IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Barbara M. Hamilton
Madam Justice Karen I. Simonsen

B E T W E E N :

KYLE GEOFFREY BLOOMFIELD	)	***M. L. Halfyard***
	)	*on her own behalf*
	)	*(via videoconference)*
	)	
(Petitioner) Respondent	)	***K. G. Bloomfield***
	)	*on his own behalf*
- and -	)	*(via videoconference)*
	)	
	)	*Appeal heard:*
MEGHAN LEIGH HALFYARD	)	***June 10, 2020***
	)	
	)	*Judgment delivered:*
(Respondent) Appellant	)	***July 16, 2020***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, all appeals are heard remotely by videoconferencing until further notice.

On appeal from 2019 MBQB 81

SIMONSEN JA

[1] This is an appeal, in a family law case, from orders that were made by a judge (the judge) on a number of motions, following a three-day hearing with affidavit *viva voce* evidence.

[2] The parties, Meghan Leigh Halfyard (the mother) and Kyle Geoffrey Bloomfield (the father), cohabited for approximately two years, separating in

March 2013. They have two children together, twins born in February 2012 (the children).

[3] In a decision made in 2015 (2015 MBQB 59), the judge granted joint custody of the children to the parties, with primary care and control to the father and specified times of care and control to the mother (the final order). Since then, the mother's care and control has been the subject of several court orders. The latest of those court orders is one of the orders under appeal.

[4] More specifically, the mother appeals the judge's decisions:

- dismissing her motion for variation of the final order due to her failure to demonstrate a material change of circumstances—she had sought to vary the care and control arrangement for the children to her having primary care and control, and to change drop-off and pick-up locations and child support to reflect the new care and control arrangement;

- dismissing her motion for an order of contempt against the father on technical grounds—she had sought a contempt order on the basis that the father had not allowed court-ordered visitation of the children or provided her with information regarding the children;

- allowing the father's motion for an order of contempt against the mother and imposing a fine of $500—the father had sought a contempt order on the basis that the mother had not complied with one of the earlier orders regarding access exchanges under the supervision of Winnipeg Children's Access Agency Inc. (WCAA);

- allowing the father's motion for an order declaring the mother a vexatious litigant such that she is precluded from instituting any proceeding against him or continuing any proceedings presently commenced against him except with leave of a judge; and

- ordering the mother to pay the father costs of $4,500, plus disbursements.

Grounds of Appeal

[5] The essence of the mother's position is that:

1. the judge was biased against her;

2. the judge did not provide sufficient assistance to her as a self-represented litigant, and failed to hold opposing counsel to the standard required when dealing with a self-represented litigant;

3. the judge erred in concluding that she had failed to demonstrate a material change of circumstances, by misapprehending the evidence and making palpable and overriding errors of fact;

4. the judge erred in dismissing her motion for contempt on technical grounds since, as a self-represented litigant, she was not aware of the requirements of the court rules;

5. the judge erred in allowing the father's motion for contempt by making palpable and overriding errors of fact; and

6. the judge erred in both law and fact in declaring her a vexatious litigant.

Analysis and Decision

[6] Preliminarily, I would summarily dismiss the allegation of bias on the part of the judge. The record reveals no bias nor any basis for a finding of reasonable apprehension of bias (see *Ritchot v The Law Society of Manitoba*, 2010 MBCA 13 at paras 35-37, 39).

[7] The judge's discretionary decision that the mother had not demonstrated a material change in circumstances affecting custody arrangements is entitled to a high degree of deference on appeal, and cannot be disturbed by this Court in the absence of an error in principle, a significant misapprehension of the evidence, or an error of law (see *Van de Perre v Edwards*, 2001 SCC 60 at paras 11-12; and *JDB v DKM*, 2019 MBCA 68 at para 38).

[8] Likewise, all of the judge's other decisions—how to conduct the proceedings and, more particularly, the extent to which he provided assistance to the mother; his dismissal of her contempt motion; his granting the father's contempt motion; his declaration of the mother as a vexatious litigant; and his order of costs—are also discretionary decisions, entitled to considerable deference. This Court is not to intervene with respect to such decisions unless the judge has made an error of law (reviewable on a standard of correctness) or an error of fact (reviewable on a standard of palpable and overriding error), or the decision is so clearly wrong as to amount to an injustice (see *Dewing v Kostiuk et al*, 2017 MBCA 22 at para 15—assistance to a self-represented litigant; *Campbell v Campbell*, 2011 MBCA 61 at paras 37-38—contempt; *Holland v Marshall*, 2010 BCCA 579 at para 18; and *Green v University of Winnipeg*, 2020 MBCA 49 at para 11—vexatious litigant; *Sun Indalex Finance*,

LLC v United Steelworkers, 2013 SCC 6 at para 247; and *Johnson v Mayer*, 2016 MBCA 41 at paras 21-22—costs).

[9] As for whether the judge failed to adequately assist the mother, a judge is required to provide some assistance and accommodation to ensure that a self-represented litigant has a fair opportunity to present a case to the best of his or her ability. However, a judge cannot become an advocate for a self-represented litigant or provide legal advice (see *Dewing* at paras 18-19, 21-22; and Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused Persons* (September 2006), online (pdf): <https://cjc.ccm.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf> (the Principles). A careful review of the record does not reveal a failure on the part of the judge to meet the expected standard, either in how he dealt with the mother or the conduct of the father's counsel.

[10] The judge found that the wife had a number of unresolved issues regarding her ability to parent the children and that "[c]oncerns the court had after the original trial in 2015, re the mother, are still present to this day" (at para 30). He also found that she had not presented a plan with respect to the care of the children. He concluded that the mother had failed to demonstrate a material change in circumstances and that it "would not be in the children's best interests to move them from their present environment" (at para 39). Furthermore, the judge accepted the father's evidence about the mother's behaviour and her disrespect for the rules pertaining to the exchange of the children under the supervision of the WCAA.

[11] The mother disagrees with the factual findings that the judge made in concluding that she had failed to prove a material change in circumstances, and

that it would not be in the children's best interests to move from their residence with the father to live with her. The mother also disagrees with the factual findings the judge made in granting the father's contempt motion. However, that is not a basis for interference by this Court. This Court cannot intervene with respect to those decisions because the mother has not established any error in law, material misapprehension of the evidence, or palpable and overriding error of fact, nor are the judge's decisions unjust.

[12] In declaring the mother a vexatious litigant, the judge noted the parties' extensive litigation history, which included: a five-day trial in 2015 that resulted in the final order; three prior orders for variation of the final order; the mother's failed peace bond applications against the father and his sister; the mother's failure to attend court appearances, and comply with court rules and filing timelines; and her failure to pay $16,150 in court-ordered costs. The father was required to bring garnishment proceedings to recover those costs, and thereafter, the mother made a voluntary payment of $100. I am not persuaded that the judge made any error of law or palpable and overriding error of fact in declaring the mother a vexatious litigant, or that his order is clearly wrong.

[13] There is also no basis for this Court to set aside the judge's award of costs.

[14] Finally, given the evidence and the judge's factual findings, the mother's motion for contempt could not have succeeded on its merits. Therefore, I would dismiss the appeal from the judge's dismissal of that motion. However, his reasons for dismissal of the motion require comment.

[15] The judge dismissed the mother's contempt motion for two technical reasons. First, the notice of motion had not been served personally on the father, but only provided to his lawyer, contrary to the requirements of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 (the *QB Rules*), r 60.10(2). Second, one of the three orders in respect of which the father was said to be in contempt was made by another judge and, under r 60.10(1), a contempt motion must be heard by the judge who granted the order that is the subject of the motion.

[16] Rules 60.10(1) and 60.10(2) state:

> **Motion for contempt order**
> **60.10(1)** A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.
>
> **Service**
> **60.10(2)** The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise.

[17] Also relevant are rr 1.03, 1.04(1), 2.03, 16.03(1)-16.03(2) and 16.08(1):

> **1.03** In these rules, unless the context requires otherwise,
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> . . .
>
> **"action"** means a civil proceeding, other than an application, that is commenced in the court by,
>
> . . .
>
> (e) a petition;
>
> . . .

> **"proceeding"** means an action or application;
>
> . . .
>
> **General principle**
> **1.04(1)** These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **2.03** The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.
>
> **Where available**
> **16.03(1)** Where service by an alternative to personal service is permitted, service shall be made in accordance with this rule.
>
> **Acceptance of service by lawyer**
> **16.03(2)** Service on a party who has a lawyer may be made by serving the lawyer if the lawyer endorses on the document or a copy of it an acceptance of service and the date of the acceptance.
>
> **16.08(1)** Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,
>
> > (a) the document came to the notice of the person to be served; or
> >
> > (b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

[18] The judge, by dismissing the mother's contempt motion for lack of personal service, apparently concluded that he could not or should not exercise his discretion to validate the service that had been made on the father's lawyer. Although personal service of a motion for contempt is undoubtedly preferable given the "quasi-criminal" nature of contempt proceedings (*Campbell* at

para 28), the case law makes clear that other forms of service may be validated where the alleged contemnor has actual notice of the motion (see *Susin v Susin*, 2014 ONCA 733; and *LLS America LLC (Trustee of) v Dill*, 2018 BCSC 2316). In *Susin,* the Court stated (at para 28):

> Procedural protections on motions for civil contempt are generally strictly enforced. This includes the requirement that the materials be served personally on the party sought to be found in contempt: see *Rules of Civil Procedure*, r. 60.11(2) [Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194]. However, procedural protections that are meaningless in a particular case ought not to trump substantive compliance where the purpose of personal service has been met in the circumstances and there has been no substantial wrong or miscarriage of justice. I am satisfied that is the case here.

[19] Despite the father not being personally served with the mother's notice of motion for contempt, it is clear that he was aware of it, knew the case to be met, and had an opportunity to respond. In his affidavit, he specifically responded to the mother's allegations of contempt and, during final addresses, his counsel addressed her contempt motion. As well, in direct examination, the father testified:

> Q. Okay. So my final question for you, you are aware that [the mother] has filed a motion seeking a finding that you are in contempt of the Court orders?
>
> A. Yes.
>
> Q. Were you personally served with that order?
>
> A. I was not.
>
> Q. And how did you receive a copy?
>
> A. Through my lawyer.

Q. Through your lawyer?

A. Yes.

[20] In these circumstances, the judge could and should have exercised his discretion to make an order validating service. Although there is no indication in the record that the lawyer endorsed and dated the notice of motion to meet the requirements for an alternative to personal service under r 16.03(2) of the *QB Rules*, delivery of the notice of motion to her resulted in actual notice to the father. In such circumstances, dispensing with the strict requirements of r 60.10(2) and validating the service on the lawyer would have best met the objectives of efficiency and fairness set out in r 1.04(1).

[21] With respect to the second technical reason for dismissal of the mother's contempt motion, r 60.10(1) provides that a contempt motion is to be heard by "a judge in the proceeding in which the order to be enforced was made." "Proceeding" is defined in r 1.03 to mean "an action or application". On a plain reading of r 60.10(1), and in accordance with "the fair, large and liberal interpretation that best ensures the attainment of its objects" (*The Interpretation Act*, CCSM c I80 at section 6; see also the *QB Rules* at r 1.04(1)), it does not limit the hearing of a contempt motion to the judge who made the order to be enforced, but includes any judge involved in the action or application in which that order was made.

[22] Here, all of the orders to be enforced were made in the same action (a civil proceeding commenced by petition, r 1.03) as the variation motion and the other motions that were before the judge. As such, he was entitled to hear the mother's contempt motion (see *Neufeld v Neufeld*, 1998 CarswellMan 15 (QB);

and *Todosichuk v Daviduik*, 2006 MBQB 6, as examples of instances where a judge has heard a contempt motion in respect of an order made by another judge).

[23] Furthermore, while it often makes sense for the same judge who granted the order in question to hear the contempt motion, in this case, the judge had made two of the three orders that were the subject of the mother's contempt motion and, during the three-day hearing, he had heard the evidence and submissions relevant to all aspects of that motion. In these circumstances, it would have been fairer and more expeditious for him to have dealt with the motion substantively, rather than dismissing it on the basis that part of it had to be heard by another judge.

[24] Finally, the father seeks costs on this appeal. The law provides that one of the purposes of an order of costs is to indemnify a successful litigant on a partial basis for legal costs incurred, or in the case of a self-represented litigant, for lost opportunity (see *Nash v Nash*, 2019 MBCA 31 at paras 52-53). Given the father's time and expenses associated with conduct of the appeal, I would award him costs of $500 for both the appeal and all related appearances before a judge of this Court in chambers.

[25] For the foregoing reasons, I would dismiss the appeal and award costs payable by the mother to the father in the amount of $500.

"Simonsen JA"

I agree: "Steel JA"

I agree: "Hamilton JA"