

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Madam Justice Diana M. Cameron  
Mr. Justice James G. Edmond  
Mr. Justice David J. Kroft

***BETWEEN:***

<b><i>R. M. S.</i></b>	)	<b><i>G. R. Champagne</i></b>
	)	<i>for the Appellant</i>
	)	
<i>(Petitioner) Appellant</i>	)	<b><i>D. M. Minuk and</i></b>
	)	<b><i>M. Munday</i></b>
	)	<i>for the Respondent</i>
<i>- and -</i>	)	
	)	<i>Appeal heard and</i>
	)	<i>Decision pronounced:</i>
<b><i>B. D. W.</i></b>	)	<b><i>February 21, 2025</i></b>
	)	
<i>(Respondent) Respondent</i>	)	<i>Written reasons:</i>
	)	<b><i>March 5, 2025</i></b>

On appeal from *RMS v BDW*, 2023 MBKB 72 [*trial decision*]

**EDMOND JA** (for the Court):

Introduction

[1] The petitioner (the father) appealed a final order pronounced by the trial judge on April 10, 2024 (the final order). This family matter proceeded to trial in January 2023, and the trial judge delivered the *trial decision* on April 21, 2023, addressing custody and parenting time respecting the father and the respondent's (the mother) three children, child support, arrears of child support, repayment of arrears of child support, imputation of income to

the father and financial disclosure. While the trial judge found the mother more successful than the father respecting the issues decided in the trial, he ordered written submissions on costs. The trial judge had not reviewed the terms of an offer to settle and stated that had there been no settlement offer, he would have awarded tariff costs plus \$250 to the mother (see *trial decision* at para 105).

[2] After receiving the written submissions and hearing oral arguments on both costs and the terms of the order, the final order was endorsed by the trial judge.

[3] The father has appealed only two aspects of the final order: (1) the imputation of his income at \$27,846 and corresponding child support payable at \$526.30 per month for the three children from June 1, 2023, pursuant to the then MB, *Child Support Guidelines Regulation*, Man Reg 58/98 [the *Guidelines*], as repealed by *Manitoba Child Support Guidelines Regulation*, Man Reg 52/2023, s 27; and (2) the costs order of \$19,495 in favour of the mother.

[4] After hearing the appeal, we dismissed it with reasons to follow. These are those reasons.

### Background

[5] The parties lived in a common-law relationship for eleven years and had three children together. They separated in September 2017 and entered into a voluntary child support agreement (the support agreement) pursuant to which, the father paid monthly child support of \$1,000, plus \$200 towards childcare for the youngest child (the support payments). At the time of

separation, the father worked as a heavy equipment operator and, in 2018, he earned annual employment income of approximately \$113,000.

[6] By February 2018, the support payments had fallen into arrears, so the mother registered the support agreement with the Maintenance Enforcement Program. Steps were taken to garnish funds to satisfy the arrears.

[7] On or about October 22, 2019, the father suffered a serious back injury, was hospitalized and treated for a disc herniation in his lower back. The medical imaging completed at the time of his hospitalization confirmed that he had a herniated disc. He was treated by his family practitioner, Dr. Ken Parker (Dr. Parker), who testified as an expert at the trial. The diagnosis of a herniated disc was confirmed by an MRI scan approximately a year later. The father was referred to a specialist in Winnipeg for spinal injections. Dr. Parker's evidence established that the father was unable to return to work as a heavy equipment operator due to his back injury. The father maintained that he was unable to return to *any* work due to sporadic and unpredictable back pain. He had applied for and was on social assistance at the time of the trial.

[8] At trial, he sought, among other relief, an increase in his parenting time with the children, a reduction in the arrears and a change in the support payments due to his injury. The mother sought the arrears in the support payments based on the support agreement, the support payments to continue and to maintain the parenting time arrangement.

[9] The trial judge made findings of fact and granted relief relevant to this appeal, including:

- a) He rejected the parenting plan argued by the father and maintained the status quo respecting the joint parenting time of the children;
- b) He found the father had not been reasonable in seeking alternate employment, had not investigated his retraining options for over three years after his injury and imputed his income at \$27,846 (based on a minimum wage salary working thirty-five hours per week) with a corresponding support payment of \$526.30 per month effective June 1, 2023;
- c) He ordered that effective June 1, 2023, expenses under section 7 of the *Guidelines* shall be paid in proportion to the parties' incomes;
- d) The father was not required to pay child support as set out in the support agreement *from* the date of his injury, October 22, 2019, to May 31, 2023. Arrears *up to* the date of his injury were \$15,167.01 and ordered to be paid within twenty-four months; and
- e) The father was to pay costs to the mother of \$19,495 (including taxes and disbursements) based on the Court of King's Bench tariff.

### Standard of Review

[10] Section 18(1) of the *Guidelines* provides that the “court may impute such amount of income to a parent as it considers appropriate in the

circumstances”, which circumstances include nine defined situations. As pointed out in *Donovan v Donovan*, 2000 MBCA 80 [*Donovan*], the “defined situations are not an exhaustive list and the section gives the court a significant amount of discretion in imputing income” (at para 13). One circumstance is where a parent is intentionally under-employed or unemployed (see *ibid* at para 14; see also *Horbas v Horbas*, 2020 MBCA 34 at paras 21-26 [*Horbas*]). Although *Donovan* deals with the *Federal Child Support Guidelines*, SOR/97-175, the principles are equally applicable to the *Guidelines* in this case.

[11] A decision to impute income involves a judge performing a contextual analysis to determine what is reasonable in the circumstances, having in mind the objectives set out in section 1 of the *Guidelines* (see *Horbas* at paras 24-26; *Donovan* at paras 15, 18-21). Such a decision is highly dependent on factual determinations and the exercise of judicial discretion. As a result, the standard of review is highly deferential, save for pure questions of law (see *Walshe v Walshe*, 2022 MBCA 93 at para 5 [*Walshe*]; *Barendregt v Grebliunas*, 2022 SCC 22 at paras 100-104). As the Supreme Court of Canada explained, “an appellate court may only intervene where there is a material error, a serious misapprehension of the evidence, or an error in law” (*ibid* at para 103; *Walshe* at para 5; see also *Housen v Nikolaisen*, 2002 SCC 33 at paras 6-37).

[12] An order of costs is a highly discretionary decision and the standard of review was described by this Court in *Knight v Smith*, 2024 MBCA 5 at para 5 [*Knight*], as follows:

Costs awards have been described as “quintessentially discretionary” (*Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 247; see also *Dundas v Schafer*, 2014 MBCA 92 at para 70) and are not lightly interfered with by this Court. A costs award will not be set aside unless the judge has made an error in principle or the award is plainly wrong (see *Johnson v Mayer*, 2016 MBCA 41 at paras 21-22).

### Decision

[13] The father submits the trial judge misapprehended the expert evidence given by Dr. Parker respecting his ability to work as of June 1, 2023. Further, he submits that the trial judge erred when he imputed income at minimum wage based on thirty-five hours of work per week.

[14] Dr. Parker gave evidence regarding the father’s injury, condition and the possibility of his return to work. He testified the father would be unable to return to work as a heavy equipment operator. However, he also said that it was possible that the father could do tasks of a more sedentary nature.

[15] The trial judge reviewed this evidence and concluded that, while the father was disabled for a period of time, he made no efforts to retrain and determined that it was unreasonable for him not to return to some form of employment by June 1, 2023.

[16] We have not been persuaded that the trial judge made a material error, that he misapprehended the evidence or that he made an error of law. The trial judge applied the law respecting the imputation of income to the facts of this case. The trial judge’s findings are amply supported by a review of all the evidence.

[17] The father is asking us to re-weigh the evidence, which is not our role.

[18] The father also submits the trial judge erred in the award of costs. He submits that the trial judge failed to recognize each party had divided success at the trial. Specifically, he submits that he was forced to proceed with the three-day trial, which proved that he was seriously injured in an accident, to obtain an order to amend the support payments and to address the issue of child support arrears. The father also submits that the trial judge erred in considering the offer to settle.

[19] The mother submits that the trial judge did not err in his award of costs. While the trial judge may have considered the offer to settle, he did not make an order of double costs against the father pursuant to MB, *King's Bench Rules*, Man Reg 553/88, rr 49.02 to 49.10 [the *Rules*]. The trial judge awarded costs in accordance with the Court of King's Bench tariff.

[20] As pointed out in *Knight*, costs awards are highly discretionary and are not lightly interfered with by this Court (see para 5).

[21] Ultimately, the trial judge found that the mother was more successful than the father on the issues to be determined, and awarded costs to the mother.

[22] In our view, the trial judge applied the law, considered the factors set out in r 57.01 of the *Rules*, and we have not been persuaded that he made an error in principle or that the award is plainly wrong.

[23] Accordingly, the appeal was dismissed with costs on tariff in favour of the mother.

Edmond JA

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Cameron JA

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Kroft JA

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