IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***C. Mann***
CHRISTOPHER MANN	)	*on his own behalf*
	)	
(Petitioner) Appellant	)	***C. A. M. Lavallee***
	)	*for the Respondent*
- and -	)	
	)	*Chambers motion heard:*
SARAH MITCHELL	)	***March 28, 2019***
	)	
(Respondent) Respondent	)	*Decision pronounced:*
	)	***April 23, 2019***

MARC M. MONNIN JA

[1] The petitioner, Christopher Mann, filed a notice of appeal from the decision of a Court of Queen's Bench judge granting a final order concerning custody of his child with the respondent, Sarah Mitchell. While the notice of appeal was filed on a timely basis, namely, June 29, 2018, the petitioner failed to perfect the appeal by not filing the material required under the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R (the *Rules*), an appeal book and factum, within the time allowed by the *Rules*. The respondent consented to three adjournments of the motion for leave to extend the time for filing but, at the last hearing, she objected and the matter proceeded as a contested motion.

[2] As I explained to the petitioner at the outset of the hearing, in order to be successful on his motion for leave to extend time, he would have to meet three criteria, namely:

1. To show that he had a continuous intention to appeal from a time within the period when the appeal should have been commenced. There is no issue that the petitioner has met this requirement.

2. That he had a reasonable explanation for the delay in filing his material.

3. That he had an arguable ground of appeal.

[3] I explained to the petitioner that an arguable ground is 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 (see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53; and *Boryskiewich v Stuart*, 2014 MBCA 77).

The Judgment Below

[4] After a lengthy trial, the trial judge delivered a 21-page oral judgment dealing with issues of custody, a parenting schedule of care and control, child support and protective relief. She heard evidence from the petitioner and the respondent and from family and friends of the parties, as well as expert evidence. She determined that, despite the high level of conflict between the parties, it was not in the child's best interests that sole custody be awarded to either of the parties. In her view, joint custody was warranted. As well, she concluded that a parental schedule, which would see the child split her time equally between the parties, was not in her best interests given the events that had transpired to date. She concluded that the respondent should have primary care and control of the child with alternate weekends and mid-week overnights to the petitioner. She also provided detailed directions as to

how the shared parenting would operate, including issues as to pickups and drop-offs, vacation time, and who has the final say with respect to medical appointments and other like issues.

Grounds of Appeal

[5] The petitioner appeals from that final order, including the recalculation of child support—past and future. The notice of appeal merely uses a generic ground of appeal, namely, that the final order appealed from "is contrary to the law, the evidence and the weight of the evidence". He did not file a motion brief setting out the points he wished to argue. As I indicated to him at the hearing of the motion, it was necessary to provide me with more specific grounds of appeal so that I would be able to assess their realistic prospect of success. In argument, he raised the following eight grounds of appeal which I have set out for the purposes of these reasons:

1. That the trial judge erred when she dismissed the proposal of an equal sharing of time with the child on the basis that the distance between their respective homes was too far.

2. That the trial judge improperly admitted an audio recording of two conversations which occurred when the parties met to exchange care and control of the child.

3. That the trial judge erred in not considering the fact that the respondent had admitted to criminal activity, namely, assaulting him, when she assessed the respondent's fitness to parent.

4. That the trial judge was not impartial in her handling of the trial,

making a comment as to pending criminal charges.

5. That the trial judge misapprehended the evidence such that her reasons do not reflect proper conclusions as to his conduct.

6. That the trial judge failed to consider that the respondent had engaged in stalking conduct for the last eight years.

7. That the trial judge failed to consider that the respondent had engaged in the abduction of the child when she failed to allow him access to her for a period of over 13 months.

8. That the trial judge erred in not relying upon the report of an expert who had recommended joint custody.

[6] The assessment of the grounds of appeal must be done with consideration to the standard of review in custody cases. An appellate court should not disturb a trial decision in a custody matter in the absence of a material error, a serious misapprehension of the evidence or an error of law (see *Van de Perre v Edwards*, 2001 SCC 60 at paras 11-16; and *Delichte v Rogers*, 2012 MBCA 105 at para 5).

[7] I will deal with each ground of appeal in sequence. My reasons are somewhat longer than usual for this type of motion but I wish to provide sufficient details as to why I have concluded as I have.

Ground 1

[8] Contrary to the petitioner's assertion that the trial judge based her conclusion not to grant a 50/50 time sharing to each parent solely on the

distance between their respective homes, that is only one of the concerns as to the proposed arrangement raised by the trial judge. It was not merely because of the distance that she had a concern but, rather, that the child was approaching school age and the distance between the parties and the proposed arrangement would make it difficult for participation in school and community-based sports and recreational activities, "particularly when the parents do not communicate or cooperate well." A number of other factors were considered to determine whether a 50/50 time-share arrangement would be in the child's best interests. This is not a ground of appeal which has a reasonable prospect of success.

Ground 2

[9] The audio recording of two conversations between the parties occurred during the course of exchanges of the child in 2014. They are particularly prejudicial to the petitioner as he exhibits confrontational and aggressive behaviour during the exchanges. The petitioner suggests that these recordings should not have been allowed as they were made a number of years before the parties agreed that exchanges could be recorded in January 2014. (In fact, the respondent's evidence was that they were made in the spring of 2014.) The petitioner also says that the recordings are not complete and may have been altered.

[10] The trial judge considered those arguments before dealing with the admissibility of the recordings. An evidentiary ruling is owed a great deal of deference as the trial judge has substantial discretion to allow evidence to be tendered at the trial. Unless she has erred in law in doing so, such a ruling will not be overturned. There is no obvious error of law.

Ground 3

[11] The suggestion that the respondent admitted to criminal behaviour arises from her cross-examination when she was asked to comment on the admission contained in the expert's assessment report that she had been violent to the petitioner on one occasion. In that portion of the expert's report, she described to him an incident where the petitioner had picked up the child in her bucket seat and was waving it around with the child not strapped in. She stated that she slapped the petitioner on his arm. In cross-examination, she conceded that she had told the expert that she had been violent to the petitioner.

[12] This event occurred some four years prior to the trial in the early stage of the parties' relationship. No charges were ever laid and it is not likely that any conviction would arise from the conduct that has been described. The failure of the trial judge to comment on that incident or to use it to conclude that the respondent is prone to criminal behaviour is not surprising and is not a ground of appeal that has a reasonable chance of success.

Ground 4

[13] The next ground of appeal is that the trial judge was not impartial. The petitioner relies on an alleged comment of the trial judge during the course of the trial, at a time which he cannot verify, to the effect that the trial judge stated that it was unfortunate for him that his outstanding charges for "uttering threats" had not been heard before the trial was concluded, implying that she would consider those charges against him during the course of her assessment.

[14] I have reviewed the transcripts of the trial, particularly the evidence of the petitioner—both direct and cross, and have been unable to find a comment by the trial judge to the effect suggested by the petitioner. As well, by the time that the trial was completed, his outstanding charges relating to the utter threats charges had been resolved with an acquittal and an absolute discharge on the breaches of the recognizance.

[15] Impartiality of a judge is presumed (see *Wewaykum Indian Band v Canada*, 2003 SCC 45; and *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25). Unless the petitioner has cogent evidence as to a lack of impartiality, this ground of appeal has little realistic prospect of success.

Ground 5

[16] The petitioner wishes to raise as a ground of appeal that the trial judge's reasons take the evidence out of context and are factually inaccurate. He argues that she misapprehended the evidence and found facts in favour of the respondent when the findings should have been made in his favour. He was unable to point to any particular findings or comments in the reasons to that effect but suggested that it was apparent from a reading of the reasons as a whole.

[17] I have read the reasons as a whole. The trial judge generally preferred the evidence of the respondent as to how events occurred. This she was entitled to do based upon her consideration of the evidence. The petitioner is unable to point to any particular finding in the reasons where the trial judge misapprehended the evidence and I do not see that this ground of appeal has a realistic prospect of success.

Ground 6

[18] The petitioner suggests, as a ground of appeal, that the respondent is guilty of criminal conduct, namely, stalking, and has done so for a number of years. He says she admitted it on the record and that it was not considered by the trial judge, an obvious error.

[19] I did not find such an admission on the record. There was an admission that the respondent had retained the services of a private investigator, to which she admitted on cross-examination, but nothing further came of that line of questioning. Issues of GPS tracking and surveillance raised by the petitioner on the hearing of this motion are nowhere to be found in the evidence. The only reference to *The Domestic Violence and Stalking Act*, CCSM c D93, is found in the trial judge's reasons with respect to dismissing that part of the respondent's claim for protective relief against the petitioner. I see no possible chance of success for this ground of appeal.

Ground 7

[20] The petitioner raises as a ground of appeal that the respondent abducted the child for a period of 13 months when she refused to allow him the visitation and access to which he was entitled under court orders. In his view, this amounted to abduction and that the trial judge failed to consider this criminal conduct of the respondent.

[21] The trial judge did, in fact, consider the period of time during which the petitioner was not permitted to see his child or only under specific restrictions. This arose because of the charges pending against the petitioner. Those charges were of uttering threats to cause death or bodily harm to the

respondent, as a result of which there was a recognizance by the petitioner which prevented him from having contact with the respondent. An exception existed, however, with respect to visitation or pickups and drop-offs of the child. The respondent did not wish to have that occur except in a supervised location, namely, the Winnipeg Children's Access Agency Inc. The petitioner objected to the use of that agency. As a result, he did not see the child for a number of months. This is hardly an abduction and there is no reasonable prospect of this ground being successful on appeal.

Ground 8

[22] Finally, on the last ground of appeal, the petitioner argues that the trial judge was not justified in dismissing the expert's report which favoured a 50/50 shared care-and-control regime. He says that the trial judge erred when she raised a concern as to the expert's report based on the fact that the petitioner had provided him with certain documents which had not been provided to the respondent. He argues that the expert did not look at them and, therefore, his report could not be seen as having been affected by those documents. The expert's report does include two documents prepared and provided by the petitioner in the list of documents which he indicated he reviewed. He stated in his evidence that he gave them no weight.

[23] The trial judge reviewed the expert's entire assessment in her reasons and then expressed some reservation which led her to not accept his recommendations fully. She believed that his process was flawed in that he received and reviewed the petitioner's documents which contained many irrelevant and prejudicial statements about the respondent without the respondent having the opportunity to respond. However, she also had a

concern about his assessment in that it did not provide a reason why the 50/50 time sharing would be beneficial to the child given that it would involve disruption from the primary care which she had always known. As well, she noted that he did not recommend a 50/50 time sharing immediately but only after a process which would depend on further evaluation by a third party. In her view, this was not a likely scenario.

[24] A trial judge is entitled to consider expert evidence properly before her and to accept part of it or none of it. I do not see that her explanations indicate an obvious error that would likely lead to a successful ground of appeal.

[25] For the reasons set out above, I am of the view that there does not appear to be an arguable ground of appeal with a reasonable prospect of success put forward by the petitioner. Therefore, the petitioner has failed to satisfy the third criterion of the test, and that alone will be sufficient to dismiss the motion.

Delay

[26] I also have some concern with respect to the petitioner's argument that the delay in preparing the factum and the appeal book was justified on the basis of the complexity and substantial amount of documentation. While I agree that it is difficult at times for a self-represented litigant to understand the intricacies of litigation, the petitioner was able to obtain three adjournments by consent to prepare his material. He has complained that documents were not available at the Court of Queen's Bench or from his former lawyer. However, he has failed to identify to his former lawyer the specific documents that he needs in order to prepare his appeal book. Court

transcripts have been available to him for a number of months. While he should be given some leeway given his lack of legal representation, it is not open-ended. I would not have dismissed the motion simply because of delay but self-represented litigants cannot expect that they will receive unrestricted time in order to prepare their material.

Conclusion

[27] I would therefore dismiss the motion for an extension of time to file a factum and appeal book. The appeal will therefore be dismissed with costs in favour of the respondent, which I fix at $350 under Tariff D of the *Rules*, and reasonable disbursements. If the parties cannot agree on a form of order, the registrar is authorised to sign it without the consent of both parties.

Marc M. Monnin JA