IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

B E T W E E N :

LORI ELLEN TEPLESKI	)	***M. A. Laham Szutiak*** *and*
	)	***A. I. Dlugosh***
	)	*for the Appellant*
(Petitioner) Appellant	)	
	)	***G. G. J. Girardin***
- and -	)	*on his own behalf*
	)	
	)	*Appeal heard:*
GERALD GUY JOSEPH GIRARDIN	)	***January 31, 2017***
	)	
	)	*Judgment delivered:*
(Respondent) Respondent	)	***April 11, 2017***

On appeal from 2015 MBQB 194

MONNIN JA

[1] This is an appeal from an order varying the terms of access to the parties' child, fixing child support arrears as well as ongoing child support and awarding double costs to the respondent.

[2] The parties were involved in a short-term, common law relationship when their child was born in 2003. They separated in 2004. Commencing in 2005, the respondent started paying child support in the amount of $160 per month.

[3] In 2008, a final order was pronounced, which provided that the parties share joint custody of their child with shared decision making, with consultation. In fact, custody of the child was almost equally shared between the parties with the petitioner having *de facto* primary care and control.

[4] According to the affidavit evidence, both parties had applied for a variation of the final order later in 2008, but that variation request basically lay dormant until 2013, when an updated family assessment report was requested from Family Conciliation. That report (the Moore report) was completed on April 22, 2014. It recommended that the parents have joint custody with final decision making to the respondent.

[5] In August of 2014, the respondent filed a motion to vary the 2008 final order, requesting that he have primary care and control of the child along with final decision-making authority. He also sought support from the petitioner and costs.

[6] In response, on November 25, 2014, the petitioner filed her own motion, requesting financial disclosure and a review of, and retroactive increase in, child support based on the parties' incomes.

[7] December 19, 2014 was initially set to hear the competing motions, but that date was adjourned by the case conference judge, who then set the date of April 28, 2015 to cross-examine the author of the Moore report.

[8] That one-day hearing eventually expanded into a three-day trial.

In addition to hearing from the author of the Moore report, the trial judge also heard from the parties and a witness who was acting as a counsellor for the child. The trial judge also had before him volumes of affidavits and other documents that the parties had prepared and filed on the belief that such documentation would be the basis on which to advance their respective motions for the relief being sought other than the custody and access issues.

[9] The bulk of the *viva voce* evidence heard by the trial judge dealt with the issues of custody and access. The issue of ongoing or retroactive child support appeared to be treated as an afterthought.

[10] Mostly on the basis of the Moore report, the trial judge ordered that the respondent have primary care and control of the child, along with final decision-making authority. The shared custody of the child continues between the parties, save for the fact that the child now spends slightly more time with the respondent than the petitioner. In fact, the situation is almost a complete reversal of what existed prior to these proceedings.

[11] The trial judge then dealt with the financial issues in two short paragraphs of his reasons, where he stated (at paras 18-19):

> In respect to retroactive and ongoing child support, the [petitioner] will pay ongoing child support based upon an imputed amount of $37,440. The line 150 amount for the year 2014 on her income tax return states that she had earned $27,155. In the court's view the [petitioner] is under-employed. She is working on a part time basis and there is no valid reason for her to not be working on a full time basis.
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> In respect to the date of retroactive child support, the Supreme Court of Canada has made it clear that unless there has been "blameworthy conduct" the court can go back three years. The

> court does not find that there has been any "blameworthy conduct" by the [respondent]. The [petitioner] could have applied prior to May 1, 2013 but chose not to do so. Therefore, the court would set the date for retroactive child support to be as of May 1, 2013.

[12] The parties could not come to an agreement on the issue of costs and re-attended before the trial judge on April 13, 2016. After hearing submissions from the parties, including a request by the petitioner that the matter be adjourned as she was not prepared to deal with the issue of costs on that day, the trial judge ruled as follows:

> First of all, [the respondent] did have a formal offer under the Rules and I having looked briefly at this documentation that was provided by [the petitioner], it is my opinion that these were not offers to settle but simply negotiations in an attempt to settle ongoing negotiations but not specifically offers to settle under the Rules, which you are entitled to of course attempt to, to try and settle a matter.
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> There was an offer under the Rules and I am of the opinion that [the respondent] is entitled to the double costs and I am awarding the respondent double costs in the total amount of $24,489.32. Thank you.

[13] The petitioner's notice of appeal sets out 16 grounds for appeal, of which only two deal with the matter of care and control and access. The balance of the grounds of appeal deal with the manner in which the hearing was conducted, the award of retroactive and ongoing child support and the granting of costs—more specifically the granting of double costs—in favor of the respondent. I do not propose to deal with each and every one of those grounds, but instead will deal with the issues as I have summarized them.

[14] There is no doubt that the manner in which this dispute was resolved was unusual, but that is not to say that such a proceeding amounts to reversible error in and of itself. The reality is simply that, in addition to all of the written materials provided to the trial judge, he opted to consider additional evidence which was put before him in *viva voce* form. Proceeding in such a manner is open to a judge if it assists him or her in arriving at a decision. In any event, the petitioner's main thrust appears to question whether the proceedings were on an interim basis as opposed to a final order. I have difficulty accepting that a motion to vary an existing final order could be considered to be on an interim basis.

[15] The hybrid manner of the proceeding might have somewhat obscured the fact that the issues before the trial judge were more than simply custody and access of the child of the marriage, but ultimately I have not been persuaded that any party was prejudiced by the manner in which the hearing unfolded. Accordingly, I would dismiss all of the grounds of appeal which deal with the manner in which the hearing proceeded.

[16] The next grounds of appeal to be considered deal with the trial judge's apportionment of shared custody and primary care and control of the child to the respondent. The petitioner alleges that the trial judge's decision fails to consider the best interests of the child. I find no merit in that argument. There was strong and cogent reasoning in both the Moore report and the *viva voce* evidence by the author of the report that supports the conclusions arrived at by the trial judge. The decision arrived at was justified based on the evidence that the trial judge had at his disposal and he committed no error in awarding primary care and control to the respondent,

nor did he err in his apportionment of shared custody.

[17] I now deal with the issue of the trial judge's settling of retroactive and ongoing child support. This is a troubling issue because scant attention was paid to it in his reasons. The reasons provide us with a conclusion, but lack any meaningful analysis as to how or why he came to the conclusions that he did. In *Cabot v Mikkelson*, 2004 MBCA 107, I dealt with the matter of insufficient reasons and a resulting finding of error in the following manner (at paras 36-38):

> In my view, the motions judge erred when he failed to provide any reason to demonstrate how he arrived at the conclusion that the respondent has not reached the 40 percent threshold. The principles established by the Supreme Court in *R. v. Sheppard*, [2002] 1 S.C.R. 869, are not solely applicable to criminal cases. The principles apply to all cases in which judges must render decisions, including family law cases. See *Lamont-Daneault v. Daneault* (2003), 177 Man.R. (2d) 235, 2003 MBCA 111, and *Petrowski v. Waskul* (2003), 173 Man.R. (2d) 237, 2003 MBCA 65. In *Sheppard*, Binnie J., in writing for the majority, stated (at para. 15):
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> > Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done, but critics respond that it is difficult to see how justice can be *seen* to be done if judges fail to articulate the reasons for their actions. Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public and to the appellate courts.
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> He goes on to say (at para. 28):
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> > It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to

> exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. Relevant factors in this case are that (i) there are significant inconsistencies or conflicts in the evidence which are not addressed in the reasons for judgment, (ii) the confused and contradictory evidence relates to a key issue on the appeal, and (iii) the record does not otherwise explain the trial judge's decision in a satisfactory manner. Other cases, of course, will present different factors. The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.
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> Clear and concise reasons explaining his decision are even more necessary in this case because the finding that the threshold amount of time had not been arrived at was made in the face of the following evidence; a consented amendment to the original order that basically provided that the children would be with the respondent for 6 out of 14 nights; an apparent, but still challengeable agreement in a case conference that the respondent has the children 43 percent of the time as well as an acknowledgement from the petitioner's counsel that the petitioner accepts that the access arrangement is 43 percent.

[18] The reasoning that I applied in *Cabot* applies to the issue of retroactive and ongoing child support. In my view, the trial judge committed reversible error in the manner in which he dealt with the issue of child support. This might be partially due to the hybrid manner in which the matter proceeded and which placed more emphasis on the issue of care and control as opposed to the financial issues, but it does not render the error any less significant. Accordingly, it is open to this Court to deal with the issue

of retroactive and ongoing child support as it deems appropriate based on the evidence as we see it.

[19] The petitioner argues that there was no justifiable basis to impute income to her when dealing with ongoing child support and that, with respect to retroactive support, there was no basis to restrict the retroactivity to May 1, 2013.

[20] On the issue of ongoing child support, I agree with the petitioner that the trial judge erred when he imputed income to her. Such relief was not sought by the respondent in his pleadings or materials filed on his behalf. The issue was only marginally covered in *viva voce* evidence and, in my view, the trial judge failed to properly consider the petitioner's reasoning for her inability to seek and obtain further hours of work in the field in which she was employed. Accordingly, I would set aside the imputation of income and order that she pay child support to the respondent on an ongoing basis at the same proportion that was ordered by the trial judge, but based on an income of $27,155 per annum and not $37,440 per annum.

[21] As to the matter of retroactive child support, the petitioner argues that the trial judge erred when he limited the retroactivity to May 1, 2013. She further argues that he erred in his finding that there was no blameworthy conduct on the part of the respondent. Finally, she argues that the retroactivity should have dated back to the time of the final order in 2008. In support of her arguments, the petitioner relies on the Supreme Court of Canada decision in *DBS v SRG; LJW v TAR; Henry v Henry; Hiemstra v Hiemstra*, 2006 SCC 37.

[22] Although *DBS* deals extensively with the issue of retroactivity, it does not, in my view, necessarily support the petitioner's argument that retroactivity should date back to the date of the final order. What I take from *DBS* is the summary of Bastarache J's analysis, which I believe applies to the circumstances of this case. He wrote (at paras 132-35):

> In the context of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay them continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time.
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> In determining whether to make a retroactive award, a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.
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> Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.
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> The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But

> there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

[23] Further attention is to be drawn to what Bastarache J had to say with respect to blameworthy conduct. He wrote (at para 106):

> Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A similar approach was taken by the Ontario Court of Appeal in *Horner v. Horner* (2004), 72 O.R. (3d) 561, at para. 85, where children's broad "interests" — rather than their "right to an appropriate amount of support" — were said to require precedence; however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments: see *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Ct. (Gen. Div.)); *Whitton v. Shippelt* (2001), 293 A.R. 317, 2001 ABCA 307; *S. (L.)* [*LS v EP*, 1999 BCCA 393]. A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support: see *Dahl v. Dahl* (1995), 178 A.R. 119. And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.

[24] Based on the above, I have difficulty understanding the trial judge's finding that there was no blameworthy conduct on behalf of the respondent, as the written materials that were part of these proceedings

contain numerous references to the difficulties the petitioner encountered over the years in attempting to obtain full and proper financial disclosure from the respondent.

[25] However, I must also recognize the fact that the petitioner herself did very little to advance her claim for a variation in child support until she filed her notice to vary in November 2014. One cannot simply stand silently by for a number of years and then come out and seek redress for a matter that she could have dealt with earlier than she eventually did.

[26] In my view, neither party is totally without blame.

[27] In the final analysis, the evidence satisfies me that the amount the respondent has been paying does not reflect what he should have paid based on his annual income as it increased from year to year. I am, however, at a loss to understand why the trial judge made his award retroactive to May 1, 2013, as opposed to any other date, as there is nothing in his reasons that explains his choice of dates, save for a reference that courts can go back for a period of three years.

[28] Accordingly, and keeping in mind both the respondent's failure to disclose and the petitioner's delay in seeking redress, I would order the respondent to pay to the petitioner retroactive child support based on what his annual income was, less a set off for the $160 per month that he actually paid, from January 1, 2012 to November 30, 2015, that date being just a few days prior to the release of the trial judge's reasons. I fixed the date of January 1, 2012, because of the fact that the respondent failed to provide his required disclosure in a timely matter, but I go no further back because of

the petitioner's own failure in dealing with this issue in a timely manner. If the parties are unable to agree on what that payment should be, because they cannot agree on the respondent's income during that period, the matter is to be returned to the trial court, before a different judge, to have the matter determined.

[29] Lastly, I deal with the issue of costs including the awarding of double costs to the respondent.

[30] Again, on this issue we are dealing with scant reasons for the award made. I understand that the trial judge awarded double costs because of his finding that the decision he arrived at was more favourable to the respondent than what he arguably had proposed to settle the matter. However, because of my disposition of the matter of imputed income I am far from convinced that such is still the case. Furthermore, although the respondent's offer to settle might have been made in a formal manner, there is evidence of ongoing settlement offers from both sides. In addition, the voluminous materials indicate that the petitioner had continuous difficulty in obtaining full and frank disclosure of the respondent's earnings and assets.

[31] This is certainly not a case where the awarding of double costs is either justified or appropriate and I would set aside that order. As to the issue of costs themselves, I am far from convinced that either party has been a clear winner. In my view, this is an appropriate case for each party to bear their own costs. Accordingly, the order of costs in favour of the respondent is also set aside.

[32] The parties will also bear their own costs on this appeal.

Monnin JA

I agree: Burnett JA

I agree: leMaistre JA