Citation: Turenne v Turenne, 2024 MBCA 18
Date: 20240214
Docket: AF23-30-09981

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Madam Justice Anne M. E. Turner

B E T W E E N :

SUZANNE LORRAINE TURENNE	)	***H. J. Slobodzian*** *and*
	)	***B. Yarish***
(Petitioner) Respondent	)	*for the Appellant*
	)	
- and -	)	***S. L. Turenne***
	)	*on her own behalf*
CLAUDE LUC JEAN TURENNE	)	
	)	*Appeal heard and*
(Respondent) Appellant	)	*Decision pronounced:*
	)	***February 14, 2024***

MAINELLA JA (for the Court):

Introduction

[1] This is a family law contempt appeal.

[2] The respondent appealed a contempt of court order made pursuant to *The Court of King's Bench Act*, CCSM c C280, and the Manitoba, *Court of King's Bench Rules*, Man Reg 553/88. This order arose from an interim parenting arrangement order made under the *Divorce Act*, RSC 1985, c 3 (2nd Supp) in relation to the parties and their three daughters (ages twelve, thirteen and fifteen) (the interim order).

[3] After a contempt hearing, the motion judge found the respondent in contempt of the terms of the interim order in relation to the petitioner's final decision-making authority regarding major issues about the health of the parties' eldest daughter. She imposed a sentence of eight days' imprisonment, to be served on weekends, that she suspended unless the respondent was found in further contempt of the interim order. She also ordered tariff costs in favour of the petitioner.

[4] The respondent's appeal is of right; leave to appeal is not required as an order making a finding of contempt is a final order (see *The Court of Appeal Act*, CCSM c C240, s 25.2(1); *Gueye v DiNino*, 2023 ONCA 342 at para 7; *Bush v Mereshensky*, 2007 ONCA 679 at para 10).

[5] After hearing the appeal, we announced that the appeal was allowed, the finding of contempt was set aside with each party bearing their own costs in this Court and the Court below, and that written reasons would follow in due course. These are those reasons.

Background

[6] The interim order was pronounced on June 23, 2022. It granted the parties equal parenting time of their daughters based on a detailed schedule. Paragraph 6.2 of the interim order requires the parties to "consult with the other on all major decisions" relating to the children but, "[i]n the event of a disagreement on major issues respecting health related decisions", the petitioner would "have the right to make the final decision" subject to conditions.

[7] The interim order is silent as to what is a major versus a minor decision and to what degree a party can facilitate one of the daughters seeing a doctor while in their care without the consent of the other party.

[8] Unfortunately, the eldest daughter has serious mental health issues and has a contentious relationship with the petitioner, which includes disagreements about what is the best course for her treatment. The petitioner wanted the eldest daughter to take naturopathic medicine as opposed to pharmaceutical drugs. The eldest daughter's doctor and a second doctor are of the opinion that the child is sufficiently mature to make decisions about her own medical care.

[9] The parties were aware of the possibility of the eldest daughter being treated with antidepressants as early as October 2022, and they discussed this option with the eldest daughter's doctor and other professionals for many months.

[10] On or about February 13, 2023, without consulting the petitioner, the respondent took his eldest daughter to see her doctor, who prescribed Prozac. The petitioner learned of this after the fact, and she spoke to the eldest daughter's doctor and the respondent. The petitioner initially expressed reservation about the treatment but confirmed to the respondent in writing on February 17, 2023 that the eldest daughter could continue to take Prozac.

[11] The parties' divorce proceedings have been high conflict and have been marked by mutual distrust. On April 17, 2023, the petitioner filed her contempt of court motion.

[12] In her reasons finding the respondent in contempt of para 6.2 of the interim order, the motion judge said that, "with respect to decision making, you have stood in direct and wilful disregard of my order, and it is not simply that appointment with respect to Prozac."

Discussion

[13] A contempt determination involves applying a legal standard to a set of facts; therefore, absent an error on an extricable question of law, a finding of contempt is a question of mixed fact and law (see *Campbell v Campbell*, 2011 MBCA 61 at paras 38-39 [*Campbell*]; *Housen v Nikolaisen*, 2002 SCC 33 at para 26). Accordingly, if the contempt decision is informed by the correct principles, it is entitled to a high degree of deference on an appeal (see *G (JD) v G (SL)*, 2017 MBCA 117 at para 73).

[14] In our view, there are two significant difficulties with the motion judge's finding of contempt.

[15] First, a motion for contempt "is a very serious matter" (*Campbell* at para 28) with strict procedural and substantive requirements given its quasi-criminal nature. The contempt power must be used cautiously and with great restraint. According to *Carey v Laiken*, 2015 SCC 17 [*Carey*], "[i]t is an enforcement power of last rather than first resort" (at para 36).

[16] With the benefit of hindsight, it can be plainly said that it was unwise for the respondent to not consult with the petitioner about their eldest daughter's desire to be treated with antidepressants before facilitating that medical treatment. A transparent and respectful dialogue involving both parties, their eldest daughter and her doctor is what should have happened in

February 2023. That said, the motion judge accepted that the respondent's conduct was based on what he thought was in the eldest daughter's best interests.

[17] The difficulty with the finding of contempt is that, once the petitioner learned of the prescription for Prozac, she ultimately agreed with that medical treatment. Two months then passed before the Prozac prescription became contentious. The wording of para 6.2 of the interim order is clear that the petitioner's right to have final decision-making authority is only triggered if there is a "disagreement" between the parties about their eldest daughter being treated for her mental health issues with Prozac.

[18] As was noted in *Fresno Pacific University Foundation v Grabski*, 2015 MBCA 70, "[t]he core of civil contempt is failure to obey a court order of which the alleged contemnor is aware" (at para 15). One of the requirements of establishing civil contempt is "proof beyond a reasonable doubt of an intentional act or omission that is in breach of a clear order of which the alleged contemnor has notice" (*Carey* at para 38).

[19] We agree with the motion judge that parties to a court order must comply with both the letter and the spirit of the order (see *Chirico v Szalas*, 2016 ONCA 586 at para 54). However, while the interim order should not be read formalistically or literally, without proof beyond a reasonable doubt of a true "disagreement" about a major health-related decision between the parties in relation to treatment of their eldest daughter, the petitioner's right of final decision-making under the interim order was not breached. Without establishment of a breach of the interim order, the finding of contempt cannot stand (see *Campbell* at para 30).

[20] Second, given the exceptional nature of contempt, the exact nature of the alleged contempt must be articulated with some specificity by a motion judge (see *Van Easton v Wur*, 2020 MBCA 82 at para 8 [*Van Easton*]). Restraint and caution are the watchwords for a court exercising its extraordinary power of contempt, especially in the family law context (see *Campbell* at para 32; *Paton v Skymkiw*, 1996 CanLII 17988 at para 27 (MBKB) [*Paton*]).

[21] As noted in *Van Easton*, "when contempt proceedings are used, care must be taken [by the motion judge] to articulate exactly the nature of the contempt, as well as the 'what' and the 'why' of the decision" (at para 8; see also *Delichte v Rogers*, 2018 MBCA 79 at paras 29-30). The necessary clarity required for a finding of contempt is not present here.

[22] If the Prozac incident is taken out of the mix (as the petitioner endorsed the treatment despite the flawed process), the motion judge's finding of contempt rests only on her cryptic references to the respondent facilitating the medical wishes of his eldest daughter on other occasions without the input of the petitioner because she and the eldest daughter do not always get along. In our view, this is far from the "clear and unequivocal" evidence required to support a finding of contempt in a family law proceeding (*Paton* at para 27).

[23] While we understand the motion judge's frustration with the respondent assisting the eldest daughter's medical decision-making without the input of the petitioner—which we agree was an unwise course of action—we are not satisfied the finding of contempt was sufficiently clear.

[24] One illustration of the lack of clarity is that the motion judge adjourned sentencing to provide the respondent "the opportunity to purge [his] contempt to follow [the interim] order by the spirit of it".

[25] The respondent did not reasonably know what he had to do to purge his contempt. The Prozac treatment was ultimately endorsed by the petitioner. The interim order said nothing about facilitating medical appointments. The eldest daughter was not prepared to follow the advice of the petitioner and was mature enough to make medical decisions.

[26] The law mandates that findings of contempt cannot rest on uncertainties (see *Carey* at paras 33-35). It strikes us that, before moving to the extreme remedy of contempt, a lesser more proportionate remedy should have been explored in this case. For example, the terms of the interim order could have been varied, in a detailed fashion, to minimize conflict in relation to the children's medical care, mindful of the interests of the parties and the maturity and views of the children. That was a realistic alternative here given the circumstances, rather than opting for the last resort of a contempt proceeding.

[27] In our view, a finding of contempt, absent the necessary evidentiary foundation to support it, is a palpable and overriding error (see *1984 Enterprises Inc v Strider Resources Ltd*, 2013 MBCA 100 at para 69; *Campbell* at para 44). As the finding of contempt against the respondent lacks the necessary evidentiary foundation, it must be set aside.

[28] We would like to make one final comment on the contempt finding.

[29] The petitioner appropriately highlighted that the motion judge, in her reasons for sentence, also referred to the respondent failing to facilitate medical treatment of the parties' middle daughter for a foot injury and that this supported the contempt finding. The difficulty is that the motion judge did not refer to this conduct in her liability decision, which was entirely directed towards the respondent's conduct in relation to the eldest daughter.

[30] Justice Deschamps noted in *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 that "both the process used to issue a declaration of contempt and the sanction bear the imprint of criminal law" (at para 35).

[31] Given the quasi-criminal nature of contempt and the possible significant consequences of a finding of contempt, including imprisonment, an alleged contemnor enjoys several procedural protections, including the following, as stated in *Vale v USWA Local 6500*, 2010 ONSC 3039 at para 3:

> (1) The right to be provided with particularized allegations of the contempt;
>
> (2) The right to a hearing;
>
> (3) The right to be presumed innocent until such time as guilt is proved beyond a reasonable doubt;
>
> (4) The right to make full answer and defence, including the right to retain and instruct counsel, the right to cross-examine witnesses and the right to submit or call evidence;
>
> (5) The right not to be compelled to testify at the hearing.

[32] One consequence of the presumption of innocence is that, subject to rare exceptions, individuals cannot be punished for unproven acts (see *R v Giesbrecht*, 2019 MBCA 35 at para 177; *R v Suter*, 2018 SCC 34 at para 35).

[33] In our view, it would violate the presumption of innocence to uphold a finding of contempt on a basis not mentioned by the motion judge at the liability phase as being proven beyond a reasonable doubt. Adopting the petitioner's submission would be contrary to the required "strict adherence with all procedural requirements" that the law of civil contempt demands (*Campbell* at para 28; *Paton* at para 23).

[34] In terms of costs, while the general rule is that costs follow the result, we are of the view that the respondent's decision to hide the eldest daughter's wishes from the petitioner, as opposed to simply being honest and transparent with the petitioner, is at the root of this contempt litigation. Without the respondent's poor choices, none of this unnecessary contempt litigation likely would have occurred. The interests of justice favour both parties bearing their own costs of the contempt litigation in this Court and the Court below, despite the respondent's success on the contempt appeal.

Disposition

In the result, the appeal was allowed and the finding of contempt was set aside with each party bearing their own costs in this Court and the Court below.

Mainella JA

Pfuetzner JA

Turner JA