COURT OF APPEAL FOR ONTARIO

CITATION: Gagnon v. Martyniuk, 2020 ONCA 708
DATE: 20201109
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Hourigan, Trotter and Jamal JJ.A.

BETWEEN

Shane Joseph Gagnon

Applicant
(Respondent)

and

Marylu Ginger Martyniuk

Respondent
(Appellant)

Marek Z. Tufman and Gregory A. P. Tufman, for the appellant

Evgeniy Osipov, for the respondent

Heard: October 16, 2020 by video conference

On appeal from the order of Justice Susan E. Healey of the Superior Court of Justice, dated March 7, 2019, with reasons reported at 2019 ONSC 1518, and the sentence imposed, dated July 5, 2019.

REASONS FOR DECISION

Introduction

[1] In the midst of high-conflict family law proceedings, Ms. Martyniuk was found in contempt for failing to comply with a court order. She was subsequently sentenced to a non-custodial penalty.

[2] Ms. Martyniuk appeals from the finding of contempt and the penalty imposed. She submits that the motion judge made errors at both stages of the proceedings. She also brings a motion to adduce fresh evidence.

[3] For the reasons set out below, the appeal is dismissed. The motion judge made no error in finding Ms. Martyniuk in contempt; nor was the penalty she imposed unreasonable. We would also dismiss the application to adduce fresh evidence. The fresh evidence application could have no effect on the motion judge's findings. Moreover, the issues raised by the proposed fresh evidence are best addressed in the Superior Court in the context of a Motion to Change that is currently before that court.

Background

[4] The parties had an on-again, off-again relationship between 2005 and 2015. They have three children: two sons, aged 12 and 14, and a daughter who is 4. The relationship has been rancorous, with the parties often in conflict over Mr. Gagnon's access to the children.

[5] Earlier proceedings between the parties resulted in a comprehensive final order on July 6, 2010. According to Mr. Gagnon, as time went by, Ms. Martyniuk increasingly ignored this order. He commenced a new proceeding in September 2017, seeking increased access to his children. At a case conference on February 27, 2018, McDermot J. made a consent order ("the Order") that addressed access

issues and required Ms. Martyniuk to obtain Mr. Gagnon's written consent before she could take the children out of the country.

[6] There were compliance issues with this order almost immediately. On a number of occasions, the parenting exchanges of the children did not happen, or they were late. Ms. Martyniuk also took the children on vacation out of the country without obtaining Mr. Gagnon's written consent.

The Contempt Proceedings

[7] Mr. Gagnon initiated contempt proceedings in October 2018. After numerous interim appearances, the contempt hearing was conducted on March 1, 2019. Both parties were represented by counsel. The record consisted of competing affidavits. Neither side requested an opportunity to cross-examine the other.

[8] The motion judge provided detailed reasons for judgment in which she reviewed the events that followed the Order. She considered Mr. Gagnon's allegations that Ms. Martyniuk contravened the Order by denying access to Mr. Gagnon; removing the children from the country without his written consent; and discussing adult issues with the children.

[9] In her affidavit, Ms. Martyniuk alleged that the children did not wish to spend time with Mr. Gagnon because of his temperament. She alleged that he yells, bullies, threatens, and belittles the children. He also allegedly says derogatory

things about her. It is her view that the children do not want to go with him. Ms. Martyniuk also relied upon Mr. Gagnon's extensive criminal record, which contains entries for crimes of dishonesty and violence, including a conviction for manslaughter.

[10] The motion judge reviewed the affidavit evidence, which included dozens of text messages between the parties. She made the following findings, at paras. 91 and 92 of her reasons:

> Although the applicant has a history of offences involving dishonesty, I find that the evidence presented by him on this motion is credible. It contains no inconsistencies, and the applicant has offered up evidence that also reflects poorly on his judgment at times. The respondent's evidence, by contrast, is general, vague and contains inconsistencies when recounting events. While I accept that there has been much verbal unpleasantness throughout their relationship, I reject the respondent's evidence that casts her as a victim in this dynamic. When she acted as the surety she describes having to live with the applicant as being one of the worst periods. Yet she held all of the control; if he was mistreating her as she alleges, she had only to revoke her consent and the arrangement would be over. And her text messages to him reveal frustration, but her manner of taunting him betrays any true fear.
>
> The respondent excuses all of her behavior as being in the best interests of the children. She accuses the applicant of inflexibility where the children's needs and plans are concerned. What she misses is that flexibility in relation to court orders only works in situations where two parents 1) recognize what is required of them; 2) respect that the other parent has rights; 3) do not impose changes unilaterally and without the express agreement of the other parent; and 4) are prepared to offer makeup

> time where a change impacts on the other parent's time with the children. None of these are present for the respondent. [Emphasis added.]

[11] The motion judge did not find Ms. Martyniuk in contempt of all conditions in the Order; rather, she made the following specific findings, at paras. 98-100:

> I find that the respondent has committed multiple breaches of the Order. Specifically, I find that she has wilfully and deliberately decided not to follow several clear provisions: para. 3(a)(iii) regarding access with Jolie; para. 3(b) regarding alternating weekend access; para. 3(d) regarding mid-week access; para. 3(e) regarding daily telephone access; para. 4(a)(i) and (iii) regarding summer access; para. 8 regarding travel with consent; and para. 10 with respect to discussing adult issues in the presence of the children.
>
> Where I have not found a breach, I find that the Order is sufficiently ambiguous to not meet the test, or that the supporting evidence does not prove a breach beyond a reasonable doubt. In particular, para. 3(c) concerning professional activity days is awkwardly worded, although I have serious doubts that the respondent was misled by the wording. Nonetheless, the standard of proof is not there. Similarly, in paragraph 4(c), the March Break "week" is not defined, and the Order contemplates that such a special holiday will "interrupt the regular schedule". With respect to Father's Day, there is no set time for an exchange to occur. With respect to the Easter weekend, the evidence is not clear about whether the applicant attempted to exercise the access on Sunday at 1:00 p.m. as set out in the Order.
>
> I find beyond a reasonable doubt that the breaches enumerated were carried out wilfully and deliberately by the respondent. The evidence shows has not actively encouraged the boys' attendance and involvement in compliance with the Order; instead, she has deliberately allowed them not to spend time with their father, not call him, take them places when they should be with him, and

> made plans when they should be with him. She has very deliberately engaged Joseph in the tug-of-war over time spent with the applicant. She knowingly has permitted Joseph to be involved in text messaging regarding these matters. Excusing the children's exposure to the applicant's messages by saying that she cannot control the Bluetooth feature in the vehicle is ridiculous and shows how little the respondent actively does to shelter the boys from the interactions. She has clearly engaged in a history of conduct that has had the effect of generally sabotaging the custody and access order. [Emphasis added.]

[12] As noted above, the motion judge reviewed many text messages between the parties. She focused on one message in particular, written by Ms. Martyniuk. As the motion judge wrote, at para. 101:

> While all of the evidence reviewed on this motion thus far proves to this court [that] respondent's breaches have been flagrant and deliberate, the respondent's own words, sent via text message, leave no room for argument on this point: "The judge does not rule my life or make decisions for my kids Shane. I'm sorry you live in that kind of mentality but I don't. I respect people and the law but my kids are everything and I do my best to keep them happy children". [Emphasis added.]

[13] The motion judge adjourned the penalty phase of the contempt proceedings to July 5, 2019. In the meantime, she clarified the arrangements between the parties, and ordered Ms. Martyniuk to enroll in a parenting course with Mr. Gagnon.

[14] At the conclusion of the penalty hearing, the motion judge made a number of orders. First, she ordered that Ms. Martyniuk comply with the Order with respect to Mr. Gagnon's access to all three children. Second, she ordered that Ms.

Martyniuk immediately enroll in the next session of the Cooperative Parenting and Divorce Program. To prevent any issues with attendance of that Program, the motion judge ordered that Ms. Martyniuk pay Mr. Gagnon: “a fine of $50 for each meeting in which she is late by 10 mins or longer” and “a fine of $200 for each missed meeting unless a medical note from a heath practitioner is provided to explain her non-attendance.” Finally, she wrote that: “The breach of any of the terms of this order that lead[s] to a 2nd finding of contempt shall result in further fines, or a period of incarceration, or both.”

Discussion

(1) The Contempt Finding

[15] Ms. Martyniuk submits that the trial judge ought not to have responded to a high conflict family law dispute with a contempt finding. She further submits that the motion judge should not have conducted the hearing solely on the basis of affidavit evidence. Rather, a trial was necessary to establish contempt beyond a reasonable doubt. Finally, Ms. Martyniuk submits that the trial judge failed to appreciate that contempt is a remedy of last resort and must be used sparingly. We reject these submissions.

[16] The motion judge carefully instructed herself on the law of contempt and the proof required to make a finding of contempt, as demonstrated by paras. 28-33 of her reasons. She noted that her authority to conduct contempt proceedings

derives from r. 31 of the *Family Law Rules*, O. Reg 114/99. She cited the three-part test required for a contempt finding, set out in this court's decision in *Les Services aux Enfants et Adultes de Prescott-Russell v. N.G.* (2006), 82 O.R. (3d) 669 (C.A.), at para. 27.

[17] Counsel represented Ms. Martyniuk at the contempt hearing. Her counsel did not request an opportunity to cross-examine the parties on the affidavits filed. She made no request for a trial. Rather, she was content to proceed on the paper record that was filed.

[18] It was appropriate to proceed in this manner. In her affidavit, Ms. Martyniuk did not dispute many of the incidents alleged by Mr. Gagnon; instead, she sought to justify her actions. The motion judge carefully considered the affidavits of both parties. Electronic communications between the parties assisted in testing the veracity of their respective accounts. The motion judge was entitled to place considerable weight on Ms. Martyniuk's text message, in which she explicitly denied the authority of the court order over her parenting decisions. Noted above in para. 12, she wrote: "The judge does not rule my life or make decisions for my kids Shane."

[19] The motion judge specifically recognized, at para. 32, that contempt is a remedy of last resort that must be used sparingly, citing *Godard v. Godard*, 2015 ONCA 568, 387 D.L.R. (4th) 667, at para. 17; and *Hefkey v. Hefkey*, 2013 ONCA

44, 30 R.F.L. (7th) 65, at para. 3. Counsel for Ms. Martyniuk on appeal submitted that, although the motion judge repeated this principle, she did not give effect to it and there is no evidence that she considered any alternatives to contempt. However, there is no reason why we should not take the motion judge's words at face value. Nothing in her extensive reasons belie the authenticity of her stated approach. As the motion judge found, this case involved multiple, wilful breaches of court orders, which she rightly found were flagrant. Additionally, as noted above, the text messages revealed Ms. Martyniuk's clear renunciation of the court's authority over her family law matters. As such, it was within the discretion of the motion judge to resort to contempt as the only appropriate option in this case.

[20] Counsel for Ms. Martyniuk further argued that the motion judge did not adequately consider the bests interests of the children. However, Ms. Martyniuk's continuous refusal to comply with the Order was aggravating an already dysfunctional dynamic, in a manner detrimental to the children. The motion judge acted accordingly.

[21] We note that the motion judge did not make a blanket finding of contempt, capturing all of the allegations made against Ms. Martyniuk. As demonstrated in the passage reproduced at para. 11 above, she considered each allegation separately and gave Ms. Martyniuk the benefit of the doubt with respect to a number of the conditions she was alleged to have breached. Accordingly, it cannot

be said that the motion judge failed to resolve ambiguities in Mr. Gagnon's allegations in favour of the appellant.

[22] We would not disturb the finding of contempt.

(2) The Penalty Imposed

[23] Ms. Martyniuk submits that the penalty imposed was improper. Her counsel argues that ordering her to pay a fine to Mr. Gagnon when she fails to attend the parenting program in a timely manner is not a proper exercise of discretion. Rather, counsel submits that this penalty aggravates a highly antagonistic situation and does not take into consideration the best interests of the children.

[24] We are not persuaded that the penalty imposed was improper. Rule 31(5) of the *Family Law Rules* provides judges with wide discretion with respect to penalties for contempt. In particular, r. 31(5) permits a motion judge to order the person found in contempt to:

> (a) be imprisoned for any period and on any conditions that are just;
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> (b) pay a fine in any amount that is appropriate;
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> (c) pay an amount to a party as a penalty;
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> (d) do anything else that the court decides is appropriate;
>
> (e) not do what the court forbids;
>
> (f) pay costs in an amount decided by the court; and

(g) obey any other order.

[25] The motion judge demonstrated great restraint in penalizing the appellant's flagrant contempt. The fine structure she imposed was designed to compel Ms. Martyniuk to participate in the cooperative parenting program. The order also required Mr. Gagnon to attend, given that the program was "cooperative" in nature. The fines were meant to avoid wasting Mr. Gagnon's time. There is nothing about this aspect of the order that could be considered contrary to the best interests of the children.

[26] The other aspect of the penalty addressed the access issues that gave rise to the finding of contempt in the first place. This was an appropriate exercise of the motion judge's discretion. It was also in the children's best interest because it sought to prevent future disputes over parenting time.

(3) The Fresh Evidence Application

[27] Ms. Martyniuk seeks to adduce fresh evidence that she contends ought to result in setting aside the contempt finding. The evidence mostly relates to events that followed the contempt proceedings. The appellant relies on the fresh evidence to demonstrate that there were good reasons why the children did not wish to interact with their father, and that she was always acting in the best interests of her children.

[28] A small portion of the fresh evidence that Ms. Martyniuk seeks to adduce consists of a recording of an incident that occurred on June 23, 2017 (before the contempt hearing). It was a recording of an aborted parenting exchange that resulted in Mr. Gagnon losing his temper and yelling at Ms. Martyniuk and the children. There is no explanation as to the history of this recording or why it did not come to light earlier. In her affidavit, she simply stated: "There is also another recording which I found." In her fresh evidence affidavit, Ms. Martyniuk explained why she sees this recording as relevant to this appeal:

> I believe that together they would clearly show to this Honourable Court that what I put before Justice Healy was true. They would show that I was not deliberately contemptuous of the Order of Justice McDermo[t], but I was simply a single mother, attempting to deal with extraordinary events, and with the very violent and abusive personality of Mr. Gagnon, and with its impact on our children.

[29] The other evidence that Ms. Martyniuk seeks to adduce relates to a court proceeding that occurred after the order under appeal. On October 22, 2019, Mr. Gagnon commenced a second contempt motion, alleging 10 incidents where Ms. Martyniuk was either late in delivering the children (x2), or did not deliver them at all (x8). In his affidavit in support of the contempt motion, Mr. Gagnon included a transcript of a conversation that one of his sons had recorded during an access visit on August 8, 2019. The transcript and the recording itself form part of the proposed fresh evidence. As Mr. Gagnon said in his affidavit: "I lost my temper and

ranted to my boys." Understandably, this was very upsetting for his two sons. In his affidavit, Mr. Gagnon expressed remorse for his actions.

[30] Based on the August 2019 recording, the Minutes of Settlement filed by the parties, and other events, Wildman J. made an interim order, dated November 21, 2019. Among other things, she referred the matter to the Office of the Children's Lawyer ("OCL"). On August 21, 2020, the OCL delivered a report that includes a number of findings that are unfavourable to Mr. Gagnon.

[31] We would not admit the fresh evidence. Ms. Martyniuk has provided no explanation for why the June 23, 2017 recording (that pre-dated the first contempt motion) was not disclosed until now, more than three years after it was purportedly made.

[32] The August 8, 2019 recording should not be admitted as fresh evidence on appeal. It does not displace the findings made by the motion judge, based on the affidavits of the parties and their voluminous text message correspondence. Moreover, this evidence does not affect the integrity of the contempt findings made with respect to access to his daughter, travel without consent, and discussing adult issues in the presence of the children. It does not nullify the effect of Ms. Martyniuk's "the judge does not rule my life" text message.

[33] As mentioned at the beginning of these reasons, the events described in the fresh evidence application, including the report of the OCL, are more appropriately

addressed in the context of a Motion to Change in the Superior Court. Accordingly, we decline to interfere on this basis.

Conclusion

[34] We dismiss the appeal from the contempt finding and penalty imposed. The application to adduce fresh evidence is also dismissed.

[35] We order costs to the respondent in the amount of $10,000, inclusive of taxes and disbursements.

"C.W. Hourigan J.A."
"Gary Trotter J.A."
"M. Jamal J.A."