Citation: Funk v Wiebe, 2024 MBCA 89
Date: 20241108
Docket: AF23-30-09998

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Diana M. Cameron
Mr. Justice James G. Edmond

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

	)	***C. H. Stewart***
	)	*for the Appellant*
SONIA MARIE FUNK	)	
	)	***J. A. Schofield*** *and*
(Petitioner) Appellant	)	***A. Barraza-Luna***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
JUSTIN SCOTT WIEBE	)	*Decision pronounced:*
	)	***October 29, 2024***
(Respondent) Respondent	)	
	)	*Written reasons:*
	)	***November 8, 2024***

RIVOALEN CJM (for the Court):

[1] The petitioner, Sonia Marie Funk (Ms. Funk), appealed the order of the Court of King's Bench judge (the judge) pronounced on December 23, 2022, pursuant to *The Family Maintenance Act*, RSM 1987, c F20, as repealed by *The Family Law Act, The Family Support Enforcement Act and The Inter-jurisdictional Support Orders Amendment Act*, SM 2022, c 15, and is asking this Court to "reinstate" primary care and control or the majority of parenting time to her. After hearing the appeal, we dismissed the appeal with brief reasons to follow. These are those reasons.

[2] The parties have one child who is now seven years of age.

[3] The parties resided with the child in Winnipeg until their separation. After the separation, when the child was approximately three months old, Ms. Funk unilaterally moved with the child from Winnipeg to Morden.

[4] A final order was pronounced on March 1, 2019, in which the parties consented to Ms. Funk having primary care and control of the child and final decision-making authority. The respondent, Justin Scott Wiebe (Mr. Wiebe), was awarded specified periods of care and control, essentially on alternating weekends and one mid-week overnight period. The final order provided for a review of the parenting arrangements following the completion of a parenting assessment. The child was two years old at the time the order was pronounced.

[5] On February 5, 2021, Mr. Wiebe filed a notice of motion to vary, seeking to exercise the right to review the parenting arrangements.

[6] In December 2021, a parenting assessment was completed and recommendations were made. These were that (1) the child should live in Winnipeg so that she could attend school; (2) the time-sharing arrangement would change to reflect that the child would be living primarily with Mr. Wiebe and spending three weekends a month with Ms. Funk; (3) holidays would be shared; (4) Mr. Wiebe would have final decision-making authority for medical, educational and recreational issues involving the child; (5) Ms. Funk should have a psychiatric or psychological assessment and it was recommended that she follow any therapeutic plan outlined by the mental health professional so as to maximize her ability to care for the child; (6) a parenting coach should be retained to assist Mr. Wiebe with communication strategies; and (7) a play therapist should be retained with the cooperation of both parties.

[7] In May 2022, the parenting assessor was cross-examined during an oral hearing that took place over a period of two days before the judge. At the conclusion of the hearing, the judge pronounced a variation order (May variation order) that changed the parenting schedule to a shared parenting arrangement commencing in June 2022 and continuing until the trial of the matter, which was set for December 2022. Mr. Wiebe was granted decision-making authority with respect to health issues arising for the child. In addition, the May variation order permitted the child to attend kindergarten in Morden pending the trial.

[8] Ms. Funk did not appeal the May variation order.

[9] Following the trial in December of 2022, the judge ordered that the shared parenting arrangement provided for in the May variation order continue (December variation order). In an endorsement signed on December 23, 2022, the judge made several findings, including that "the Court [continued] to have serious concerns about [Ms. Funk's] attitude towards [Mr. Wiebe]" and went on to list those concerns in great detail.

[10] Since the pronouncement of the December variation order, Ms. Funk has been found in contempt. As a penalty for the contempt, Mr. Wiebe sought, and the judge ordered, a change in the parenting arrangements, thereby varying the December variation order that is the subject of this appeal.

[11] The order addressing the penalty and implementing the change in the parenting arrangements was pronounced on January 17, 2024 (the penalty order). Ms. Funk did not appeal that order.

[12] During oral submissions, counsel for Ms. Funk argued that the judge erred by relying on the December 2021 assessment report and, in particular, those aspects of it where Ms. Funk's mental health was questioned. He submitted that this was damaging to Ms. Funk and that the November 2022 assessment of her completed by a psychologist concluded that she did not meet the diagnostic criteria for factitious disorder imposed by another.

Standard of Review

[13] The Supreme Court of Canada has reaffirmed the high level of deference to be applied in parenting cases in *BJT v JD*, 2022 SCC 24. An appellate court is not entitled to intervene unless there has been a material error, a serious misapprehension of the evidence or an error in law. Absent a material error, an appellate court is not in a position to determine what it considers to be the correct conclusions from the evidence as this is the role of the trial judge (*ibid* at paras 55-57).

Decision

[14] We have reviewed the record and the transcripts from the lower court. We have not been persuaded by counsel for Ms. Funk that the judge made a material error, that he misapprehended the evidence or that he made any error of law. The judge had the evidence of the psychologist before him and was aware of his conclusions regarding Ms. Funk's mental health. The judge commented in the endorsement that he had the opportunity to hear expert testimony with respect to the concerns raised by the assessor and he accepted the psychologist's report. In making his decision that the parties continue with a shared parenting schedule, the judge made a number of findings and listed them to support the reason why Ms. Funk should not have

primary care and control of the child or decision-making authority with respect to matters involving the child's health.

[15] Ms. Funk is asking us to reweigh the evidence, which is not our role.

[16] Further, the parenting regime between the parties was first implemented by the judge in the May variation order. That order put into operation the recommendations made by the parenting assessor. In addition, the penalty order is now governing the parenting arrangements, not the December variation order. That is, the parenting provisions that are at the heart of this appeal have been deleted. The December variation order is no longer in force and, therefore, the appeal is moot.

[17] In *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CanLII 123 (SCC) [*Borowski*], the Supreme Court confirmed that the doctrine of mootness applies when a decision "will not have the effect of resolving some controversy which affects or may affect the rights of the parties" (at 353). That is the case here (see also *SJC v S-JCA*, 2010 BCCA 31).

[18] Having determined that the appeal was moot, we considered the criteria set out in *Borowski* at 358-63, and heard the appeal on the merits. As set out above, we provided Ms. Funk with the opportunity to argue that the judge erred and were not persuaded by those arguments.

[19] For these reasons, we dismissed the appeal with costs.

Rivoalen CJM

Cameron JA

Edmond JA