

IN THE COURT OF APPEAL OF MANITOBA

Docket: AF16-30-08599

BETWEEN:

J. D. G.)
)
(*Petitioner*) *Respondent*)

- *and* -)

S. L. G.)
(*Respondent*) *Appellant*)

- *and* -)

G. R. Champagne
for the Appellant

J. A. Schofield
for the Respondent

Docket: AF16-30-08649

BETWEEN:

J. D. G.)
)
(*Petitioner*) *Respondent*)

- *and* -)

S. L. G.)
(*Respondent*) *Appellant*)

Chambers motion heard:
June 8, 2017

Decision pronounced:
June 29, 2017

NOTICE OF RESTRICTION ON PUBLICATION: No press, radio or television report of a proceeding under Part II, III or V shall disclose the name of any person involved in the proceedings as a party or a witness or disclose any information likely to identify any such person (see section 75(2) of *The Child and Family Services Act*, CCSM c C80).

MARC M. MONNIN JA

[1] The respondent seeks an extension of time to file an appeal book in support of appeals she has filed against two orders made by a judge of the Family Division of the Court of Queen's Bench. The first order dealt with the issue of custody of the couple's two children. The second order, less than one month later, dealt with issues of financial support and costs.

[2] What would normally have been a fairly simple decision has been rendered more complex by events which occurred after the rendering of the decisions. This was a lengthy trial which lasted a number of weeks. The notices of appeal for each order were filed within the time limits required by the Rules; however, the respondent did not have the financial wherewithal to pay for the transcripts and applied to Legal Aid in May 2016 for financial assistance. After being notified of the Legal Aid application, as is its practice, the Registry awaited further notice from the respondent's counsel.

[3] At the hearing, the Court was advised by counsel for the respondent that the initial application had been rejected by Legal Aid in June 2016. Counsel candidly admitted that she then sought advice from more senior counsel as to how to proceed. She did not prepare a revised application to Legal Aid until October 2016 and then only filed it in December. The filing may have been prompted by her receipt of a notice from the Registrar that, unless the appeal was perfected, it would be deemed to be abandoned within 30 days. That letter was sent on December 8, 2016. I was advised that Legal Aid's reconsideration of the new application for funding occurred in early December and was successful. A transcript was ordered and filed with the Court on April 6, 2017.

[4] The respondent then filed her two facta on May 24, 2017. While she was late with respect to the facta, the petitioner's counsel consented. However, as to the appeal book, it was not ready to be filed until a week later. Counsel for the respondent indicated that the reason for the delay was her inability to obtain the full file from the Registry such that she could prepare the list of exhibits for the trial. She was advised by Registry staff that in light of that delay she would require an order from a judge in chambers to extend the time for the filing of the appeal book.

[5] A further complicating factor is that the respondent is facing charges of abduction of the children. While there was no direct evidence before me, the matter has an element of notoriety which led me to seek some information from counsel in order to properly assess its relevance to the motions. While the respondent has not been convicted (the trial is proceeding soon), the allegations may well be relevant to a determination of the best interests of the children in the ultimate outcome of any appeal were it to proceed.

[6] I was also advised that, while custody was granted to the petitioner, difficulties encountered in placing the children with the petitioner have required a delay to the transitioning which will result in the youngest child being moved into the petitioner's custody shortly but no full implementation of the custody decision whereby both children will eventually be with the petitioner.

The Law

[7] It is well recognized that applications governing the extension of time to perfect an appeal are governed by the same law as those seeking an

extension of time to file an appeal. As stated in *Boryskiewich v Stuart*, 2014 MBCA 77, the criteria are well-known and require that the Court be satisfied that (at para 6):

- 1) there was a continuous intention to appeal from a time within the period when the appeal should have been commenced;
- 2) there is a reasonable explanation for the delay;
- 3) there are arguable grounds of appeal; and
- 4) any prejudice suffered by the other party can be addressed.

See also *Zalizniak v Zalizniak et al*, 2006 MBCA 161. Additionally, the Court has a discretion to either grant or deny the extension if it is right and just in all the circumstances that it be granted or denied (see *Hunter v Hunter*, 2000 MBCA 134).

[8] In respect of child custody proceedings, the best interests of the child must also be considered (see *C (S) v C (AS)*, 2011 MBCA 70 per Steel JA). While Steel JA indicated that the question of arguable grounds should be considered within the context of the best interests of the child, in my view, the best interests of the child are also a consideration with respect to the consideration of the “justice” of the matter proceeding. As noted by Steel JA (at para 10):

Delay and uncertainty are of particular concern in child custody proceedings where an expeditious resolution and finality are in the child’s best interests. Such a consideration is no different than considering whether prejudice would result to the other party, except here, that party is not the opposing party, but the child involved in the case.

See also *Armstrong v Armstrong*, 2006 ABCA 228 at paras 40-41; and *Hart v Hart*, 1997 CarswellBC 1389 at para 9 (CA).

Decision

[9] There is no issue that the respondent has satisfied the first criterion, namely, she had displayed a continuous intention to appeal from the time within the period when the appeal should have been commenced. The notice of appeal was filed within the time prescribed and there is no indication that her intention to appeal was ever abandoned.

[10] As to the second criterion, an explanation for the delay in filing the appeal book, I have a concern. In the normal course of events, the time taken to obtain financing from Legal Aid would not be a problem. However, the time taken from the rejection of the first application and the inordinate delay in re-filing a second request, some six months which counsel for the respondent says were used to seek advice of senior counsel, is problematic. Not only is it unduly long, the respondent's counsel was not candid with opposing counsel or the Registry as to what was transpiring. However, what is at issue here is the delay, in my view, in filing the material in response to the Court's letter. There is a reasonable explanation given by counsel for the respondent as to why she was late by a few days in filing the appeal book. Notwithstanding my concern about the overall delay, I am satisfied as to the second criterion.

[11] As to arguable grounds, the test of whether such grounds have been raised was discussed by Rothstein J in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, and will be met where the grounds cannot be dismissed after a preliminary examination giving due consideration to the

likely applicable standard of review. It is not appropriate to consider the full merits of the case but simply whether the appeal has a potential to succeed and, thus, change the result. See *Boryskiewich* at para 9 per Chartier CJM.

[12] The standard of review with respect to child custody appeals is well-known and is set out by the Supreme Court of Canada in *Van de Perre v Edwards*, 2001 SCC 60, which states that an appellate court should not disturb the trial judgment in the absence of a material error, serious misapprehension of the evidence or an error of law. See also *Delichte v Rogers*, 2012 MBCA 105.

[13] In this case, the thrust of the respondent's appeal on the custody order is relative to allegations that the petitioner sexually abused his daughter. In the respondent's submission, the trial judge failed to properly appreciate the evidence and wrongfully concluded that there was coaching of the children by the respondent that led her to refuse to admit videotaped statements by the children on the grounds that they did not meet threshold reliability. Without that evidence, she misapprehended the risk to the children of being placed with the petitioner.

[14] While the standard of review for the evidentiary rulings by the trial judge and her ultimate conclusion with respect to custody are both subject to a high degree of deference, on a preliminary review, there is some scope for arguing that the trial judge erred and, as a result, reached a different conclusion.

[15] Given that I will decide that the matter should proceed, I will not discuss the grounds of appeal any further.

[16] As to the fourth criterion, I am very concerned that the appeal has the potential of continuing the uncertainty with respect to the children's future at a time when certainty is required and that it is their best interests which are at the core of these proceedings. The findings by the trial judge are devastating to the respondent's case. As well, her alleged conduct after the decisions were rendered is, if ultimately proven, likely to diminish her ability to have custody of the children even if she were successful; hence the concern that this appeal is likely not to give her the relief that she seeks. If a panel of this Court were to find error in the trial judge's findings and reasoning, it is unlikely that the matter would be sent back for a trial but, rather, a decision would be reached by the panel based upon the record and the events that have occurred since the trial.

[17] While I do so with some reluctance, I am of the view that this criterion, as well, does not lead me to conclude that leave should not be granted. I was advised that the children are still not with the petitioner notwithstanding the custody order as Child and Family Services is not ready to transition the children as a result of issues that have arisen after the trial. There is no immediate or short-term detriment to the children if the issue of custody in this matter proceeded to an appeal in the near future. The financial issues relating to support and costs do not have the same potential prejudicial effects upon the children.

Conclusion

[18] After consideration of all of the above-mentioned criteria, I conclude that, in the circumstances, the respondent should be given leave to perfect her appeal by filing an appeal book in proper form. However, it is

subject to a direction that the appeal proceed without delay. Counsel should advise the Registry of their availability in September and October with the expectation that this hearing be set down during those two months. If counsel have not reached an agreement within 10 days of the release of this decision, the Registry will set an appearance before me to set the date.

[19] I will also grant the respondent leave to amend her facta to modify her treatment of the standard of review at pages 8 and 19. Revised facta should be filed within one week of the release of this decision. I understand that the petitioner has filed his facta. If, after receipt of any revised document from the respondent, he wishes to amend his facta, he may do so within two weeks of receipt of such document.

[20] Costs will be in favour of the petitioner in any event of the cause but not forthwith.

Monnin JA