

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

JURI ZILKE

(Petitioner) Respondent

- and -

IRINA EPP

(Respondent) Applicant

) ***I. Epp***
) *on her own behalf*

) ***M. G. Mercier***
) *for the Respondent*

) *Chambers motion heard:*
) ***February 6, 2025***

) *Decision pronounced:*
) ***March 28, 2025***

CAMERON JA

Introduction

[1] The applicant (the mother) moves to extend time for her to file a notice of appeal from an order of a judge of the Court of King's Bench (the contempt motion judge) that was heard and decided on October 30, 2024, dismissing the mother's motion that the respondent (the father) be held in contempt of court for failing to comply with parenting conditions of a court order.

[2] While I accept that the mother had a continuous intention to appeal, I would dismiss the motion on the basis that the grounds of appeal raised by the mother do not raise an arguable case.

Background

[3] The mother and the father were married in Russia in 1993 and had three sons, born in 1994, 2001 and 2003, before they immigrated to Canada in 2003. Their daughter (J.Z.) was born in June 2007. The contempt proceeding taken by the mother, the appeal of which is the subject of this motion, concerns J.Z. alone. To understand how such an acrimonious proceeding came about, it is necessary to examine the relevant previous family proceedings (among many) that evidence the devolution of the relationship between the mother and father as it relates to J.Z.

[4] In June 2018, a different judge of the Court of King's Bench (the trial judge) pronounced the parties' final order. He provided primary care and control of J.Z. to the mother with specified periods of care and control to each party (the final order). In his oral reasons granting judgment, he warned the mother about her previous non-compliance with court orders regarding contact between J.Z. and the father and told her that, should she not comply with the terms of the final order in this regard, he would consider a variation changing custody of J.Z. to the father.

[5] As foreseen by the trial judge, the mother did not comply with the terms of the final order. On December 6, 2018, he granted the father's request for a variation, thereby granting the father primary care and control of J.Z. He ordered the mother to pay costs in the amount of \$4,000, inclusive of disbursements (the trial judge's variation order).

[6] In *Zilke v Epp*, 2019 MBCA 114 at paras 4-5, this Court upheld the trial judge's variation order, finding that he did not err when he held that the variation order was in the best interests of J.Z. based on (i) the lack of contact

that she had with her father since the final order, (ii) fresh evidence regarding the mother's influence regarding J.Z.'s relationship with her father, and (iii) the fact that the mother had withdrawn J.Z. from school without notice to the father.

[7] On December 18, 2018, the trial judge ordered the mother to pay \$1,500 in costs for failing to comply with the trial judge's variation order.

[8] On June 20, 2019, the mother was found to be in contempt of:

- The final order, by failing to allow the father to have time with J.Z.;
- The trial judge's variation order, by failing to turn over care and control of J.Z. to the father; and
- Failing to comply with an order made by the trial judge on April 30, 2019, ordering that she attend counselling with Dr. Lavack.

[9] On August 9, 2019, the trial judge sentenced the mother to twenty-one days' imprisonment for the contempt and ordered her to pay \$10,000 in costs. The mother's appeal of this order resulted in this Court pronouncing an order reflecting the parties' agreement that the remainder of the period of incarceration (the mother had served six days before being released on bail pending appeal with the consent of the father) be suspended for two years on the condition that the mother comply with all orders dealing with custody. This Court further gave effect to their agreement that the costs

order of \$10,000 be reduced to \$7,500, payable forthwith (see *Zilke v Epp*, 2020 MBCA 99 at para 4 [*Zilke 2020*]).

[10] On February 16, 2024, the contempt motion judge pronounced an *ex parte* variation order finding that the father had been in default. While the order dealt with numerous issues previously settled by the parties, of import, it reversed the trial judge's variation order by providing the mother with primary care and control of J.Z. (the variation order).

[11] Upon learning of the variation order, the father moved to set it aside. On July 10, 2024, on motion of the father, the contempt motion judge set aside the variation order in its entirety. She made an order specifying parenting time over the summer months for 2024 (the second order). In that order, the father was to have parenting time with J.Z. from August 11 to August 25, 2024.

[12] It is the second order which was the subject of the contempt proceedings brought by the mother on October 3, 2024. It was heard and decided by the contempt motion judge on October 30, 2024 (the contempt motion).

Reasons Dismissing the Contempt Motion

[13] The contempt motion judge commenced her reasons by noting that the mother did not specify which paragraphs of the second order she alleged the father had breached.

[14] Nonetheless, at the hearing of the matter, the mother specified that the father was in Germany from August 11 to 19, 2024, when he was to have parenting time with J.Z. The father, in his affidavit and oral argument,

explained that their adult son picked up J.Z. for visitation and cared for her in the father's home. The father explained that he had been in Germany that week caring for his father, who was ill.

[15] In dismissing the contempt motion, the contempt motion judge cited *Campbell v Campbell*, 2011 MBCA 61 [*Campbell*], finding that the circumstances in this case did not meet the test for a willful breach of a court order, which she correctly stated was a very serious matter.

[16] In denying the mother's additional request to vary the second order, the contempt motion judge noted that there was no reason to justify such a change and that the proceeding constituted a failed motion for contempt and not a variation order. She further noted that she had reversed the variation order because she "found that it was granted based on facts that were not known to this Court and that [she] was misled."

[17] She granted, in part, the father's request that as a condition of the contempt motion being dismissed, the mother be prohibited from filing further requests for relief until all outstanding costs had been paid. She held that the mother be prohibited from filing further requests for relief until the costs orders in the amounts of \$4,000 and \$1,500 made by the trial judge are paid. At the time of the hearing, none of the outstanding costs had been paid.

[18] Although the contempt motion judge was under the misunderstanding that the \$10,000 costs order¹ made by the trial judge was

¹ The contempt motion judge was unaware that the order was reduced to \$7,500, payable forthwith, in *Zilke* 2020 at para 4, as earlier stated.

still in effect (based on the representations of the father's counsel), she simply reminded the mother that that costs order had to be paid as well.

[19] Finally, the contempt motion judge ordered punitive costs against the mother in the amount of \$5,000. In making the order, she stated that the mother continued to repeat the same information regarding her belief that the parenting order involving J.Z. should not have been made. The contempt motion judge found it to be a huge waste of court resources and expense to the father that the mother repeated the same type of evidence over and over again. She found the contempt motion brought by the mother to be "tantamount to an abuse of the Court process."

Motion for Extension

[20] The order regarding the contempt motion was signed by the contempt motion judge on November 12, 2024. The mother failed to meet her thirty-day deadline by failing to file her notice of appeal by December 13, 2024, in compliance with MB, *Court of Appeal Rules (Civil)*, Man Reg 555/88R, r 11(1).

[21] On January 9, 2025, she filed her notice of motion to extend time to file her notice of appeal.

[22] In support of her motion, the mother states she applied to legal aid for counsel on October 30, 2024. That application was denied on November 5, 2024. The mother subsequently had an appointment with the Legal Help Centre on November 28, 2024. She stated in oral argument that the Legal Help Centre simply advised her to appeal.

[23] The mother further explained that she had a sore tooth and that was why she could not file her documents on time. However, she also explained that this tooth had been bothering her since February 2024 and that it needed a crown. She blamed her not being able to attend to the tooth earlier on the father's failure to abide by the variation order to provide his insurance coverage. I note that that order has been overturned. The mother agreed that while social assistance (which she currently relies on for support) would pay for the tooth to be removed, it would not pay for a crown. She felt she was too young to have a tooth removed.

[24] In her draft notice of appeal, the mother lists many grounds of appeal, including (among other things) an appeal from the order made by the contempt motion judge regarding the contempt motion, asking that this Court reconsider each of the trial judge's orders, compensate her with periods of lost access to J.Z., permit her to file new matters in the Court of King's Bench, dismiss the costs orders of \$4,000 and \$1,500, and dismiss the order of punitive costs made by the contempt motion judge.

Test for Extension

[25] The criteria for extending time to file a notice of appeal are (i) a continuous intention to appeal from a time before the expiration of the filing period, (ii) a reasonable explanation for the delay, and (iii) arguable grounds (see *Bohemier v Bohemier*, 2001 MBCA 161 at para 2).

[26] As noted in *Singh v Pierpont*, 2015 MBCA 18: "In addition, the court has an overriding discretion to grant or refuse an extension if it is right and just in the circumstances" (at para 41).

Discussion and Conclusion

[27] I accept that the mother had a continuous intention to appeal from a time before the expiration of the filing period. While I seriously question her explanation for the delay to the extent that it was based on a tooth that had been problematic since February 2024, I would not necessarily dismiss her motion on either of the first two criteria.

[28] Rather, I am of the view that the mother has not presented arguable grounds for her appeal. The contempt motion judge's order was limited to the dismissal of the contempt motion, the order that the mother not bring further proceedings until she pays the costs orders of \$4,000 and \$1,500, and the order of punitive costs. The other matters raised by the mother are not appealable in this proceeding.

[29] While the threshold test for arguable grounds is low, the mother must at least demonstrate that the points to be argued have a reasonable chance of success. In *Mann v Mitchell*, 2019 MBCA 44, Monnin JA described a reasonable chance of success as “one which survives a preliminary examination under the applicable standard of review and has the potential to succeed and to change the result of the hearing below” (at para 3).

[30] A decision regarding an alleged contempt is a question of mixed fact and law. If it is informed by the correct principles, it is entitled to a high degree of deference on appeal (see *Turenne v Turenne*, 2024 MBCA 18 at para 13).

[31] Here, the mother simply argues that a parenting order requires, without exception, that the parent exercising the order be physically present with the child.

[32] The contempt motion judge disagreed with this blanket statement. She found that a determination of contempt must be made on a case-by-case basis. I agree.

[33] I would also note that this Court emphasized the quasi-criminal nature of contempt in *Campbell* at para 29, emphasizing:

The party bringing the motion has the *evidentiary burden to prove all the elements of contempt beyond a reasonable doubt*. See Jeffrey Miller, *The Law of Contempt in Canada* (Scarborough: Carswell, 1997) at 33, and *Paton* at para. 24. As stated in *G. (N.) c. Services aux enfants et adultes de Prescott-Russell* (2006), 29 R.F.L. (6th) 92 (at para. 27): “[a]ny doubt must clearly be resolved in favour of the person or entity alleged to have breached the order.”

[emphasis added]

[34] As explained in *Campbell*, the elements of a civil contempt consist of knowledge of the provisions of the order, breach of the order and that the breach was willful (see para 30). The Court stated (*ibid* at para 32):

The courts advocate restraint and caution against resorting to powers of contempt when other orders will suffice. This is often discussed in the context of custody matters, but is pertinent to all family disputes. See *Paton* at para. 27. Consistent with the principle of restraint, the law of contempt does not concern itself with matters that are “trifling” in nature. See *Barker v. Barker*, 2009 MBQB 10, 235 Man.R. (2d) 152. In addition, the courts often look to whether the breach was persistent in nature. See *Paton* at para. 29.

[35] Here, the father had to attend to an unusual circumstance. He trusted the care of J.Z. (who was seventeen years of age at the time) to her older adult brother, who picked her up and cared for her in the father's home. In my view, absent any other evidence, the mother has no arguable case that the contempt motion judge erred in law or that she erred in applying the law to the facts in this case when she dismissed the contempt motion.

[36] The order that the mother not be permitted to bring any further proceedings in the Court of King's Bench until her outstanding orders of costs in the amounts of \$4,000 and \$1,500 are paid is a discretionary order subject to review on a highly deferential standard. An appellate court is only justified in intervening where there has been misdirection or the decision is so clearly wrong that it amounts to an injustice (see *Elsom v Elsom*, [1989] 1 SCR 1367 at 1375, 1989 CanLII 100 (SCC)). Given the mother's litigation history that I have described, including that she had, up to the date of the contempt motion, not paid any outstanding costs orders, she has no arguable case that the contempt motion judge erred.

[37] Absent a misdirection as to the applicable law or a palpable and overriding error in the assessment of the facts, an award of costs is subject to appellate review on a highly deferential standard (see *Johnson v Mayer*, 2016 MBCA 41 at paras 21-22). The mother has no arguable case that the contempt motion judge erred when she found that the mother wasted court resources and expense to the father, repeated the same type of evidence "over and over again", and her action in bringing the contempt motion was "tantamount to an abuse of the Court process." She has not demonstrated arguable merit that the contempt motion judge erred in making the punitive costs order.

[38] Finally, as I have tried to emphasize, the litigation in this matter has been excessive and must come to an end. J.Z. is currently seventeen years old and will be eighteen in a matter of months.

[39] In all the circumstances, it is not in the interests of justice that the mother be permitted to extend time to file her notice of appeal.

[40] I would dismiss the motion to extend time to file the notice of appeal with costs on tariff.

Cameron JA