Citation: Delichte v Rogers, 2024 MBCA 31
Date: 20240411
Docket: AF23-30-09921

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron
Mr. Justice David J. Kroft

***B E T W E E N**:*

KARYN LYNNE DELICHTE	)	***K. L. Delichte***
	)	*on her own behalf*
	)	
(Petitioner) Appellant	)	***L. K. Kirchner** and*
	)	***J. N. Lieberman***
- and -	)	*for the Respondent*
	)	
BRENDAN NOEL ROGERS	)	*Appeal heard:*
	)	***January 22, 2024***
	)	
(Respondent) Respondent	)	*Judgment delivered:*
	)	***April 11, 2024***

KROFT JA

Introduction

[1] The petitioner appeals a March 11, 2022 order requiring her to pay elevated costs for breaching conditions of a previous contempt order. For the following reasons, I would dismiss the appeal.

Background

[2] The context for this appeal is a high-conflict, twenty-year-long family proceeding and, particularly, a June 23, 2017 contempt order[1] (the

[1] Filed February 23, 2018.

contempt order) against the petitioner for failing to provide information to the respondent concerning their children as directed by the Court on October 1, 2007.

[3] The contempt order imposed a sixty-day prison sentence, suspended on condition that the petitioner once again provide information to the respondent, this time only in respect of their then-teenage son and only until he turned eighteen years old in April 2019. The information related to their son's education and extracurricular activities. The contempt order also directed the petitioner to pay solicitor and client costs of $13,000 to the respondent, which to this day remain unpaid. A motion by the petitioner for leave to extend the thirty-day appeal period was denied, and her appeal of that denial was dismissed (see *Delichte v Rogers*, 2018 MBCA 79, aff'd 2019 MBCA 69). In other words, the contempt order was not overturned or varied.

[4] The present appeal arises from the March 11, 2022 order (the cost order), made in response to a motion by the respondent to enforce the contempt order and for costs on a solicitor and client basis or, alternatively, costs in a quantum and on a timeline as determined by the Court (the cost motion).[2] The cost order declared, among other things, that the petitioner breached her information obligations under the contempt order and required the petitioner to pay the respondent elevated costs of $31,336. The prison sentence was not pursued by the respondent. However, it is clear from the judge's reasons and the cost order that the level of costs was intended not only to compensate the successful respondent for significant unnecessary legal costs incurred to respond to the petitioner, but also to reflect the judge's

[2] The notice of motion was filed September 18, 2018.

finding that grounds for incarceration existed (i.e., were not moot despite the parties' son reaching adulthood before the cost motion was argued) and to signal the Court's disapproval of the petitioner's disrespect for the institution and its process.

[5] The judge's declarations and cost award were made after consideration of the contempt order, the respondent's evidence of breach of the contempt order, the petitioner's evidence in response and the parties' submissions. After doing so, the judge concluded the petitioner failed to satisfy suspended sentence conditions, one, two, three and five of the contempt order. He then referred to *Campbell v Campbell*, 2011 MBCA 61 [*Campbell*]; and *Burr v Krahn*, 2009 MBQB 262, underscoring that civil contempt orders have both a private and public component. On the private side, civil contempt is a mechanism for enforcing an order one litigant obtains against another. On the public side, civil contempt orders communicate to society that in a system committed to even-handed justice, courts cannot stand by when someone ignores, disobeys or defies an order simply because, in their view, it is right or opportune to do so.

[6] The judge then considered whether the matter before him was moot (i.e., had been rendered meaningless), recognizing that courts generally will not decide moot cases. He found that because the parties' son had reached adulthood by the time this matter was finally argued, the petitioner's failure to provide information was moot insofar as the best interests of the child were concerned (central to requiring the information be provided to the respondent in the first place). However, it was not moot insofar as the petitioner ignored, disobeyed or defied court orders. In other words, while the private component of the contempt order might have been rendered moot by the passage of time

between the initiation and the hearing of the motion, the public component was not.

[7] Finally, after considering the contempt order and the petitioner's breaches thereof[3], as well as the respondent's success in the cost motion, the multiple pre-hearing court appearances and the extensive material filed in relation thereto, the judge determined that, in all the circumstances, costs should be awarded in favour of the respondent, calculated as a Class 4 proceeding under Tariff A of the MB, *King's Bench Rules*, Man Reg 553/88 [the *KB Rules*]. Because the tariff had not been revised for more than ten years, he also ordered the tariff should be doubled insofar as the preparation of affidavits and motion briefs was concerned. This resulted in the $31,336 cost order referenced in my introduction.

Grounds of Appeal

[8] The petitioner asks this Court to set aside the cost order, alleging the judge:

1) misapplied the legal principles applicable to civil contempt;

2) erred in his reasoning related to the issue of mootness (in other words by making the order almost three years after April 6, 2019, when the parties' son turned eighteen years old);

[3] At the outset of his reasons, the judge also noted that this was not the first time during these family proceedings the petitioner had been found in contempt.

3) failed to apply s 16(3)(j) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp), which requires a court to consider family violence when determining the best interests of the child;

4) misapprehended the evidence pertaining to the information provided by the petitioner to the respondent pursuant to the contempt order; and

5) was biased against the petitioner, basing his decision on his own personal agenda.

Standard of Review

[9] The essence of the petitioner's submission is that the judge's cost order was misinformed by the alleged errors. As cost awards are discretionary, they should only be set aside on appeal where the appellant establishes the court below made an error in principle or if the cost award is plainly wrong (see *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 247; see also *Knight v Smith*, 2024 MBCA 5 at paras 5, 9; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at paras 48-49).

Analysis and Decision

[10] Pursuant to *The Court of King's Bench Act*, CCSM c C280, s 96(1), the costs of or incidental to a proceeding, or a step in a proceeding, are in the discretion of the court and the court shall determine liability for costs including the amount or the way the costs shall be assessed.

[11] In exercising its discretion under s 96, the court may consider any matter relevant to costs, including the complexity of the proceeding, the importance of the issues, the conduct of any party that tended to lengthen or complicate unnecessarily the proceeding, a party's denial or refusal to admit anything which should have been admitted and the relative success of a party (see the *KB Rules*, r 57.01(1)).

[12] Underlying the petitioner's first two grounds of appeal is the assertion the judge wrongly factored the contempt order and failure to comply therewith into his cost considerations.

[13] To the extent the petitioner argues the judge misapplied the principles of civil contempt, it must be recalled that it is not the contempt order itself that is the subject of this appeal. The petitioner attempted to appeal the contempt order that imposed the conditions in the first place, but leave to extend the appeal period was denied, and her appeal of that denial was dismissed. It is the judge's finding that certain conditions of the contempt order had not been complied with and the cost order that are at issue on this appeal.

[14] There is not any serious argument that the judge erred in finding that the petitioner had breached conditions of the contempt order that were moot. As noted by the judge, the contempt order was not moot to the extent that the public interest was engaged (see *Campbell* at para 27).

[15] What the judge had to determine was the consequence of his finding that the conditions of the contempt order had been breached.

[16] Although dealing with the issue of an appropriate penalty for a condition of a contempt order that had been purged and not the condition of a contempt order that had been breached (as in this case), in *McLean v Sleigh*, 2019 NSCA 71 [*McLean*], the Court upheld the finding of contempt against the appellant for failing to provide her address as required by a court order. This resulted in the respondent being unable to exercise his rights of summer and Christmas access with the parties' daughter. In upholding the order of costs and disbursements totalling $15,297.77, Hamilton JA stated (*ibid* at para 91):

> . . . [W]hile each case will depend on its own circumstances, costs in contempt matters, even those involving family disputes, may be significant to impress upon the contemnor and the public generally that court orders must be followed. If costs are not sufficient, it may make a mockery of and undermine contempt proceedings.

[17] In the present case, after finding the petitioner did not comply with the contempt order, the judge simply could have sent the petitioner to jail for sixty days. He chose not to do so. That said, because the grounds for imprisonment nevertheless existed and to recognize the public component of contempt orders described in para 5 herein, the judge included the petitioner's conduct among the factors he considered when assessing costs in favour of the respondent. I am not persuaded that the judge erred in principle as alleged by the petitioner.

[18] The petitioner's third ground of appeal is the judge failed to consider family violence when fashioning the cost order. She relies on ss 16(1) and 16(3)(j)(ii) of the *Divorce Act*. Paraphrasing, those subsections provide that, when making a parenting or contact order, a court shall take into consideration

only the best interests of the child of the marriage. And, when determining the best interests of the child, a court shall consider all factors related to the circumstances of the child, including any family violence and its impact on, among other things, the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child.

[19] The cost order was not about the best interests of the parties' child. At issue was whether the petitioner breached the terms of the suspended sentence conditions of the contempt order. The judge concluded she did. The petitioner herself accepts that, at the time the cost order issued, her son was an adult, rendering the best interests of the child question moot. As earlier stated, this is not an appeal from the conditions of the contempt order—that order stands. The petitioner is not entitled to revisit that order here.

[20] The petitioner's fourth ground of appeal is that the judge misapprehended the evidence in concluding that she failed to satisfy the suspended sentence conditions one, two, three and five of the contempt order. I see no merit to this ground of appeal. It is clear from the judge's reasons that he carefully reviewed the evidence and submissions of the parties and came to specific reasonable findings of fact. There is no doubt from the petitioner's submissions she disagrees with the judge's conclusions and believes she offered appropriate explanations for her non-compliance. Her personal disagreement and explanations that were rejected by the judge cannot form the basis for overturning the judge's findings.

[21] At the hearing of the appeal, the respondent conceded that, in his affidavit, he erroneously attested in respect of condition five that the last email

he received from the petitioner was on Saturday, October 27, 2018, when, in fact, the petitioner had sent him an email on May 23, 2019 (which email was before the judge). The petitioner submits the judge relied on this error. From my review of the judge's reasons in the context of all the evidence that was before him, I am satisfied that even if the error was palpable (i.e., plain to see) it was not overriding (i.e., did not affect the result). He carefully considered all the evidence and arguments that were before him and explained where and why he found the petitioner breached her obligations under the contempt order. His conclusions were reasonable. The petitioner has not established the judge misapprehended the evidence.

[22] The petitioner's fifth and final ground of appeal is that the judge was biased. The petitioner had raised this argument during a pre-hearing appearance but chose to abandon it. The nature of the alleged bias is that the judge's decision was based on a misplaced personal agenda to foster a father-son relationship where there was no reasonable prospect of one existing.

[23] As this Court has recently stated, given the quasi-criminal nature of contempt and the possible significant consequences of a finding of contempt, several procedural protections are available to the alleged contemnor (see *Turenne v Turenne*, 2024 MBCA 18 at para 31). As well, a litigant may request a judge who has made credibility findings unfavourable to the litigant to consider recusing themselves. However, in this case, no such motion was brought.

[24] Abandonment aside, this argument is irrelevant to the question of whether, based on the evidence, the petitioner complied with the conditions of the contempt order. Moreover, having reviewed the record as contained in

the appeal books, I find nothing amounting to an actual or a reasonable apprehension of bias as explained by the Supreme Court of Canada in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 20-26. The petitioner has not met the high burden required to rebut the strong presumption of judicial impartiality (see *Kamer v Ptashnik*, 2020 MBCA 70 at para 5).

Conclusion

[25] The petitioner has not established that in making the cost order, the judge committed an error in principle or was plainly wrong.

[26] I would dismiss the appeal and order costs to the respondent in accordance with MB, *Court of Appeal Rules (Civil)*, Man Reg 555/88R, r 47, Tariff "B".

Kroft JA

I agree: Monnin JA

I agree: Cameron JA