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— Franks & Zalev - This Week in Family Law

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Contents

Could this Be the Final Record re Secret Recordings?

Van Ruyven v. Van Ruyven (2021), 62 R.F.L. (8th) 451 (Ont. S.C.J.) — Kurz J.

In this case, Justice Kurz wrote what is likely to become the leading decision on surreptitiously recorded evidence. Everything started with, in Justice Kurz's words, "One cookie and just a nibble or two."

The parties were married in 2017. Their child was born six months after their wedding. They separated for the first time in June 2019, but tried to reconcile in March 2021, when the father returned to live in the matrimonial home.

The father was a police officer. The mother did not work outside of the home.

The parties' relationship was "challenging." At some point in the unspecified past, the mother had punched the father three times in the face. She then bragged that she would teach the child to do the same if she were ever "emotionally threatened by a man." The mother did not deny the assault.

The mother claimed that the father had returned to the matrimonial home a "changed man" and became a frequent consumer of marijuana and magic mushrooms. She claimed that the father left marijuana around the home when he should have locked it in his lockbox, along with his service pistol. The father acknowledged that he used marijuana, but indicated that he had only tried mushrooms once.

The parties separated in July 2021, but remained in the matrimonial home until August 13, 2021. That was the day the child found a marijuana-laced cookie in her father's shaving kit in the bathroom. The mother was present, but did not see how many bites (if any) the child took from the cookie. She immediately called 911, and an ambulance was dispatched. The mother called the father as well, who was not nearly as concerned. As Justice Kurz pointed out, despite her panic, the mother had "the wit to record their conversation." Justice Kurz noted that both parties had adduced evidence of secretly recorded conversations.

The child was discharged from the hospital without any concerns. The mother returned to the matrimonial home to find a Tupperware container of marijuana in the father's gym bag. She then took the child and moved in with her parents, and refused to tell the father where she and the child were living.

Initially, the mother took the position that the child should have no contact with the father unless he passed a hair follicle test. After an urgent case conference, her position changed to the point where the mother was arguing that the child should see the father for five out of every 14 days. The father was pushing for an equal time-sharing arrangement.

Both parties tried to file recordings of the other parent that they had secretly made.

Justice Kurz first set out the general rule of evidence:

> In the evidentiary sphere, the general rule is that if it is relevant, it is admissible, provided that it is not hearsay. But that rule is as often honoured in the breach as it is in its fullest expression. The rules of evidence have evolved to balance various interests in ensuring that the court's process and its search for truth works towards justice and the public's interest despite the classical rules of evidence. Further, under r. 14(18) and (19), certain hearsay is admissible in family law motions.

Courts in family law cases are generally reluctant to allow surreptitious recordings made by spouses of each other and their children. The reason for this was explained out by Justice Sherr in *Hameed v. Hameed*, 2006 CarswellOnt 4653 (C.J.) at paras 11 -12:

> [11] . . . Surreptitious recording of telephone calls by litigants in family law matters should be strongly discouraged. There is already enough conflict and mistrust in family law cases, without the parties' worrying about whether the other is secretly taping them. In a constructive family law case, the professionals and the courts work with the family to rebuild trust so that the parties can learn to act together in the best interests of the child. Condoning the secret taping of the other would be destructive to this process.
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> [12] I agree with Justice Henry Vogelsang who said in paragraphs [5] and [6] of *Tatarchenko v. Tatarchenko*, 83 A.C.W.S. (3d) 792, [1998] O.J. No. 4685, 1998 CarswellOnt 4374 (Ont. Gen. Div.), 1998 CanLII 14087:
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> > [5] . . . There is a wide scope for potential abuse in this practice.
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> > [6] The reliability of such evidence is very difficult to determine, even for a trial judge who has the benefit of much more opportunity to explore all of the evidence than that enjoyed by a motions judge. The suspicious and disturbing circumstances surrounding the production of this "evidence" convince me that it should be struck in its entirety and should not be before the court.

The rule is not an absolute one. The court retains discretion to determine whether the probative value of secretly recorded evidence outweighs the strong policy factors set out by Justice Sherr.

Justice Kurz noted that since *Hameed* was first decided, attempts to admit secretly made recordings by one parent of another and/or children has surged "from a trickle to a gusher." Justice Kurz stated that he is regularly provided with secret recordings that one party has made of the other, which the recording party claims will prove the instability or perfidy (. . . have to confess . . . had to look that one up) of the other. Justice Kurz also pointed out that most of the time, the recording is either edited or is just a selectively recorded version of a highly contentious argument between the parties.

Justice Kurz set out his view on such recordings as follows:

> [40] It is dangerous to the state of family law and more importantly, to the parties and children governed by it, to treat their dealings as if they were living under the Stasi in East Germany. Not everything is public and not every utterance or gesture needs to be recorded. To the contrary, routinely allowing our courts to reward a party's attempt to secretly spy on the other by admitting the fruits of that conduct into evidence contributes to the corrosiveness of matrimonial litigation. That approach must be discouraged.
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> [41] The only way that judges can effectively discourage such conduct is to refrain from rewarding it. To do that, **courts must presume that the prejudicial effect of those secret recordings far outweighs their probative value** to our system of family law and the best interests of the children affected by it. That presumption cannot be rebutted short of evidence disclosing serious misconduct by a parent, significant risk to a child's safety or security, or a threat to another interest central to the need to do justice between the parties and children. Short of such evidence, courts must say "hands (or

> phones) off" the recording feature of parents' smart phones when they seek to secretly record each other and their children. [emphasis added]

It is hard to argue with a presumption against admitting surreptitious recordings. It is of little assistance to do as many previous cases have done — to say "this is an odious practice . . . this should never happen . . . but, in *this case* we will make an exception." [See, for example: *B. (A.D.) v. B. (E.)*, 1997 CarswellBC 104 (S.C.) at para. 12; *Mathews v. Mathews* (2007), 47 R.F.L. (6th) 307 (B.C. S.C.) at para. 43 (dealing with a stolen diary — but same principle); *Surrett v. Butkiewicz*, 2018 CarswellBC 2152 (S.C.); *Finch v. Finch*, 2014 CarswellBC 1031 (S.C.); *M.Y.T.C. v. L.H.N.*, 2019 CarswellBC 4118 (S.C.); *Scarlett v. Farrell* (2014), 51 R.F.L. (7th) 479 (Ont. C.J.)]

Bad behaviour tolerated is bad behaviour encouraged.

Here, the fact that the child had consumed marijuana turned out to be minor (from a medical standpoint), and the evidence just showed that the parties were arguing. The surreptitious recordings adduced by the parties were excluded from evidence, and Justice Kurz ordered that, prospectively, neither party would record the other without their clearly expressed consent, and any recordings of the child would be for personal use only.

Justice Kurz then considered the interim parenting arrangements. Ultimately, the mother's decision to resort to self-help and her intransigence proved to be more important than any concerns regarding the father's baking. It also came to light that the mother had, at one point, placed a GPS tracker on the father, which also undermined her case for being the more stable and reliable parent. On a temporary basis the father's requested schedule was ordered, though strict conditions on the use of drugs or alcohol were placed on both parties.

Not long after *Van Ruyven*, Justice Kurz had the chance to opine on surreptitiously recorded evidence again in *E. v. V-E.* (2021), 65 R.F.L. (8th) 419 (Ont. S.C.J.), where there was no compelling evidence of provenance of the only partially-audible recordings. There, his Honour noted, "allowing secret recordings into evidence is so corrosive to the idea of trust that it must be firmly and categorically rejected unless a child's safety or another vitally important interest is at stake."

Section 9 of the *Child Support Guidelines*: Back to the Dumpster Fire

Spiess v. Spiess, 2021 CarswellAlta 3054 (Q.B.) — Lema J.

In *Spiess*, Justice Lema considered the impact of a new partner's income when dealing with a claim for child support under s. 9 of the *Child Support Guidelines*.

Section 9 requires courts to consider the following factors when determining the appropriate amount of child support in a shared parenting arrangement:

> (a) the amounts set out in the applicable tables for each of the spouses;
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> (b) the increased costs of shared parenting time arrangements; and
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> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

As the goal of s. 9 is to provide "a fair level of child support," the weight to be ascribed to each of these factors can vary depending on the circumstances of each case. As Justice Bastarache explained for the majority of the Supreme Court of Canada in *Contino v. Leonelli-Contino* (2005), 19 R.F.L. (6th) 272 (S.C.C.):

> [27] **The three factors structure the exercise of the discretion. These criteria are conjunctive: none of them should prevail** (see Wensley, at p. 90; Payne and Payne, at p. 254; *Jamieson v. Jamieson*, [2003] N.B.J. No. 67, 2003 NBQB 74 (N.B. Q.B.), at para. 24). Consideration should be given to the overall situation of shared custody and the costs related to the arrangement while paying attention to the needs, resources and situation of parents and any child. **This will allow**

> **sufficient flexibility to ensure that the economic reality and particular circumstances of each family are properly accounted for. It is meant to ensure a fair level of child support.**
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> . . . . .
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> [68] Section 9(c) vests the court a broad discretion for conducting an analysis of the resources and needs of both the parents and the children. As mentioned earlier, this suggests that the Table amounts used in the simple set-off are not presumptively applicable and that the assumptions they hold must be verified against the facts, since all three factors must be applied. Here again, **it will be important to keep in mind the objectives of the Guidelines mentioned earlier, requiring a fair standard of support for the child and fair contributions from both parents. The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances.**
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> . . . . .
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> [82] **The determination of an equitable division of the costs of support for children in shared custody situations is a difficult matter; it is not amenable to simple solutions.** Any attempt to apply strict formulae will fail to recognize the reality of various families. A contextual approach which takes into account all three factors enunciated by Parliament in s. 9 of the Guidelines must be applied. [emphasis added]

These principles are easy enough to summarize — but they are almost impossible to apply with any degree of consistency or predictability. For further discussion of s. 9, see our comment on *Smederovac v. Eichkorn* (2020), 41 R.F.L. (8th) 270 (Man. C.A.) in the 2020-42 (November 2, 2020) edition of *TWFL*. As you can tell from the title — "Section 9 of the *Child Support Guidelines*: A Hot Mess Inside a Dumpster Fire Inside a Train Wreck" — we aren't big fans.

The basic facts in *Spiess* were as follows:

- The parties had a shared parenting arrangement for their four children;
- The father was earning approximately $88,000 a year;
- The mother had no income, but her new partner, with whom she had a young child, was earning approximately $176,000 a year (although there was some evidence to indicate that his income had recently declined);
- With respect to s. 9(a) of the *Guidelines*, a straight set-off based on the parties' actual incomes would have resulted in the father owing the mother $2,036 a month in child support for the four children, and the mother owing the father nothing; and
- In an earlier decision (2021 CarswellAlta 2196 (Q.B.)), Justice Lema determined that "no move off ss.9(a) support was warranted under ss.9(b)" (i.e. the increased cost of the parties' shared parenting arrangement).

The father argued that since the mother had chosen not to work, and as she was already providing the children with a standard of living that was as good as or better than that which they had with him, he should not have to pay her any child support (or, alternatively, she should have to pay child support to him). This argument was not novel, and it was accepted by the court in *H. (M.D.) v. H. (M.N.)*, 2013 CarswellBC 392 (S.C.), where child support was, in fact, terminated because the mother's second spouse earned so much that the child enjoyed a higher standard of living with the mother than with the father.

In rejecting the father's arguments, Justice Lema found that the *father* had not met *his onus* of proving that a straight set-off based on the Tables would not be appropriate in this case:

> [20] . . .

> • to the extent the father anchors his position in differential standards of living, he goes off-track in effectively equating differential household income to differential living standards. **As the mother notes, the record is relatively sparse or at least incomplete on the standards of living in each home.** The mother disclosed the scale of her new partner's income and acknowledged that he has covered her living expenses, plus those of their child, as well as those of the shared-parented children when they live with them. Beyond that, **the specifics of his contributions — what specific kinds of expenses covered? How much spent for each category of expense? Funded entirely out of his income? If not, from what other source(s)? What expenses incurred by him for purely personal or at least non-family purposes (if any)? — are largely unknown;**
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> • **here the onus was effectively on the father i.e. to show (if actually the case) that the new partner's higher income has translated, on the ground, into a higher standard of living for the children.** Per cases such as *Wetsch v. Kuski*, 2017 SKCA 77 (para 165) and *Gottinger v. Runge* (cited above) (para 53), whose analysis I find would translate into an Alberta context, **a person in the father's position can oblige a person in the new partner's position (whether directly or via the other parent, here the mother) to provide evidence detailing "contributions to, and draws upon, the household" in question.** To advance his argument, the father should have requested such particulars and, if none were provided, sought an order requiring it to be provided;
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> • as it was, the father was left with only indirect clues on differential living standards, which I find inadequate to prove any significant differential here: . . . [emphasis added]

As a result, Justice Lema concluded that he did not "see a convincing reason, under the ss 9(c) analysis, to depart from the straight set-off outcomes for support for the years in question per ss 9(a)". Therefore, he ordered the father to pay the mother child support based on a straight set-off which, since the mother was not earning any income, was actually the same as the full Table amount.

Respectfully, we have some difficulty with this reasoning. First of all, the mother had complete control over the evidence as to the standard of living in her home that Justice Lema found was "sparse" and "incomplete". And *she* was *also* the one claiming support *from* the father. Given the very significant disparity between the total income that was available to each household, in our view, it should have been the mother's burden to provide sufficient evidence to show that she needed the amount of child support she was claiming to maintain an adequate standard of living for the children during the 50% of the time they were with her.

Second, it appears that Justice Lema approached this matter from the perspective that he should default to the set-off amount unless he was satisfied that ss. 9(b) and/or 9(c) warranted a departure from the Tables (at the very least, there is nothing in the decision to explain why $2,036 a month was the "right" amount of child support in the circumstances). However, the Supreme Court was clear in *Contino* that there are no presumptions when dealing with s. 9 (see para. 31, where Justice Bastarache noted that "not only is there no presumption in favour of awarding at least the Guidelines amount under s. 3, there is no presumption in favour of reducing the parent's child support obligation downward from the Guidelines amount").

Finally, when Justice Lema considered the parties' household standards of living, it does not appear that he considered the impact on the children's standard of living with the father of ordering the father to pay the mother almost $25,000 net a year in child support.

On a ***gross*** income of $88,000 a year, the father would have been left with about $65,000 a year after tax with which to meet his expenses before accounting for his child support obligation. After deducting the approximately $25,000 a year in child support he was ordered to pay, the father will only be left with about $40,000 a year to meet his expenses, and the four children's expenses during the 50% of the time they are with him.

In the absence of clear evidence explaining why the mother actually needed $25,000 a year from the father to provide the children with an appropriate standard of living while they were with her, it is hard to see how the father transferring almost 40% of his already modest net income to the mother's household was an appropriate result in the circumstances. On the facts of this case (as we understand them), it will be impossible for the father to provide the children with a standard of living anywhere

close to the one they have with the mother with a net income of only $40,000 a year. And, if one of the purposes of s. 9 is to avoid major disparities in standards of living between households, this result seems inimical to that purpose.

Respectfully, it does not appear that his Honour gave sufficient weight or consideration to the new partner's income. While the income of a new partner should not to be taken into account at the beginning of the s. 9 analysis, it should have been taken into account in s. 9(c) — at the stage when the Court was considering the impact of the father paying child support on the comparative standards of living in each home: *E. (B.P.) v. E. (A.)* (2016), 84 R.F.L. (7th) 33 (B.C. C.A.). And while it is improper (and arguably an error) to award child support on the basis of ***requiring*** equal standards of living in both homes (*Wetsch v. Kuski* (2017), 1 R.F.L. (8th) 290 (Sask. C.A.); and *Smederovac v. Eichkorn* (2020), 41 R.F.L. (8th) 270 (Man. C.A.)), it is equally an error to ignore disparity in standards of living.

We don't know how many lawyers, trial courts, appellate courts and academics need to say it, or how many times it need be said, but as Philip Epstein put it many years ago in the 2012-38 (September 25, 2012) edition of *TWFL*, "[s]ection 9 doesn't work well and most jurisdictions have wrestled over how to deal with shared parenting and child support. We need a new model. This one is broken." We couldn't agree more.

Why Have the Big Guns if We Never Use Them?

J.M. c. B.C., 2021 CarswellNB 671 (Q.B.) — Boudreau-Dumas J.

The parties separated in 2018. They had two children together (the reasons do not indicate how old the children were, but we know they were both at least seven because the parties adopted them in or around 2015).

In June 2020, the Court ordered that the parties would have shared decision making, and that they would have parenting time with the children on a week-on/week-off basis.

The mother did not comply with the June 2020 order, and almost immediately brought a motion to have it revoked. She also asked for sole decision making authority, and that the father be limited to supervised parenting time in accordance with the children's wishes. She argued that the children did not want to be with their father half of the time, and that the Court ordered schedule was having an adverse impact on their mental health.

The mother's motion was dismissed because she did not establish that there had been a material change since the June 2020 order was made.

The mother initially complied with the June 2020 order after her motion was dismissed. However, in April 2021, she again started refusing to comply with the June 2020 order, and claimed yet again that the children did not want to see their father, and that his parenting time was causing them distress.

In September 2021, the father brought a motion for contempt against the mother. The evidence indicated that although the children were demonstrating worrying behaviours, including threats to harm themselves, those behaviours had only occurred while they were with the mother. And, according to the father's evidence, the children were totally fine when they were with him, but the children knew that the mother did not want them to have a relationship with him. For example, the father gave evidence that the children told him that "they did not want to show him affection for fear of hurting their mother's feelings and even went so far as not to smile in photos taken with [the father]".

At the start of the contempt hearing, the mother admitted she was guilty, presumably because it seemed fairly clear that all three elements of the test for contempt had been met in this case. In particular: (1) the order stated clearly and unequivocally what should and should not be done; (2) the mother had actual knowledge of the order; and (3) she had intentionally failed to comply with the Order (*Carey v. Laiken*, 2015 CarswellOnt 5237 (S.C.C.) at paras. 32-35).

The mother also agreed that a fine would be an appropriate remedy in the circumstances, although she did not agree with the size of the fine the father had requested.

However, it does not appear that the mother was aware of Justice Jamal's (as he then was) decision in *Moncur v. Plante* (2021), 57 R.F.L. (8th) 293 (Ont. C.A.), where his Honour explained that even if all three elements of contempt have been established beyond a reasonable doubt, the court still has discretion not to impose a contempt finding, particularly in cases involving the best interests of a child:

> [10] . . . 2. **Exercising the contempt power is discretionary**. Courts discourage the routine use of this power to obtain compliance with court orders. The power should be exercised cautiously and with great restraint as an enforcement tool of last rather than first resort. A judge may exercise discretion to decline to impose a contempt finding where it would work an injustice. **As an alternative to making a contempt finding too readily, a judge should consider other options, such as issuing a declaration that the party breached the order or encouraging professional assistance**: *Carey*, at paras. 36-37; *Chong v. Donnelly*, 2019 ONCA 799 (Ont. C.A.) , 33 R.F.L. (8th) 19, at paras. 9-12; *Valoris pour enfants et adultes de Prescott-Russell c. K.R.*, 2021 ONCA 366, at para. 41; and *Ruffolo v. David* 2019 ONCA 385 (Ont. C.A.) , 25 R.F.L. (8th) 144, at paras. 18-19.
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> 3. **When the issue raised on the contempt motion concerns access to children, the paramount consideration is the best interests of the children**: *Ruffolo*, at para. 19; *Chong*, at para. 11; and *Valoris*, at para. 41. [emphasis added]

[For further discussion of Justice Jamal's decision in *Moncur v. Plante*, see the 2021-34 (September 6, 2021) edition of *TWFL*]

But for the mother's admission, Justice Boudreau-Dumas indicated that she would not have held the mother in contempt, as she was not satisfied that there was no other option for compelling the mother to comply with June 2020 order:

> [33] If I had had to decide the contempt issue, I would have followed the reasoning of Jamal J.A. in *Moncur v. Plante*. **Instead of a contempt finding, I would have issued a declaration of breach.** This will therefore be reflected in [the mother's] sentence. **This reasoning is mainly due to the fact that other measures would have been available and should have been considered by [the father] instead of bringing this application.** Serious negotiations should have been undertaken by the parties, including meetings with their counsel in an attempt to find constructive solutions to the problem. An application for case management, an application to the court for directions, a joint consultation with a mental health professional, and so on, could also have been considered. [emphasis added]

Given these comments, it is not clear to us that Justice Boudreau-Dumas was actually bound to find the mother in contempt notwithstanding her admission of guilt. The court's discretion when dealing with contempt presumably also gives a court authority to reject an admission of contempt in appropriate circumstances.

In any event, instead of exercising her discretion to reject the mother's guilty plea entirely, Justice Boudreau-Dumas exercised it to impose a less punitive sentence. Even though the mother had conceded that a fine would be appropriate, Justice Boudreau-Dumas declined to impose one. Instead, relying on Rule 76.06 of New Brunswick's *Rules of Court*, N.B. Reg. 82-73, which allows a judge to "make any order it considers necessary" after making a finding of contempt, she ordered the mother to "attend therapy sessions focusing on the separation (acceptance of and impact on the family members) as well as her role as a parent in compliance with the [father's] parenting time with the girls."

She also ordered the mother to "take concrete and positive action on a weekly basis so that the [father's] parenting time with the child A. resumes", and provided various examples of "concrete and positive actions", including participating in telephone and electronic calls with the father and the children, and participating in various activities with the father and the children such as dinners, movies, bowling, etc. She also ordered the mother to pay the father $500 in costs.

While this may be all well and good, we have serious doubts about whether this type of order is actually going to work. The mother had a history of breaching court orders. She was still insisting that she was incapable of compelling the children to see their father. She had already had years to get whatever help she needed, but had not done so. In these circumstances, it seems unlikely that therapy would help. Furthermore, in a high conflict case like this one, it seems unrealistic to expect that the parents

will just be able to start taking the kids to dinner and/or the movies together. As we said in our comment on *Moncur v. Plante* in the 2021-34 (September 6, 2021) edition of *TWFL*:

> . . . In a high conflict case, it seems overly optimistic to suggest that a "declaration of breach" would "give the parties pause to reflect on their conduct and work on cooperative solutions in the best interests of their children." When a party wilfully breaches a parenting Order, more times than not, that party is not interested in "reflecting on their conduct" or "working cooperatively." . . .

We can accept that contempt findings should generally be a last resort after, perhaps a warning — *maybe* two. However, when contumelious behaviour continues, respectfully, the court must exercise its contempt power. In high conflict situations, or where one parent simply refuses to see the impact of their behaviour on the children, respectfully, "serious negotiations" and/or "meetings with counsel in an attempt to find constructive solutions to the problem" are not going to work. Nor are "applications to the court for directions," "applications for case management" or "joint consultations with a mental health professional." All these lesser orders are just a means to further delay, and will show contumelious parties that a motion to be held in contempt is nothing to fear. In all candor, the suggestion that the response to proven contumelious behaviour should be "serious negotiations"? That is the sort of suggestion that makes family lawyers crazy: "I know your case dragged on for $2\ ^{1}/_{2}$ years. And I know you won the trial. And I know s/he is flouting the order and preventing you from seeing the kids. It's time for some serious negotiation!"

Furthermore, because the order in this case did not include important details (e.g. who the therapist should be, how many sessions the mother should attend, whether the therapist will report to the court, etc.) or say what the consequences will be if the mother does not comply, there is a very good chance that the parties are just going to end up back in court arguing about whether the mother complied with the therapy and/or with the requirement to take "concrete and positive actions".

Of course "contempt station" should not be the first stop. But it should not be the 10^{th} stop either.

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