach of the order, beyond a reasonable doubt.

[19] As pointed out by Duncan C.J. in *Spurvey v Melew*, 2024 YKSC 30 at para. 24, "the evidence in support of the application must conform to the rules of admissibility at trial: no hearsay, opinion, or conclusions".

[20] At the case conference, I had ordered that this matter proceed by way of oral argument for two hours. Neither party requested a trial of the contempt application with *viva voce* evidence. That is usually the request of the alleged contemnor who often wishes the right to cross examine and to attack the credibility of the applicant's evidence in order to properly respond to the claim for contempt. Moreover, an oral hearing is necessary where there are issues of credibility concerning the contempt issues: see *Fischer v Milo*, [2007] OJ No 3692 (SCJ).

[21] In this case, however, there were few credibility issues; it is common ground that the Defendant's calls were not being answered and that the Plaintiff was not disciplining the children for not taking the calls although she said that she was encouraging the calls. The children's present therapist filed an affidavit which confirmed that the children did not wish to have contact with the Defendant and this was confirmed by the children's lawyer, Ms. Mooney. As discussed below, there is no need to make a finding as to whether there was alienation of the children or whether there was abuse by the father as alleged by the children. A trial of the issue pursuant to Rule 59(12) of the *Rules of Court*[3] would not have greatly assisted the court in making findings in these contempt proceedings.

[3] YOIC 2022/168

A. Is the Order Sufficiently Clear as to be Capable of Enforcement?

[22] The order appears, at first glimpse, to provide for a maximum number of telephone or video calls. It states that the Defendant is entitled to "telephone or video calls up to two times per week". The suggestion by Plaintiff's counsel was that this does not provide that E.N.A.G. must provide the Defendant with a minimum number of calls with the children, and therefore the obligation on her is unclear and incapable of enforcement.

[23] I disagree. Any reasonable interpretation of the order must be such as would give the order some reasonable effect to its intentions, which is clearly to provide the father with telephone or video parenting time after the children move to New Brunswick. To say otherwise would leave the children without any weekly contact with their father after the children move across the country to New Brunswick. That cannot be, in any way, a reasonable interpretation of the order.

[24] That is confirmed by transcripts of a Judicial Case Conference held on February 3, 2025, attached as an exhibit to the Defendant's affidavit sworn May 10, 2025. In that transcript, Duncan C.J. says, "[E.N.A.G.], the order currently says that [J.S.P.] has access with the children two times per week. That was the order of January 2024" to which E.N.A.G. responds, "Correct".[4] From that conversation, it appears that the Plaintiff understood that there was an obligation to facilitate the telephone parenting time two times per week, something she eventually agrees to facilitate on Sundays at 6:00 p.m.[5] and Wednesdays at 7:30 p.m. (re L. only).[6]

[4] Transcript of February 3, 2024 case conference attached as Ex. A to the Defendant's affidavit sworn May 10, 2025, p. 2, Lines 26 – 29.
[5] Ibid., p. 4, Lines 37 *et sequent.*
[6] Ibid., p. 5, Lines 22 - 25

[25] The fact that the parties could not agree to times between themselves and needed court intervention to do so does not mean that the order is incapable of interpretation and enforcement. The discussions (if you can call them that) at the rather chaotic case conference on February 3, 2025, make it clear that the parties understood that paragraph 9 of the final order obliged the Plaintiff to facilitate telephone or video parenting time two times per week. The times had to be arranged and this was done at the case conference. The Defendant says that he has called on the dates and times arranged at the case conference and the phone was not answered. The Plaintiff does not deny that the calls were not answered.

B. Is the Plaintiff Aware of the Order and the Obligations Thereunder?

[26] It is apparent from the transcript at the case conference that the Plaintiff was aware of the order and that she had to provide telephone parenting time two times per week. That issue was not contested by the E.N.A.G.'s counsel at the hearing of the application.

C. Did the Plaintiff Intentionally Breach the Order?

[27] E.N.A.G. says that she has done her best to make the visits take place. She says that she does her best to have L. take the calls but that L. absolutely refuses to do so. She was clear at the case conference that she will "try" to make the calls happen but that she would not force the children to take the phone calls. She says in the case conference that this will do nothing other than hurt the children and that this will also impair the relationship between the children and their father.

[28] J.S.P. says that this is nonsense. He says that the children were in therapy in the Yukon before leaving in July 2024, and have now been in therapy in New Brunswick

since December 2024, and nothing has improved; in fact the situation has worsened. He characterizes this as alienation of the children by the Plaintiff; his views can be summed up in one statement made by him at the case conference when he says:

> [S]he will not follow this order, Your Honour. I will not be able to speak with my children. This is - we - this is a bit of a pantomime. She's going to pretend. It won't happen. Just so we're clear. I'm going to tell you that right now that we will - I will not speak to them because she will not- she will not let them speak to me.[7]

[29] I return to the issue of onus. The onus remains on the claimant to prove that the alleged contemnor, E.N.A.G., intentionally breached the order in issue. In *Jackson* Chappel J. notes at para. 64 that:

> In determining whether an alleged contemnor has breached their obligation to ensure compliance with a custody and access order, the court must maintain a steady focus on the proper burden of proof in contempt proceedings. The onus of proof remains on the moving party at all times. Accordingly, if the moving party's theory is that the alleged contemnor did not take all reasonable steps to promote compliance with a custody and access order, they must establish this point beyond a reasonable doubt. To shift the onus onto the responding party to prove that they satisfied their obligation to encourage compliance is an error of law… [citations omitted].

[30] It is to be noted that the Defendant's onus is to prove that the responding party did not take "all reasonable steps" to ensure that the order was complied with. This is important where children refuse to go for parenting time with another parent. The typical responses to a party who says that they cannot force the children to attend for parenting time is "what would you do if these children refused to go to school?" and "is there any difference between the children going to school and going for parenting time with the

[7] Ibid., p. 5, Lines 43 - 47

non-primary residence parent?" That issue has been answered by *Godard v Godard*, 2015 ONCA 568, a case cited by the Defendant, where the Ontario Court of Appeal said at para. 29:

> No doubt, it may be difficult to comply with an access order, especially as children get older. Parents are not required to do the impossible in order to avoid a contempt finding. They are, however, required to do all that they reasonably can. In this case, the motion judge inferred deliberate and wilful disobedience of the order from the appellant's failure to do do [as written] all that she reasonably could: she failed to "take concrete measures to apply normal parental authority to have the child comply with the access order".

[31] This Court of Appeal dismissed the suggestion that a primary residence parent can simply leave it up to the estranged child as to whether she will attend for court mandated parenting time. As noted above, Chief Justice Duncan also rejected that notion when she refused to insert in the order a provision that the parenting time would be subject to the wishes of the children. Generally, the law is that the custodial parent must take all reasonable steps including, where appropriate, disciplinary measures, to ensure that the children attend for parenting time ordered by the court.

[32] In the present case, it is clear that the Plaintiff was only willing to take certain measures to ensure that the parenting time take place. She said this at the case conference when she stated that she was not willing to "chase the children around with a videocall". She stated at the case conference:

> I'd like to make it really clear, Your Honour, I'm not going to chase the children around with a videocall for him to see them refusing. I'm not going to do that. I'm not going to do damage to my kids over this. I'm going to offer it. I'm going to give them advanced notice of it.[8]

[8] Ibid., p. 5, Line 26.

[33] The real issue is whether the Plaintiff has taken “all reasonable steps” to ensure compliance with the order. Did she just leave it up to the children as to whether they would take the phone calls, which I accept did not take place as discussed at the case conference?

[34] The Plaintiff deposed in her May 18, 2025 affidavit as to what she has done to comply with the court order, at least concerning L. She does not mention 12 year old R. in this affidavit as she says that R. has been estranged for some time from the Defendant, and has not spoken to him since November 2023, more than 18 months ago. He has been expressing his own views and preferences for some time, and argument of this motion were focused on L., who is only eight years old.

[35] The Plaintiff says that she has done the following to get the children to accept the video and phone calls made by the Defendant:

i) she has lined up the phone calls in advance with the Defendant, presumably so that the children have notice of those phone calls;

ii) she has given L. “advance notice and emotional support/preparation” for the calls;

iii) she has provided L. with “hands on” activities to do during the phone calls;

iv) she “took pictures and texted them to the Defendant on [L.'s] behalf or suggested she send GIFs (small moving images) or other images she liked when she did not feel able to talk”;

v) she had her sister, L.’s aunt, sit with L. when the calls were scheduled to provide emotional support;

vi) she says that she has provided "kind but firm insistence, and other efforts" to have L. attend to the calls from the Defendant.[9]

[36] This has been to no avail. It is common ground that the Defendant has made numerous calls to the Plaintiff without result. The calls are simply not answered. The Defendant says that Duncan C.J. had directed that the Plaintiff answer the calls so that the Defendant could hear and understand the efforts being made to have L. participate in the calls. I could not find that particular direction in the transcript of the February 3, 2025 case conference and when that subject was raised at the case conference, the Plaintiff expressed that she was not willing to speak with J.S.P. if L. refused to participate.

[37] The Plaintiff deposes that she has an honest belief that to force L. to go through the phone calls would do nothing other than harm L. and her relationship with the Defendant. She did not come up with this on her own. She filed as Exhibits to her affidavit closing summaries from R.'s and L's therapists from Whitehorse as well as an affidavit from the children's therapist in New Brunswick.

[38] The reports from R. and L.'s Yukon therapists attached to the Plaintiff's affidavit are, on their face, hearsay evidence and also contain double hearsay evidence from the two children regarding alleged abuse of the children by the Defendant. As noted above, that evidence would be inadmissible at trial and would be excluded. The hearsay evidence from the children would not be admissible without a *voir dire* under *R v Khan,* 2001 SCC 86. The reports attached to J.S.P.'s affidavit are inadmissible as to the truth of the contents of those reports, although, as noted below, they can be used to measure

[9] All set out in para. 6 of the Plaintiff's affidavit sworn May 18, 2025.

the Plaintiff's state of mind and the issue of reasonableness as the Plaintiff deposes that this information was provided to her by the therapists leading to her decision not to discipline the children.

[39] However, since October 2024, the children have been attending therapy in separate sessions with Ricky McIntyre, who is a social worker and therapist in Saint John. He filed his own affidavit sworn May 12, 2025, in this proceeding (as part of the Plaintiff's materials). At the date of this affidavit, the children had attended for 13 separate sessions each. Mr. McIntyre noted in that affidavit that J.S.P. contacted him about seeing the children and Mr. McIntyre told him that it was not recommended until the children were "ready." J.S.P. said at the February 3 case conference that he had last spoken with the children's therapist in December 2024 and he did not appear to be interested in further communicating with him. Mr. McIntyre says that both children have "expressed consistent and significant fear regarding the possibility of returning to their father's care."[10] He says in a progress report dated March 13, 2025, that the children are exhibiting symptoms of trauma and that:

> Given their current emotional state and therapeutic progress, I do not recommend forcing contact at this time. Any communication should occur only at the child's request to ensure their sense of safety and emotional well-being. This can be reassessed once the therapeutic process his further along.[11]

[40] These recommendations are corroborated by Ms. Mooney, the Child's Lawyer. Of all of the professionals involved with these children, she has perhaps had the most

[10] Affidavit of Ricky McIntyre sworn May 12, 2025, Ex. C and D
[11] Affidavit of E.N.A.G. sworn May 18, 2025, *Op Cit.*, Ex. D

extensive experience with the children, having seen R. 18 times and L. 12 times. She last spoke with the children separately on May 12, 2025.

[41] She confirmed to the Court in her submissions that the children's relationship with J.S.P. will be harmed if the children are forced to see or go through contact with their father. Her instructions on behalf of her clients, contained in two reports filed for this application, are that the children do not want to be forced to have contact with their father and that her position on behalf of the children is that parenting time with J.S.P. would not be in accordance with their views and preferences. Although J.S.P. says that these views are a product of the alienation of the children at the hands of E.N.A.G., Ms. Mooney says that her assessment is that the views and preferences of the children are independent and have been consistent throughout.

[42] J.S.P. made impassioned submissions about the statements made by the therapists and by Ms. Mooney. He notes that after 18 months of therapy, the children's views as to parenting time have become more entrenched, not less. He says that whatever the therapists say, they have got it wrong; they have not accounted for what he says is the ongoing alienation of the children at the hands of their mother. He says that he has ample evidence of this alienation which has been ongoing and pervasive. He claims to have had a good relationship with both children until they suddenly refused to have contact with him, R. in September 2023 and L. in October 2024. In light of the lack of explanation for this about turn, he says that the only reasonable explanation for this behaviour is the Plaintiff's alienation of the children. He asks that I draw an adverse inference from E.N.A.G.'s resistance to a psychological investigation and assessment of

the children, something he has been requesting since May 2024. As noted above, he renewed his request for an assessment at this application.

[43] When I pointed out to J.S.P. that it was not just E.N.A.G. but also the court that dismissed his application for an assessment, he said that there had been changes in circumstances since then insofar as the children had now moved to New Brunswick and that L. was now also refusing to see or talk to him. However, when I asked him whether he had made any demands for an assessment since the application for an assessment was dismissed by Duncan C.J. in June 2024, he could not point to any evidence of any such demands or requests in his materials. I decline to find an adverse inference against the Plaintiff as requested by the Defendant.

[44] Moreover, when I asked J.S.P. of any evidence of alienation of the children contained in his materials, he said that he had plenty of evidence, but none that was before me. He said that there was ample evidence in previous affidavits filed, but he appeared to be unable to take me to that evidence. The parties confirmed that nowhere in her January 16, 2024 trial decision did Duncan C.J. make a finding of parental alienation by the Plaintiff; in fact in her decision of January 16, 2024, Duncan C.J. stated that the Defendant's claims of alienation were "not objectively substantiated."[12] I have no specific evidence of alienation and no previous finding of alienation by this court. If J.S.P. was correct that there was a plethora of evidence proving alienation, it was not persuasive enough to allow for a finding of that at trial. There is no evidence before the court other than J.S.P.'s bald assertions from which I can find that alienation is a factor leading to the children's resistance to contact in this contempt application.

[12] *ENAG v. JSP*, 2024 YKSC 32 at para. 21.

[45] There were also allegations about the children having been abused at the hands of the Defendant. Again, I make no finding in this regard. Most of the evidence regarding the alleged abuse is either hearsay or double hearsay evidence, inadmissible in this contempt application.

[46] However, the issue is not whether there was alienation or abuse. These are not findings that I have to make. The issue is whether the alleged contemnor took all reasonable steps to ensure compliance with the order, and whether her failure in disciplining the children for their refusal to take the calls puts her in contempt. The issue therefore is what a reasonable person would do having received the recommendations from the children's therapists or the disclosures of the children.

[47] Although courts have held that the custodial parent may be obliged to discipline the children in the event of their refusal to attend for parenting time, that may not be an appropriate finding in all situations. Each case turns on its own merits, and if the court finds that the circumstances dictate that discipline is not a "reasonable measure" to ensure compliance, there would be no finding of contempt because the mother has otherwise done all that she could to comply with the order.

[48] In the present case, all of the children's therapists have advised against forcing the children to have parenting time with their father, virtual or otherwise. The children's lawyer has, as well, endorsed this approach. The therapists have told E.N.A.G. that forcing contact with the father would be traumatic for the children and would cause further damage to the children's already impaired relationship with their father. E.N.A.G. noted this at the case conference. She says that the children have disclosed to her abuse at the Defendant's hands. Sara Galbraith, L.'s therapist, recommended that the

mother ought to use creative, not coercive, measures to ensure contact, and E.N.A.G. has followed that advice and says that she will not force parenting time between the children and their father through the use of discipline.

[49] E.N.A.G. was clear at the case conference and in her affidavit that she was not willing to discipline the children to force them to talk to J.S.P. or "follow L. around with the call" to ensure that she picked up the phone. She was clear that she did not want to use discipline or force the children to attend on the phone calls because this would harm the children as suggested by their therapists. These recommendations have been communicated to the father. It is reasonable for any parent to follow advice from the children's caregivers, including their therapists, as they are seen as being the experts who are best able to judge what actions are in the best interests of the children. I therefore find that a reasonable parent, having received the advice provided by the children's therapists, would not coerce the children to have the parenting time, but would, as suggested by one therapist, use "creative measures" to encourage parenting time and attempt to create a safe space for the children. I therefore find that, in the circumstances of this case, the mother took all reasonable steps to comply with the order.

[50] There is ample case law for the suggestion that the court must be cautious in making an order for contempt, which is a quasi-criminal finding: see *G(N) c Services aux enfants & adultes de Prescott-Russell*, [2006] OJ No 2488 (CA) ("*Prescott-Russell*"). This is especially so where the father has provided no evidence to me as to alienation of the children by the Plaintiff other than bare allegations or of obstruction of parenting time by the Plaintiff. As discussed above, the father has the onus of proving

intentional breach of the order beyond a reasonable doubt and he has not met this onus.

D. Exercise of Discretion

[51] Even if a court can find contempt, the court has discretion, notwithstanding a breach of the order, to decline to make a finding of contempt. Justice Chappel put it in these terms at para. 60 of *Jackson*:

> … "the subjective good faith of the alleged contemnor--even if their intention is to act in the best interests of a child- is insufficient to justify breaching a court order." However, the court noted that a party may be excused from following a court order in circumstances where there is an *objectively valid justification* for the breach based on the child's needs and interests. [emphasis mine]

[52] Put another way, if based upon objective criteria, the alleged contemnor has a "legitimate excuse" not to comply with the order, the court may exercise its discretion in not making a finding of contempt: see *Prescott-Russell*.

[53] This is supported (or perhaps based upon) what the Supreme Court of Canada said in *Carey* at para. 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: see, e.g., *Morrow, Power v. Newfoundland Telephone Co.* (1994), 121 Nfld. & P.E.I.R. 334 (Nfld. C.A.), at para. 20; *TG Industries*,[13] at para. 31. 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.

[13] 2001 NSCA 105

[54] It is an appealable error for the court to fail to consider discretionary issues when addressing a contempt application: see *Chong v Donnelly*, 2019 ONCA 799.

[55] In the present case, based on the evidence before the court, J.S.P. was told by the children's therapists, both in Whitehorse and in Saint John, that to force the children to attend on court ordered parenting time through disciplinary measures would be harmful to the children. The evidence of Mr. McIntyre, who filed his own affidavit, is not hearsay evidence; he advises that the children are afraid of their father and that it is not in the best interests of the children to force them to have parenting time with their father until they are "ready". He puts this in serious terms, stating, "[a]dditional support and trauma-informed care are recommended in all environments the child may be placed" and that parenting time with the Defendant should not take place until the allegations of the children are "investigated."[14] This is echoed by the submissions of the children's lawyer, who says that the children are expressing fear of their father and do not wish contact with their father.

[56] In *Antoine v Antoine*, 2024 ONSC 1397 ("*Antoine*"), Chappell J. declined to find contempt where the mother had refused parenting time because "the mother had reasonable grounds for her concerns about the safety and well-being of the children in the care of the father and his partner" and where there were doubts as to whether the parenting time would be in the children's best interests or in the interests of justice: see para. 59.

[57] One issue raised by *Antoine* is whether E.N.A.G. has brought a motion to vary the order of Duncan C.J. concerning the Defendant's parenting time with the children. I

[14] See the affidavit of Ricky McIntyre sworn May 12. 2025, Ex. D and E which are reports concerning each of the children. This statement is in both reports.

was advised during the hearing of the application by E.N.A.G.'s lawyer that this motion to vary has already been brought in New Brunswick. There is no delay on her part in bringing that motion.

[58] Contempt is primarily a remedial remedy; it is not intended to punish the wrongdoer but to ensure compliance with court orders: see *Kim v McIntosh*, 2023 ONSC 5121. Enforcement of the order must be in the best interests of the children. Under the circumstances, I find that there is objective evidence from Mr. McIntyre that forcing the children to have parenting time may be harmful to the children and would cause them unwarranted trauma. Based upon the advice received from the children's therapists, the mother has, as was the case in *Antoine*, a reasonable fear that forcing the children to speak with their father would be harmful to them. Under the circumstances, disciplining the children for their failure to take the calls would not be a reasonable step to take to enforce the order for parenting time. In light of the potential harm to the children and the observations of the children's therapist, I decline to exercise my discretion to make a finding of contempt.

[59] I realize this finding will mean that, in the short term, J.S.P. will probably not exercise meaningful parenting time under the order of Chief Justice Duncan dated January 16, 2024. I note, however, that there appear to have been steps that the Defendant could have taken to encourage visits with the children. E.N.A.G. says that J.S.P. could have taken steps to encourage the children, including sending Christmas and birthday greetings, presents for Christmas and birthdays and written correspondence. She says that J.S.P. has done none of these things.[15] Moreover, at

[15] J.S.P. said during argument (not in any affidavit evidence) that any gifts he gave were given away and not delivered to the children.

the February 3, 2025 case conference, J.S.P. showed little interest in working with the therapists to arrange for parenting time; in answer to a question from Duncan C.J. as to whether he would work with Mr. McIntyre in having phone calls through Mr. McIntyre, J.S.P.'s response is clear and unequivocal. He says that all that he's interested in is enforcement of the order, when he says "Your honour, I want the order enforced. That's it."[16] He shows no interest in addressing the fears and concerns of the children, insisting that they talk to him notwithstanding these fears. He chose to take a rigid approach, admitting no wrongdoing and instead of working with the children's therapists and addressing the children's needs, he has brought an application for contempt, which is seen by the courts as a last resort after exhausting all other options: see *Godin v Godin*, 2012 NSCA 54 at para. 70; *Carey* at para. 36; *Jackson* at para. 56.

[60] It appears from his materials and the arguments made to the court that J.S.P. does not admit to any cause for the children's estrangement other than his theory that the Plaintiff has alienated the children and has not sought out alternative remedies to the "last resort" of a contempt motion. I find that this is not a case where the discretion of the court should be exercised to issue a contempt order.

[61] For these reasons, the Defendant's application for an order for contempt is dismissed.

JURISDICTION FOR APPLICATION TO VARY THE ORDER

[62] As set out above, both parties wish to bring an application to vary the final order made by Duncan C.J. on January 16, 2024. The Plaintiff's counsel advises that her variation proceedings have already been commenced in New Brunswick. Both parties

[16] Transcript of February 3, 2025 case conference, *Op cit.*, p. 3, Line 31.

acknowledge that there has been a material change in circumstances warranting a variation of the order but differ as to what that change is. Certainly, since that order was made, the children have moved to New Brunswick as permitted under that order (which would be a foreseeable change in circumstances as it was contemplated under the final order). Further, when the final order was made, only R. was estranged from his father and refusing contact; now both children are.

[63] However, that is not an issue for me. Both parties wish to bring an application to vary the order. At the March 17, 2024 case conference, I made a direction pursuant to Rule 36(4)(i) and (j) of the *Rules of Court* for argument as to the jurisdiction where the application to change should be brought, in the Yukon or in New Brunswick.

[64] In this application, as I am sitting as a Deputy Judge for the Yukon, I can only determine whether the application to vary may be brought in the Yukon. Therefore, the issue is whether the Supreme Court of Yukon should retain jurisdiction to address the variation application.

[65] The Defendant argues that the proper jurisdiction for any variation proceedings remains with the Yukon courts. He says that the evidence concerning the best interests of the children remains in the Yukon and that the children were habitually resident and present in the Yukon at the commencement of these parenting proceedings. He says that is all that is required under s. 37 of the *Children's Law Act*. He says that the requirement for habitual residence applies to the commencement of the originating proceedings for a parenting order and not the commencement of the application to vary which is brought within the main proceedings pursuant to Rule 63.

[66] Rule 63(6) of the Yukon *Rules of Court* reads as follows:

> An application to vary, suspend or rescind an order made by this court in a proceeding brought under the *Family Property and Support Act*, the *Children's Law Act* or the *Divorce Act* (Canada) must be brought by notice of application in the family law proceeding.

[67] I assume that what J.S.P. is saying is that since the application for variation is brought "in the family law proceeding", the operative date for the residency requirements under s. 37 of the *Children's Law Act* is when the original family law proceedings are commenced.

[68] It is instructive to review the terms of s. 37 of the *Children's Law Act*:

> (1) The court shall only exercise its jurisdiction to make an order for custody of or access to a child if
>
> (a) the child is habitually resident in the Yukon at the commencement of the application for the order; or
>
> (b) although the child is not habitually resident in the Yukon, the court is satisfied that
>
> (i) the child is physically present in the Yukon at the commencement of the application for the order,
>
> (ii) substantial evidence concerning the best interests of the child is available in the Yukon,
>
> (iii) no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,
>
> (iv) no extra-provincial order in respect of custody of or access to the child has been recognized by a court in the Yukon,
>
> (v) the child has a real and substantial connection with the Yukon, and

> (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in the Yukon.

[69] It is significant that the wording used both in ss. 37(1)(a) and 37(1)(b)(i) call for the children to be habitually resident in the Yukon or alternatively physically present in the Yukon, "at the commencement of the *application for the order*" [emphasis mine]. Rule 63(6) states that the variation proceedings are to be brought by *application* in the originating proceedings. That suggests to me that the operative date for the children's residency requirements under s. 37 are at the commencement of the application for variation of the order, not the originating Statement of Claim which began the parenting proceedings already resolved by the final order of Duncan C.J. on January 16, 2024.

[70] The question therefore rests on the children's residency right now as J.S.P. has not yet commenced his application and the mother only recently commenced hers. Firstly, it is without a doubt that the children are habitually resident in New Brunswick at present; a plain reading of s. 37(2) which states that a child is habitually present where the child resides, "if the parents are living separate and apart, with one parent … under a court order". In the present case, the children live with the mother in New Brunswick pursuant to the January 16 final order. The children are obviously also not physically present in the Yukon at this time and s. 37(1)(b) of the *Children's Law Act* cannot give this court jurisdiction to proceed with the variation proceedings. Therefore, s. 37 of the *Children's Law Act* mandates that the Yukon court does not have jurisdiction to entertain the variation proceedings that both parties wish to bring. I accordingly decline jurisdiction of the Yukon court concerning any variation proceedings unless the residency of the children changes in the future.

[71] I note that, even if the court had jurisdiction, the children have been living with the Plaintiff in New Brunswick for nearly a year. Their schools and their therapist is in New Brunswick as is their home and the mother's family. The evidence as to best interests is best accessed in the province and the locale where the children live. This was confirmed during the argument over the appointment of an independent assessor, something strongly advocated by J.S.P. When I asked him how the assessment could take place when the children were in New Brunswick, J.S.P. suggested that the assessor be retained in New Brunswick.

[72] Although there is also evidence in the Yukon, especially that of the father and his family, and the transfer of the proceedings to New Brunswick will lose the children's lawyer in the Yukon proceedings, Ms. Mooney, that is outweighed by the long term *status quo* of the children and their support system in New Brunswick as well as the fact that the majority of the evidence as to the children's best interests is now in New Brunswick: see *TTTM v EEQ*, 2008 YKSC 37. This is especially so where one of the major issues raised by the Defendant is alienation within the mother's home, which is in New Brunswick.

[73] I therefore decline jurisdiction over any application to vary the final parenting order made in these proceedings.

OTHER ISSUES

[74] I have already addressed the father's request for an independent assessment of the children and their best interests above. That request is dismissed.

[75] The father also requested during argument that I make a finding that there has been a material change in circumstances which would warrant a change in the

parenting order. I declined to address this issue. Again, it was not mentioned in the father's application which was for contempt. As well, this would normally be the function of the judge who will be addressing the motion to vary the order which I have ruled will be in New Brunswick and I hesitate to interfere with that judge's discretion.

COSTS

[76] Both parties have requested costs for this long motion. The Defendant asked for nominal costs of $1.00 presumably because the ruling of costs against the Plaintiff was more important than reimbursement of his actual costs. He relied upon the Plaintiff's unreasonable behaviour and bad faith behaviour in refusing his parenting time, her alienation of the children, and in disobeying court orders.

[77] The Plaintiff requested costs of $3,000. Ms. Morrissey says that the motion for contempt was not the way to address the children's reluctance in seeing their father and that his behaviour was unreasonable. She says that E.N.A.G. was forced to retain counsel as a result of this motion.

[78] Under Rule 60(9), costs generally follow the event. However, under Rule 60(15), the court has the discretion to withhold the ordering of costs related to an improper act or omission by that successful party.

[79] I find that, if anyone exhibited unreasonable behaviour, it was the Defendant. He need not have brought this contempt motion; there were other, more constructive, routes that he could have taken. His rigid approach allows no explanation for the children's hesitancy in seeing him other than the Plaintiff's alienation of the children and his focus on this was neither constructive nor in the children's best interests having regard to the therapists' closing summaries and the affidavit of Mr. McIntyre. J.S.P. was

unsuccessful in this application and in his two oral applications (without notice) to have an assessment performed of the children and to have the court rule prematurely as to whether there was a change in circumstances warranting a variation of the order. The Plaintiff shall have her costs of the application.

[80] Under Rule 60(1.3), I can fix lump sum costs of an application and I exercise my discretion to do so as this matter will no longer continue in the Yukon.

[81] The amount of costs requested by Plaintiff's counsel, $3,000, is reasonable for an argued application and the Plaintiff's solicitor has filed two affidavits, an outline, and case books in support of her position. Extensive materials including an affidavit by the children's therapist was filed. The Plaintiff shall have her costs of this motion in the amount of $3,000.

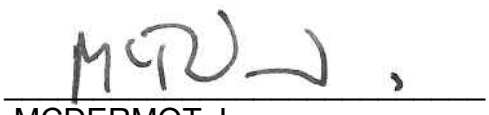
CONCLUSION

[82] The father's contempt motion is therefore dismissed.

[83] This court declines jurisdiction for the application to vary the January 16, 2024 parenting order. That matter shall continue in New Brunswick.

[84] The oral requests by the father for an independent assessment and for a finding of a change in circumstances are dismissed.

[85] Costs to the Plaintiff of this application in the amount of $3,000.



MCDERMOT J.