IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice William J. Burnett
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***S. L. Sydor***
	)	*on her own behalf*
	)	
	)	***K. P. Land***
SANDRA LEE SYDOR	)	*for the Respondent*
	)	
(Petitioner) Appellant	)	*Appeal heard:*
	)	***September 16, 2019***
- and -	)	
	)	*Judgment delivered:*
JOHN JAMES KEOUGH	)	***December 4, 2019***
	)	
(Respondent) Respondent	)	***Motion under Court of***
	)	***Appeal Rule 46.2***
	)	
	)	*Decision pronounced:*
	)	***February 18, 2020***

PER CURIAM

[1] The petitioner (the wife) moves for an order pursuant to r 46.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R (the *CA Rules*), for a rehearing of her appeal that was dismissed on December 4, 2019 (see 2019 MBCA 119).

[2] For the following reasons, we are satisfied that oral argument on the motion for a rehearing is not required and conclude that the wife has not met her heavy burden of establishing exceptional circumstances that would justify

the Court rehearing the appeal.

The Background

[3] The parties married on October 6, 1990 and separated on August 2, 2010. They have one child together, who ceased to be a "child of the marriage" as of March 1, 2014.

[4] The only issues at trial were the wife's claims for retroactive child support, retroactive spousal support and increased prospective spousal support, all of which were dismissed by the trial judge. The trial judge also awarded costs in favour of the respondent (the husband).

[5] On the wife's appeal to this Court, the focus of her position was that the trial judge erred by refusing to attribute income to the husband as a consequence of significant pre-tax income generated, post-separation, by Cousin's Freight Services Ltd. (Cousin's), of which the husband is (through his numbered company) a 50 per cent shareholder.

[6] More specifically, on appeal, the wife argued that the trial judge erred by deciding her claims without full financial disclosure from the husband; failing to properly determine the husband's income; concluding that the wife was not entitled to retroactive child support; concluding that the wife was not entitled to retroactive spousal support; dismissing the wife's claim for increased prospective spousal support; and awarding costs in favour of the husband.

[7] As we have said, the wife's appeal was dismissed and she now brings a motion for a rehearing.

Rehearing of Appeals

[8] Rule 46.2 of the *CA Rules* sets out the rules with respect to seeking a rehearing of an appeal. It reads, in part, as follows:

> **Rehearing**
> **46.2(1)** There shall be no rehearing of an appeal except by order of the court or at the instance of the court.
>
> **46.2(2)** A rehearing of an appeal may be ordered before the certificate of decision has been entered.
>
> . . .
>
> **46.2(9)** There shall be no oral argument on the motion requesting a rehearing unless by direction of the court.
>
> . . .

[9] The principles governing a motion for rehearing of an appeal were summarised by this Court in *Rémillard v Rémillard*, 2015 MBCA 42 (at paras 8-9):

> The principle of finality of litigation has shaped the development of the law with respect to when rehearings may be permitted and must be a crucial consideration for a court when considering a motion for rehearing. See *Willman v. Ducks Unlimited (Canada)*, 2005 MBCA 13, 192 Man.R. (2d) 39; and *Child and Family Services of Winnipeg v. J.A. et al*., 2005 MBCA 26, 192 Man.R. (2d) 76. As a result, the rehearing of an appeal is to be "granted only in exceptional circumstances, where the interests of justice manifestly compel such a course of action" (*Willman* at para. 9).
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> In *Willman*, while acknowledging other circumstances may satisfy the exceptional threshold, Freedman J.A. cited three circumstances that would be recognized as exceptional (at para. 10):
>
> …

> 1) there is a patent error on a material point on the face of the reasons;
>
> 2) the appeal was decided on a point of law that counsel had no opportunity to address, and which point could not have reasonably been foreseen and dealt with at the hearing; or
>
> 3) the court has clearly overlooked or misapprehended the evidence or the law in a significant respect and there is a consequential serious risk of miscarriage of justice.

Analysis and Decision

[10] Applying the above principles, we will address each of the four grounds for rehearing raised by the wife.

Ground 1—Did This Court Make a Patent Error on a Material Point or Overlook or Misapprehend the Evidence, or the Law, With Respect to Its Determination Concerning Income Disclosure in This Litigation Process?

[11] In her memorandum of argument, the wife asserts that this Court erred with respect to the financial disclosure made by the husband. She essentially argues, as she did in her factum, that his disclosure was incomplete and not produced until shortly before the trial commenced. Those arguments were considered and dismissed by this Court (see paras 20, 46), and the wife has failed to explain how it erred in doing so.

[12] Although not specified as a ground for rehearing, the wife also seems to contend that this Court provided unsatisfactory reasons as to why the retained earnings resulting from post-separation income generated by Cousin's were not considered in the determination of the husband's income.

This Court addressed the wife's concerns with respect to the retained earnings, and concluded that a determination of the husband's post-separation income was only material if the test for entitlement to retroactive child support was met or any increases in the husband's post-separation income were relevant to spousal support (see para 26). This Court upheld the trial judge's conclusions that the test for entitlement to retroactive child support was not met and that, for the purpose of setting the amount of spousal support, the wife was not entitled to benefit from any post-separation increase in the husband's income due to his involvement in Cousin's. This Court also upheld the trial judge's conclusion that the wife had not met the test for entitlement to a retroactive increase in spousal support. The wife has not articulated how this Court failed to consider or misapprehended the evidence or the law in making these determinations.

[13] Furthermore, the wife's focus on delay fails to explain how delay is relevant to her request for a rehearing. Instead, she indicates that she does not understand this Court's decision regarding delay and would like clarification. The issue of delay, which is relevant to the wife's claims for retroactive child support and retroactive spousal support, was clearly addressed by the trial judge and by this Court (see paras 28, 41).

Ground 2—Did This Court Make a Patent Error on a Material Point or Overlook or Misapprehend the Evidence or the Law in Not Addressing the Trial Judge's Use of the "With Child Support Formula" in Determining Spousal Support Amounts?

[14] The wife argues that this Court failed to address the trial judge's use of the "with child support formula" in the Spousal Support Advisory

Guidelines (the SSAG) in making her award of spousal support (ch 8 of the SSAG). However, this Court appreciated that the trial judge had understood that child support terminated in 2014 and that she nonetheless determined that the spousal support awarded was appropriate (see para 10). The trial judge, having utilised the "with child support formula", concluded:

> I am satisfied from all these factors that the $1,000 of spousal support, that was in [the] guideline amount, continued to meet those goals of the non-compensatory support, even having regard to the termination of child support in 2014.

The SSAG are advisory only and are used as a tool to assist in setting spousal support, after a consideration of all of the circumstances. That is how the trial judge used the SSAG and the wife has not explained how the trial judge or this Court erred on this issue.

[15] In the wife's memorandum of argument, she seems to be simply re-arguing the determination of spousal support made at the trial.

Ground 3—Did This Court Make a Patent Error on a Material Point or Overlook or Misapprehend the Evidence or the Law in Not Providing the Wife an Opportunity to Review the Costs Award to Ensure the Accuracy of the Amounts Claimed by the Husband?

[16] The wife says that this Court erred with respect to the issue of costs. Once again, she appears to be attempting to re-argue the appeal, after this issue was squarely dealt with by this Court when it concluded the award of costs made by the trial judge was not unjust (see paras 44-45).

[17] The wife has not explained any error or misapprehension made by

this Court on the issue of costs, let alone established one that would qualify as an exceptional circumstance where the interests of justice require a rehearing of the appeal.

Ground 4—Did This Court Make a Patent Error on a Material Point or Overlook or Misapprehend the Evidence or the Law in Not Providing Clearer Explanations of the Trial Judge's Oral Reasons on Matters of Fact and Law?

[18] While the wife says that an error was made by this Court in not providing her with clearer reasons for decision, she seems, in fact, to argue that the trial judge's decision to deliver her reasons orally rather than in writing constitutes an error because the wife was not able to fully understand those oral reasons. The trial judge's decision to deliver her reasons orally was discretionary and within her purview to make.

[19] Again, the wife has not identified any error made by this Court that would entitle her to a rehearing.

Conclusion

[20] Nothing in the submission of the wife would indicate that she has established exceptional circumstances and met the test for a rehearing as set out in *Willman v Ducks Unlimited (Canada)*, 2005 MBCA 13. She has essentially attempted to restate her factum and re-argue the appeal (including her motion for the admission of fresh evidence) and, to some extent, re-argue the trial, and has failed to articulate any error that would qualify as an exceptional circumstance which would manifestly compel this Court to order a rehearing of her appeal.

[21] Therefore, her motion for a rehearing of the appeal is dismissed with costs in favour of the husband in accordance with the applicable tariff.

Steel JA

Burnett JA

Simonsen JA