

CITATION: E.M.B. v. M.F.B., 2024 ONSC 162
COURT FILE NO.: FS-17-90706
DATE: 2024 01 08

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
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E.M.B.) Jared Teitel, for the Applicant/Father
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Applicant)
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- and -)
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M.F.B.) M. Freeman,
) for the Respondent/Mother
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Respondent)
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) **HEARD:** December 7, 2023

2024 ONSC 162 (CanLII)

REASONS FOR PENALTY ON MOTION FOR CONTEMPT

MANDHANE J.

INTRODUCTION

[1] These are my reasons on the penalty stage of a contempt hearing. I found that the Respondent/Mother in contempt for breaching a final order by refusing to facilitate the Applicant/Father’s court-ordered overnight parenting time on three

occasions in 2021: *E.M.B. v. M.F.B.*, 2022 ONSC 4838, 77 R.F.L. (8th) 363 (the “Contempt Finding”).

[2] This is a high-conflict case. Since making my final order in July 2021, this Court has made fourteen further endorsements and orders related to parenting of the parties’ seven-year-old daughter (“the Child”). After the Contempt Finding, I requested the involvement of the Office of the Children’s Lawyer (“the OCL”). The Report of the Children’s Lawyer (“OCL Report”) dated October 18, 2023, provides insight into the Child’s current circumstances and best interests.

[3] As a penalty for the Mother’s contempt, the Father asks me to order a reversal of primary parenting time such that the Child would leave the Mother’s primary care in Brampton and move to London with him. The Father proposes a 90-day suspension in the Mother’s parenting time, followed by supervised parenting time and the alternating weekends (“the reversal”). He asks for joint decision-making responsibility and believes that the Child should be attending therapy more consistently. He says that the reversal is in the Child’s best interests because the Mother has not purged her contempt and continues to obstruct his parenting relationship. In the alternative, the Father asks me to order family counselling, make-up parenting time, an expansion of his summer parenting time, a financial penalty of \$10,000, and an apology letter from the Mother.

[4] The Mother opposes the reversal. She says that the Contempt Finding was a “wake up call” and that she has purged her contempt. As proof, she points to the undisputed fact that the Father’s weekend parenting time has been taking place

for over a year now. She notes that the OCL does not recommend the reversal because the Child has been in her primary care since birth and is thriving academically and socially. The Mother says I should exercise my discretion not to order any penalty at all because she has purged her contempt, or I should consider a suspended sentence. She is willing to work with a parenting coordinator to resolve any future disputes, but she is not interested in therapy because she says it is unnecessary and unaffordable. She is agreeable to continuing to involve the Child in therapy with her current treating therapist but asks that the Father help pay for the cost.

[5] A reversal of primary parenting is the most extreme order I can make in a parenting dispute. Even in the context of a penalty hearing for contempt, the only basis for making such an order is because it is in the Child's best interests. Here, it is undisputed that the Child is thriving academically and socially, that she sees her Father regularly, and that she has a meaningful relationship with both of her parents. It is also undisputed that the reversal would mean a dramatic change to the Child's day-to-day life—it would disrupt her family, social, community, and therapeutic relationships.

[6] The question is whether such an extreme order is in the Child's best interests because of the Mother's ongoing efforts to minimize the Father's parenting role. In my view, it is not. At this stage in the Child's life and in the life of this litigation, the parents need to focus on maintaining stability, minimizing parental conflict, and supporting one another in their respective roles. The proposed reversal would not

accomplish any of these goals. An order for make-up parenting time, along with an expansion in the Father's parenting time is a more proportionate penalty for the Mother's contempt.

ISSUES

[7] The issues before me are:

- Has the Mother purged her contempt?
- What parenting orders are in the best interests of the Child?
- Is the reversal an appropriate penalty for the Mother's contempt?
- If not, what is the most appropriate penalty for the Mother's contempt?

SHORT CONCLUSION

[8] The most appropriate penalty is to order five weekends of make-up parenting time and an expansion of the Father's parenting time to a week-about schedule during the summers. In order to minimize the Child's exposure to conflict, I would also order that the parents minimize their contact and communication, and use the services of a parenting coordinator. The Child shall continue to be engaged with in-person therapy with her treating therapist.

THE PRINCIPLES APPLICABLE AT THE PENALTY STAGE

[9] After a finding of contempt, Rule 31(5) of the *Family Law Rules*, O. Reg. 114/99, gives me wide latitude to determine the appropriate penalty, including:

- imprisonment;

- a fine, financial penalty, or costs;
- that a person “do anything” I believe appropriate or “not do” what I forbid; or
- that they obey any other court order.

The list is not exhaustive or mutually exclusive such that I can apply the list of penalties in Rule 31(5) flexibly to achieve a fair outcome: *Geremia v. Harb* (2007), 40 R.F.L. (6) 362 (Ont. S.C.), at para. 11. As always, I must also be mindful of the primary objective of Rule 2(2) of the *Family Law Rules* (the “FLR”), which is to deal with cases justly: *Stone v. Stone*, 2019 ONSC 3214, at para. 20.

[10] The overriding purpose of sentencing in contempt proceedings is the “preservation of the integrity of the administration of justice”: *Geremia*, at para. 38. The starting premise is that breach of family orders must have consequences: *Stone*, para. 38. Meaningful consequences are *essential* in high conflict matters where allowing a contemnor to “get away” with breaching an order could be misinterpreted as judicial condonation for their behaviour: *Stone*, at para. 39; *Cassidy v. Cassidy*, 2010 ONSC 2707, 85 R.F.L. (6th) 148, at para. 9.

[11] The sanction I impose must be proportionate to the nature of the contempt and the mitigating and aggravating circumstances: *Stone*, at para. 39. The penalty should be both restorative to the victim and punitive to the contemnor; it must correlate to the conduct at issue, while not reflecting a marked departure from penalties imposed in similar circumstances: *Stone*, at para. 40; *Cassidy*, at para. 10. I must consider the available sentences, proportionality to the wrongdoing,

similarity of sentences in like circumstances, the presence of mitigating and aggravating factors, deterrence, and the reasonableness of a fine or incarceration: *Cassidy*, at para. 13.

[12] The purging of contempt does not negate the contempt but rather goes to the appropriate penalty: *Van De Mierden v. Van De Mierden* (2009), 73 R.F.L. (6th) 415 (Ont. S.C.), at para 44. The onus is on the party in contempt to demonstrate on a balance of probabilities that they have purged their contempt or made best efforts to do so: *Stone*, at para. 18. If a party proves that they have purged their contempt, this will be a mitigating factor when imposing a penalty: *Kim v. McIntosh*, 2023 ONSC 5121, at para. 22.

[13] Pursuant to Rule 31(5) of the *FLR*, I can change a final parenting order as a penalty for the Mother's contempt: *Wilson v. Wickham*, 2017 ONSC 5279, [2017] W.D.F.L. 5039, at para. 45. The language in Rule 31(5) is broad and gives me wide discretion to fashion an appropriate remedy, which may involve making an order that touches on parenting (i.e., make-up time, decision-making authority, or a change to the parenting schedule). According to the Court of Appeal for Alberta, after a finding of contempt, I may find that a change in parenting is required to protect the children's best interests, "not as a punishment per se, but as a consequence of a parent who fails to comply with court orders": *JLZ v. CMZ*, 2021 ABCA 200, Alta. L.R. (7th) 60, at para. 60. Put simply: parent's failure to comply with a court order made in the children's best interests is not acting in the children's best interests.

[14] Even so, I must show great restraint when revisiting a final order outside of the context of a motion to change: *JLZ*, at para. 62. This is because a finding of contempt does not necessarily mean that the applicant has proven that there has been a material change in circumstances that impacts the best interests of the Child, and a contempt motion should not become a litigation tactic to avoid having to prove a material change in circumstances. Therefore, as a practical matter, if an applicant seeks a reversal of primary parenting as a remedy for contempt, it is prudent for the applicant to truly consider whether there has been a material change in circumstances such that the Final Order is no longer in the Child's best interests. This is especially important where the order sought will result in a disruption a long-standing status quo. Sometimes the frequency and intensity of conflict itself will constitute a material change that requires revisiting a final order—that will depend on the facts of the case: *Chin Pang v. Chin Pang*, 2013 ONSC 2564, [2013] W.D.F.L. 4710, at para. 81.

[15] Finally, I must never impose a change in parenting as a punishment for contempt; it should only consider such a change where it is in the best interests of the child: *Chan v. Town*, 2013 ONCA 478, 34 R.F.L. (7th) 11, at para. 6; *Ruffolo v. David*, 2019 ONCA 385, 25 R.F.L. (8th) 144, at para. 19. The question is whether one parent's disobedience justifies a change in parenting, for example, because it demonstrates that the parent is unwilling to support the development and maintenance of the child's relationship with the other spouse, or because it shows that one parent is unable to shield the child from conflict: *Phong v. Nguyen*, 2023

ONSC 514, 85 R.F.L. (8th) 146, at para. 22, referring to s.16(3)(c) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.); *S.V.G. v. V.G.*, 2023 ONSC 3206, at paras. 113-115, referring to ss. 7.1-7.5 of the *Divorce Act*.

[16] The Father says that this case is similar to other cases where a change in primary parenting time was justified as being the child's best interests, including cases where the primary parent was found in contempt. I summarize the facts of these cases here:

- A parent manipulated the child (age 12) into making unfounded allegations of sexual abuse, withheld parenting time, and sabotaged reunification therapy; the child was aggressive and hostile towards the alienated parent and had a "distorted sense of reality": *Y.H.P. v. J.N.*, 2023 ONSC 5766
- A parent manipulated the children (ages 7 and 5) into falsifying allegations of sexual abuse as a way to obstruct and limit the other parents' parenting time; the older child was engaging in violent behaviour because of his exposure to parental conflict: *S. v. A.*, 2021 ONSC 5976, 61 R.F.L. (8th) 45.
- A parent psychologically manipulated the children (ages 14 and 18) and then refused to facilitate court-ordered equal parenting time based on the children's alleged refusal to attend: *Wilson v. Wickham*.
- A parent alienated two children (ages 5 and 2) from the other parent and then refused to facilitate court-ordered reunification therapy: *JLZ*.

[17] The Mother relies on another set of cases where the Court refused to order a reversal in primary parenting time because of the child's strong attachment to the primary parent and the fact that some degree of parenting time was taking place or the disruption was relatively short: see *Smart v Beland*, 2022 ONSC 5612, at paras. 17-18; *King v. Cameron*, 2020 ONCJ 548, at paras. 80-81.

[18] According to McGee J. in *S. v. A.*, at paragraph 33:

[A] reversal of primary care is the most difficult of parenting decisions. It is an option that must be approached with caution, and each case must be considered on its own facts. *A reversal is not a vindication of which parent is right or wrong.* It is a finding as to which parent can best provide physical, emotional, and psychological safety and security to a child in distress. Which parent will best protect the child from the conflict and place the child's well-being above the litigation "win." [Emphasis in original.]

I would add that a reversal of primary parenting is a remedy of last resort that is best suited to situations where the primary parent is both the primary source of the child's emotional distress and also ungovernable. Where both parents are contributing to the child's distress—for example, by exposing them to parental conflict—a reversal in primary parenting may accomplish little in terms of deescalating the conflict.

HAS THE MOTHER'S PURGED HER CONTEMPT?

[19] The parties appeared before me for a four-week trial in 2021, after which I made a "Final Order" (as amended July 14, 2021): *E.M.B. v. M.F.B.*, 2021 ONSC 4264, 339 A.C.W.S. (3d) 145 ("Trial Decision"). The Final Order granted the Mother sole parental decision-making over the Child and the Father overnight and summer parenting time. The Child was four years old at the time.

[20] In my Contempt Finding dated August 23, 2022, I found that the Mother had breached the overnight parenting provisions of my Final Order three times: on July 17, September 11, and September 25, 2021. In exercising my discretion to find the Mother in contempt rather than ordering a lesser penalty, I found that the Mother's actions were consistent with of a larger pattern of conduct that started immediately upon separation, and which continued before and after the trial. I summarized the Mother's conduct at length at paragraphs 61 to 67 of the Contempt Finding:

Unfortunately, throughout the five years since this application was commenced, the Mother has shown a complete disregard for court-ordered parenting time, and a frequent resort to self-help measures.

...

I am particularly troubled that the Mother's pattern of conduct has continued since the trial and after my Final Order was made. In my view, breach of a Final Order is a very serious matter. The Final Order was made after a four-week trial that involved testimony from the parties, their families, and the Child's treating physician and therapist. There is simply no other court that will be in a better position to craft an order that is in the Child's best interests than the judge who hears a contested trial and makes a final order. If a party believes that the trial judge got it wrong, they have a right to appeal.

Here, the Mother did not appeal my Final Order. Instead, she has continued her pattern of breaching orders and resorting to self-help measures. I am extremely troubled that, in addition to the breaches of paragraph 27 noted above, the Mother also refused to agree to a summer parenting time schedule without the Father resorting yet again to the courts.

Courts have found that the contempt remedy may be appropriate where the alleged contemnor has engaged in a history of conduct that has the effect of generally sabotaging the custody and access order: *Godard v. Godard*, 2015 ONCA 568, at paras. 20-21; *Jackson*, at para. 63.

Here, the Father had to wait five weeks after my Final Order was made to commence his overnight parenting time. He missed his July summer parenting time because the Mother would not agree to a schedule. He has had to fight to see his Child every step of the way.

The Mother's blatant disregard for court orders favours finding her in contempt. The Final Order was found to be in the best interests of the Child; the Mother's repeated failure to follow it requires censure and not just another compliance order.

[21] I initially adjourned the penalty stage of the contempt hearing to December 6, 2022; the rationale for delaying the penalty stage by three months was to "give the Mother ample opportunity to purge her contempt through facilitation of the Father's make-up parenting time for any parenting time that was missed, for whatever reason": Contempt Finding, at para. 80. To assist the Court at the penalty stage, I ordered the Mother to obtain a psychological assessment report from Dr. Susan Walker-Kennedy, and an assessment report from the Child's therapist, Daniela Shulman: Contempt Finding, at para. 83.

[22] I conducted focus hearings to keep the matter on track. On November 3, 2022, after Ms. Shulman advised me that she was not qualified to prepare an assessment report for the Child, the parties agreed to engage the services of the OCL. The OCL encountered delays in receiving third-party records such that 16 months have now passed since I found the Mother in contempt. In my view, this delay was to the Mother's benefit since I maintained the parenting status quo, and she had ample time to cure her contempt.

[23] Even on the narrowest view of the word "purge," the Mother has not purged her contempt. She never offered or facilitated make-up parenting time for the three missed overnights at issue in the Contempt Finding. She did not do so despite me explicitly encouraging her to do so. The Mother also withheld the Child on two

additional weekends since I made my Contempt Finding. On the weekends of July 14 and August 11, 2022, the Mother did not facilitate the Father's regular parenting time because she claimed that he would already have the Child for nine consecutive days during the court-ordered summer parenting time from July 28 through August 6, 2022. The summer parenting time was clearly meant to be in addition to his regular parenting time. There was no provision in my order allowing the Mother to override or alter the regular parenting time on account of the Father's summer parenting time.

[24] Overall, I find that the Mother has not proven that she has purged her contempt. She has never offered any make-up parenting time for the three weekends at issue in the Contempt Finding. She has never offered make-up parenting time for the two missed weekends in the summer of 2022. She has continued to block the Father's parenting time when she thinks she can get away with it, for example, by scheduling extracurricular and religious activities during the Father's parenting time or withholding the Child when she has a minor cough or cold.

[25] Contrary to the conclusory statements in her Affidavit, I would hardly characterize the Mother's actions as indicative of a "wake up call." The Mother is content to do the bare minimum when it comes to facilitating the Child's relationship with her Father, even when she knows that her conduct is under the microscope. She has readily admitted to Dr. Kennedy-Walker and to the OCL investigator that she had lingering concerns about the Child's welfare while in the

Father's care and that she would prefer that the Child spend less time with him. She continues to advance of false narrative about the Father being unfit as a parent without a shred of evidence.

[26] That said, I am encouraged that the Mother has settled into the alternating weekend schedule such that the Father has been having consistent parenting time for over a year now. This shows that—when properly motivated by the looming threat of sanction—the Mother is able to comply with court orders. Her recent compliance does not, however, speak to someone who has gained new insight into her behaviour and the harm it is having on her Child. Indeed, both Dr. Kimberly-Walker and the OCL investigator both found that the Mother had limited insight into the damage caused by her breach of court orders. Both of them found that she had an inflated sense of herself as a Mother and an overly negative view of the Father. In this regard, she has a distorted sense of reality. The fact is both parents are flawed and yet they are both decent parents who love the Child.

WHAT PARENTING ORDERS ARE IN THE CHILD'S BEST INTERESTS?

[27] In my Trial Decision, I discussed the court's role in determining a Child's best interests (paras. 52-71), made findings of fact regarding the Child's circumstances and needs (paras. 75-136) and made a Final Order in her best interests (paras. 137-172). Here, I focus on relevant information that has emerged since the Final Order.

[28] The Child is now in grade two and the OCL describes her as “bright, intelligent, caring and kind.” She loves to dance, loves school, and has “one big family.” The Child is doing very well academically and socially. The Child is Catholic and is preparing for her First Communion. The Child wants to continue living with her Mother and seeing her Father on weekends. She would enjoy having him come to her dance recitals. The Child is very attached to her Mother but she struggles to articulate anything positive about her Father. The Child liked working with her therapist Dr. Shulman and found it helpful.

[29] Consistent with my Final Order, the Mother has sole decision-making authority and primary parenting time in Brampton. The Child has always lived with her Mother, her maternal grandparents, and her maternal aunt in a detached home. The Mother is a single, stay-at-home parent, and the Child shares a bedroom with her. The Child has a playroom and a backyard. The OCL found the home environment to be “warm, positive, and encouraging.” The Father told the OCL that the Mother “is a good mother and will do anything for their daughter.”

[30] The Father has alternating weekends with the Child plus holiday and summer parenting time in London. The Father continues to live in the paternal grandmother’s basement apartment and has primary parenting time with his daughter from a subsequent relationship (“the Sister”). The sisters share a room with two beds. The Father works full-time and the paternal grandmother helps with childcare; the Child sometimes sleeps with her grandmother upstairs. The OCL described the home environment as “warm, positive, and encouraging” and did not

have any concerns with the extent of the paternal grandmother's involvement in the Child's life. If the Father were awarded primary parenting time, the Child would share a room with the Sister, would be enrolled in the local Catholic school, would attend after-school care, and would be enrolled in extracurricular activities like dance and soccer. The Father does not attend Church regularly. He proposes finding a therapist for the Child in London.

[31] The Father has historically supported the Child's relationship with the Mother and continues to view her as a good caregiver. Even now, he says that he is only seeking a reversal because he says that the Mother steadfastly refuses to support his relationship with the Child. He remains concerned that the Mother has not facilitated all of his weekend parenting time and has not offered make-up parenting time, does not inform him about events and activities, schedules the Child's activities during his parenting time, does not provide him with information, and continues to involve the police and child welfare authorities in his parenting time.

[32] I outlined the Mother's long-standing pattern of withholding parenting time and obstructing the Father's parenting role at length in my Trial Decision at paragraphs 108 to 120. For example, in my Trial Decision, as a justification for ordering police enforcement, I stated at paragraph 172 that: "While police enforcement is generally an extraordinary remedy, it is necessary here to ensure that the Child has stable and consistent parenting time with the Father. The Mother has repeatedly breached court orders and forced the Father to bring motions to

reinstate his parenting time. The threat of police enforcement is the only way to ensure that the Mother will not supplement her judgment for that of this court.”

[33] The Mother continues to have no insight into how her behaviour is impacting the Father’s relationship with the Child. In relation to the Contempt Finding, the OCL found that the Mother’s failure to facilitate court-ordered parenting time, “indicates poor decision-making related to [the Child],” and noted that “[The Mother] has shown little insight into how her behavior impact the ability to co-parent with the [Father] and ultimately impacting the relationship he has with their child.” None of this is new. The Mother’s lack of insight was something that I also touched on in my Trial Decision, reflecting that “the Mother’s impressions of the Child did not always match the Child’s emotional state or her capabilities”: at para. 80.

[34] In my Trial Decision at paragraph 78, I described a Child who was young and whose parents were appropriately shielding her from parental conflict. Unfortunately, the circumstances have now materially changed. The Peel Children’s Aid Society has now verified a risk of emotional harm to the Child due to her exposure to ongoing post-separation conflict. Dr. Shulman told the OCL that the Child “is still having a hard time with the separation and sometimes overhears things that may impact her, whether intentional or unintentional.” At seven years old, the OCL says that the Child is already starting to exhibit early signs of anxiety and distress such as stomach aches because of her parents’ behaviour.

[35] The conflicts between the parents are ongoing and mostly center on communication. For example, both parents described the Child’s iPad as a

“lightening rod” issue. The Father complains that his Facetime calls are not private, where the Mother says that the Father does not facilitate them. The Father says that the Mother tried to undermine his parenting by communicating with the Child during his parenting time. The Mother admits to tracking the Child’s whereabouts using the “Find my” function on the iPad, which is particularly troubling being she has previously used private investigators to conduct surveillance on the Father: *E.M.B. v. M.F.B.*, 2021 ONSC 3691, 58 R.F.L. (8th) 165. The Child has noticed that the iPad is a source of parental conflict, telling the OCL that her Father does not “let her” call her Mother and lamenting that she would “want to call mommy every day and night if [she] could.”

[36] The OCL found that both parents have involved police and child welfare authorities in parenting time, which has undermined their mutual trust and has a negative impact on the Child. The Father uses the threat of court-ordered police enforcement to gain an advantage in his communications with the Mother, while the Mother has asked the police to conduct well-being checks when the Father has not responded to her repeated texts requesting information. As recently as July 2023, the Mother manipulated a psychologist into reporting the Father to child welfare agencies based on her one-sided and inaccurate account of his substance abuse issues.

[37] For his part, according to the OCL, the Father “struggles with letting the past issues go” and is “firmly rooted in the ongoing conflict” such that he is inflexible about his parenting time and not able to prioritize the Child’s best interests. The

most telling example of the Father's approach has been his repeated resort to "the nuclear option" throughout the history of this litigation. Despite being worried about alienation, I note that the Father has not recommended reunification therapy or even a gradual expansion in his parenting time. In seeking a reversal, even in the face of the OCL recommendation against it, I find that the Father has been primarily motivated by "winning", even if it comes at the cost of escalating conflict and harming the Child.

[38] As was the case in the Trial Decision, I take guidance from the 2021 *Parenting Plan Guide* by the Association of Family and Conciliation Courts (Ontario) ("*Guide*"). For children between ages of 6 and 9 years, the *Guide* says that "children generally should have very significant involvement with both parents," bearing in mind that they will also be spending more time at school and in activities: p. 22. In relation to parental conflict, the *Guide* states at page 21 that:

If parents are in conflict, the child's sense of competence may be affected. It is important to protect a child from conflict between their parents. In this regard, it can be helpful for transitions or parenting exchanges to take place at neutral places (such as school). Children this age often feel they need a parent's "permission" to see the other parent. They have developed an appreciation for others' points of view; if they believe that a parent is unsettled or anxious about their spending time away, the child may have feelings of guilt, fear, anxiety, or even anger.

While children in this age range are stressed by parental conflict, they are more flexible than older children, and may be better able to transition between parents who may still be hostile towards one another. Entrenched child resistance to contact with one parent due to the parental conflict or the influence of an aligned parent may start at this age, but generally only starts with children who are a little older.

The *Guide* notes that, between the ages of 10 and 12, "[i]f there is a high level of conflict, and one or both parents are not supporting the child's relationship with the

other parent, this is an age where some children may strongly identify with one parent”: p. 25.

[39] The OCL found that the Child is “being placed in the middle of the parental conflict” and has become “aligned with her mother” such that she is unable or unwilling to express positive feelings about her Father (despite their close and loving relationship). The Child worries about her Mother when she is at the Father’s home. The OCL also found that the Child remains sad about her parents’ separation and expressed wanting her parents to be together. According to the OCL, “these thoughts show that she cares for both parents and would like them to be more amicable with each other.” The OCL stated that the Child “needs her mother to support the relationship she would like to have with the father and paternal family members.”

[40] The OCL recommends that the Child stay in the Mother’s primary care, and that the Father’s summer parenting time be expanded. However, the OCL does not rule out the possibility of a reversal being in the Child’s best interest in the future, stating: “Should [the Mother] not follow through with recommendations provided by the court, then it would be recommended to consider a complete reversal provided the appropriate supports are in place to support the family and emotional needs of the child.”

[41] To reduce the Child’s exposure to conflict, the OCL recommends that there be no Facetime calls during the Father’s parenting time unless the Child initiates them, and one weekly Facetime call during the Mother’s parenting time. The OCL

recommends that the parents use an app for all communication, participate in individual counselling, and work with a parenting coach. Finally, to support the Child's emotional development, she should continue to work with Dr. Shulman.

[42] Dr. Walker-Kennedy also recommended that the Child continue seeing a therapist, that the Mother engage in therapy, and that the parents use a parenting coach. She explains the role of a parenting coach as follows:

It is strongly recommended that [the Mother] and [the Father] retain the services of a Parenting Coach who shall be a duly qualified mental health professional with expertise in separation/divorce, child development and high conflict families. The Parenting Coach shall have two general functions:

- To minimize the current level of conflict and help the parents enhance their co-parenting and communication skills. In this regard, the Parenting Coach will assist the parents to actively foster and facilitate the child's relationship with both parents.
- To address the parenting concerns raised by [the Mother] to help her question the accuracy of her perceptions and assumptions in a supportive and safe environment. To provide education regarding the long term impact on why it is in the Child's] best interests to have a stable, predictable and meaningful relationship with her father.

[43] Based on all the information before me, I find that an order that is in the Child's best interests will:

- Maintain the Child's close attachment to her Mother and maternal family;
- Deepen the Child's relationship with the Father, Sister, and paternal family;
- Foster the Child feeling safe and secure in her Father's care;
- Limit contact and communication between the parents;

- Support the parties' parenting roles by facilitating better communication; and
- Use the parents' limited financial resources to support interventions that will directly and immediately benefit the Child.

From a child development perspective, it would appear that time is of the essence. It is important to establish a parenting routine and minimize parental conflict well before the Child enters puberty and adolescence when she is more likely to reject the Father if the Mother does not properly support the relationship.

IS A REVERSAL IN PRIMARY PARENTING AN APPROPRIATE PENALTY?

[44] The short answer is no. Foremost, a reversal in this case is not in the Child's best interests because it will be more emotionally damaging to the Child than maintaining the current *status quo*. A reversal is contrary to the Child's views and preferences because it would permanently disrupt the Child's strong bond with her Mother while emotionally alienating her from the Father at a critical juncture in her development. The OCL states that a reversal would be "a significant loss" to the Child because she would be removed from the only home she has ever known, and because it would "support the ideology [the Child] has expressed in interview that [the Father] is trying to take her away from [the Mother]." The reversal may result in the Child refusing to attend parenting time with the Father. The OCL said that such a change might cause emotional harm, while also disrupting her

therapeutic relationship with Dr. Shulman. In my mind, the Child will feel more secure with her Father if I gradually increase his parenting time. A radical change in the parenting plan will just make the Child more anxious and disconnected from the Father, while lacking the supports that she would usually rely upon to manage her feelings.

[45] Second, such an order would not minimize the parental conflict that is harming the Child. A reversal will not resolve the iPad issue and will do nothing to address or discourage police enforcement or wellness checks—it would just change the dynamics. To the contrary, a reversal will only embolden the Father, inflame the Mother, entrench the parties in their positions, and spur further litigation. The reversal serves only one purpose and that is to “pick a winner.” Such an approach is at odds with my laser-focus on the Child’s best interest and the goals of a contempt penalty.

[46] Third, I note that this case is distinguishable from cases where courts have justified a reversal as being in the child’s best interests. Unlike those situations, and despite the Mother’s problematic conduct, this is not (yet) an alienation case. In the two-and-a-half years since my Final Order, the Father has spoken with the Child regularly during the week and can only point to a handful of weekends when the Mother has denied his parenting time. The last time the Mother denied his weekend parenting time was well over a year ago. The Child attends parenting time willingly and is happy when she is in the Father’s care. At its highest, the Child feels conflicted about her Father, not alienated from him. So, while I am concerned

about the possibility of alienation in the future, the situation at present does not justify such an extreme penalty as a reversal. At present, this case is more akin to the cases cited by the Mother where maintaining the status quo is in the child's best interests despite the offending parties' conduct.

[47] Finally, I would also not order a change in parental decision-making. While the Father admits that the Mother makes sound decisions for the Child, the Father is concerned that she does not inform him about them. While the OCL proposes that the Mother be required to formally consult the Father before making a decision, I am concerned that making such an order would effectively require the parties to communicate *more* rather than *less* which would increase conflict rather than decrease it.

WHAT PENALTY SHOULD BE IMPOSED?

[48] Having canvassed the Child's best interests and the Father's request for a reversal, I now consider the most appropriate penalty for the Mother's contempt, bearing in mind the overall goal of promoting compliance with court orders by punishing the contemnor and providing restitution to the victim.

[49] In my view, an appropriate penalty on the facts of this case must address the Mother's continued attempts to obstruct the Father's parenting role, while deescalating the conflict between the parties. First, I would order that the Mother provide the Father with five weekends of make-up parenting time between now and the start of the Father's summer parenting time. The Father shall propose

dates for the make-up parenting time, and the Mother shall not withhold her consent unreasonably. If the make-up parenting time conflicts with the Child's extracurricular activities, the Father shall make reasonable efforts to facilitate the Child's participation in her regularly scheduled activities. This will ensure the Child does not come to resent the Father for the make-up parenting time.

[50] Second, I would also order a moderate expansion in the Father's parenting time to allow the Child to begin to feel more safe and secure in his care, and to build the Mother's trust in his parenting abilities. Going forward, in addition to the school year parenting time and holiday parenting time set out in my Final Order, the Father shall have expanded summer parenting time. Consistent with the recommendation of the OCL, on the last day of school, the Father shall have week-about parenting time commencing on Friday at 6:00 p.m. to the following Friday at 6:00 p.m. This rotation should continue throughout the summer.

[51] Third, though not in the nature of a penalty, *per se*, I would also change my Final Order based on a material change in circumstances, namely the escalating conflict between the parties and the impact it is having on the Child. I would order the Mother to ensure that the Child is regularly receiving in-person therapeutic support from Dr. Shulman, consistent with her professional advice. Both parties are encouraged to speak with Dr. Shulman directly to seek feedback about what is recommended in terms of sessions. The Father shall claim the cost of the Child's therapy through his employee benefits, and any remaining amount shall be split between the parties 50/50.

[52] Fourth, except in the case of emergencies affecting the immediate wellbeing of the Child, the parties shall communicate exclusively through an app (such as AppClose, Our 2 Houses, or Our Family Wizard). Each parent should commit to checking the app twice per week, once at the beginning of the week and once during the weekend. In the event of an emergency, a parent can text the other parent once to request that they check the app on an urgent basis. This approach will discipline the parties to think before texting and provide some degree of accountability.

[53] Fifth, I would change my Final Order as it relates to communication with the Child during the other parent's parenting time. I would change my Final Order as follows:

- During the Father's regular parenting time, the Child shall have access to her iPad to contact her Mother on Saturday evening at 8:00 p.m. It will be up to the Child to decide whether she would like to initiate contact with the Mother.
- During the Mother's regular parenting time, the Child shall have access to her iPad to contact the Father on Wednesday evening at 8:00 p.m. It will be up to the Child to decide whether she would like to initiate contact with the Father.
- During the parties' summer parenting time, the Child shall have access to her iPad to contact the other parent twice per week

(Wednesday and Sundays) at 8:00 p.m. It will be up to the Child to decide whether she would like to initiate contact with the other parent.

- On a holidays and special days, the Child shall have access to her iPad to contact the other parent at 8:00 p.m. It will be up to the Child to decide whether she would like to initiate contact with the other parent.
- All communications should take place in a private setting without the presence of adult observers and should be limited to 15 minutes maximum.

[54] Finally, the parties shall engage the services of a parenting coordinator as described by Dr. Walker-Kennedy. The parenting coordinator shall be provided with all court decisions, Dr. Walker-Kennedy's report, as well as the OCL report. Some of the specific issues that should be addressed are information sharing, scheduling of extracurricular activities, communication during parenting time, and dispute resolution. The Father shall claim the cost of the parenting coordinator through his employee benefits, and the parties shall split the cost of an outstanding amount 50/50 between them.

FINAL ORDER AND COSTS

[55] Pursuant to these reasons, the parties shall endeavour to agree on the terms of a draft order. The draft order and appropriate consents shall be sent to my assistant on or before January 22, 2024, at Aleisha.Salim@ontario.ca. If the

parties are unable to agree on the terms of an order, they shall send to my assistant their draft order on or before January 22, 2024.

[56] The Father was successful on the contempt motion and his parenting time was expanded. However, the Father was not successful in having primary parenting time reversed at the penalty stage, which was the most contentious issue through the motion. The parties are encouraged to resolve the matter of costs between themselves. If the parties are not able to agree on the matter of costs, they shall each send to my assistant their Costs Outlines, any relevant offers to settle, and written costs submissions (maximum five pages, double-spaced, 12-point font) on or before January 22, 2024.

[57] I remain seized of this matter pending the issuance of my penalty order.

Mandhane J.

Released: January 8, 2023

CITATION: E.M.B. v. M.F.B., 2024 ONSC 162
COURT FILE NO.: FS-17-90706
DATE: 2024 01 08

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

E.M.B

Applicant

- and -

M.F.B

Respondent

**REASONS ON PENALTY ON MOTION
FOR CONTEMPT**

MANDHANE J

Released: January 8, 2024