COURT OF APPEAL FOR ONTARIO

CITATION: Kim v. McIntosh, 2023 ONCA 356
DATE: 20230518
DOCKET: C70026, M54077, M53902

Doherty, Zarnett and Sossin JJ.A.

BETWEEN

Anita Kim

Respondent (Applicant)

and

Adan McIntosh

Appellant (Respondent)

Adan McIntosh, acting in person

Anita Kim, acting in person

Heard: April 19, 2023

On appeal from the judgment of Justice Jana Steele of the Superior Court of Justice, dated October 1, 2021.

By the Court:

[1] There are three matters before the court. In all three, Mr. McIntosh is the appellant/moving party and his former partner, Anita Kim, is the respondent.

[2] The appellant appeals from the order of Steele J. of the Superior Court of Justice, dated October 1, 2021, made after an uncontested trial (C70026). The appellant further seeks an order vacating the order of Nordheimer J.A., dated

November 8, 2022. In that order, Nordheimer J.A. refused to stay the order of Steele J. pending appeal (M53902). In addition, the appellant brings what we would describe as an omnibus motion, seeking a wide variety of orders (M54077). On that motion, the appellant challenges various orders. He also seeks an order directing the recusal on all matters pertaining to these proceedings of any judge who received or saw a certain case note made by Shore J. of the Superior Court of Justice (Toronto Region). In addition, he asks the court to set aside any order made by any judge of the Toronto Superior Court who may have seen or read Shore J.'s case note before he or she made an order in this proceeding.

[3] The appellant and the respondent met in 2005. They had four children together between September 2008 and July 2017. The parties did not marry and eventually separated in August 2019. In September 2019, the respondent commenced an application seeking sole decision-making authority for the children, child support, and other relief. The children have always lived in Ontario with the respondent. Since the separation, she has been their sole provider. The appellant is an Australian national and returned to live in Australia shortly after the separation. The appellant has not paid any child support since these proceedings began, over three years ago.

[4] Unfortunately, the proceedings have been marred by the appellant's repeated non-compliance with numerous court orders and a seemingly interminable stream of motions and appeals brought by the appellant at various

court levels. He has appeared on his own behalf in all these proceedings. The respondent was unable to retain counsel for oral argument, although she did have the assistance of counsel in preparing her responding factum.

A. THE MOTION TO SET ASIDE THE ORDER OF NORDHEIMER J.A. (M53902)

[5] By endorsement dated November 8, 2022, Nordheimer J.A. declined to stay the order of Steele J. pending the hearing of the appeal from that order. Nordheimer J.A. also declined to make an interim parenting order in favour of the appellant pending the hearing of the appeal. Lastly, he refused to make an order directing the respondent to file material in accordance with the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194.

[6] The appeal from the order of Steele J. has now been heard. Our reasons for dismissing that appeal are set out below. The impugned orders of Nordheimer J.A. are spent. There is no purpose in reviewing those orders now.

[7] The appellant also submitted that Nordheimer J.A. failed to consider his submission asking for an order requesting the Office of the Children's Lawyer to prepare a Voice of the Child Report. Nordheimer J.A. does not refer to this submission in his endorsement. We will deal with the question of whether it would be appropriate to request a Voice of the Child Report in our consideration of the appeal from the order of Steele J.

[8] The motion to set aside the order of Nordheimer J.A. is dismissed.

B. THE APPEAL FROM THE ORDER OF STEELE J. (C70026)

[9] In December 2020, the appellant brought a motion for an order extending the time allowing him to file his response to the application brought by the respondent. The appellant had been granted at least one previous extension.

[10] Shore J. granted a further extension, this time on terms. The terms required the appellant:

- to file his answer and updated financial statements within 10 days;
- to pay outstanding costs orders in the amount of $26,500; and
- to post security for costs in the amount of $6,000.

[11] Shore J. further ordered that if the appellant did not comply with the terms on which the further extension had been granted, Ms. Kim could seek to proceed by way of an uncontested trial: *Kim v. McIntosh*, 2020 ONSC 719.

[12] The appellant unsuccessfully sought to appeal the order of Shore J. to the Divisional Court. That motion for leave to appeal was dismissed for procedural reasons and not on the merits.

[13] Some nine months later in September 2021, the matter came before Steele J. The appellant had filed an answer to the respondent's application, but had not complied with the terms of the order of Shore J., on which he was granted the

further extension of time to file his answer. Specifically, the appellant had not paid the various costs orders and had not posted security for costs.

[14] In her endorsement, Steele J. provided a detailed history of the litigation. That history included references to the appellant's failure to pay many costs orders, his breach of a restraining order, and his failure to post the required security for costs. Steele J. concluded that she would proceed with the uncontested trial. She observed, at para. 49 of her endorsement:

> Mr. McIntosh has not made any payment toward the outstanding costs orders against him, which total $33,625, nor has he paid into court the security for costs he was ordered to pay. Mr. McIntosh continues to pursue litigation in this court while at the same time disregarding the orders of the court. This is not acceptable.

[15] Steele J. then turned to a consideration of the merits of Ms. Kim's application. She began with Ms. Kim's request that she be given sole decision-making authority in respect of the children, proposing eight weeks of parenting time for the appellant. Steele J. correctly stated that the only test is the best interests of the children. She reviewed s. 24 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("*CLRA*"), which requires the court in making any parenting order to consider only the best interests of the children. As set out in s. 24(2), in determining the best interests of a child, the court shall consider all factors related to the circumstances of the child, and, in doing so, shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

Steele J. proceeded to set out the list of factors related to the circumstances of the children as set out in s. 24(3).

[16] Steele J. noted that Ms. Kim had been the sole decision-maker in respect of the children, at least over the last two years. Mr. McIntosh's residence in Australia made any kind of joint decision-making arrangement difficult. Steele J. was also satisfied there was no evidence the parties could communicate effectively in a manner which would permit joint decision-making. The evidence suggested very much to the contrary. Steele J. awarded sole decision-making to the respondent.

[17] Steele J. next considered the question of parenting time. She was satisfied that it was in the best interests of the children that they have meaningful time with both parents. While Mr. McIntosh's residence in Australia created some practical difficulties, Steele J. was satisfied that he should have up to eight weeks of parenting time per year with the children. The parenting time was to occur in Ontario for periods of up to no more than four weeks at a time. Steele J. set down further additional terms and conditions on the parenting time, which need not be detailed here. She also ordered that when the appellant was not exercising physical parenting time, he was to have video or telephone access to the children three times a week, for up to two hours.

[18] Steele J. also made a non-removal order pursuant to s. 37 of the *CLRA*. There was evidence before her that Mr. McIntosh had previously taken steps to unlawfully remove the eldest child to Australia.

[19] Ms. Kim sought child support. The appellant had not paid any child support since the parties separated on August 9, 2019. The appellant claimed to be impecunious and unable to pay child support. Based on the evidence before her, Steele J. concluded that the appellant was intentionally unemployed. She accepted Ms. Kim's sworn evidence that Mr. McIntosh had a number of university degrees and had held a number of positions over the years. He previously worked with the Australian Federal Police as a graduate program member in their information and technology department, in web design and as a mechanic. After referring to the obligation of all parents to support their children as set out in s. 31 of the *Family Law Act*, R.S.O. 1990, c. F.3, and s. 19(1)(a) the *Child Support Guidelines*, O. Reg. 391/97 ("*CSG*s"), as well as the test in *Drygala v. Pauli* (2002), 61 O.R. (3d) 711 (C.A.) for imputing income, Steele J. imputed income to the appellant of $65,000. The appellant's actual previous income had been considerably higher. Based on the presumptive amounts in the *CSG*s, Steele J. ordered retroactive child support at a rate of $500 per month, and ongoing child support in the amount of $732 per month.

[20] Steele J. declined to order a specific amount payable by Mr. McIntosh in respect of s. 7 expenses under the *CSG*s. Instead, she directed that the appellant

pay his proportionate share. Finally, Steele J. made no order for spousal support in favour of either Mr. McIntosh or Ms. Kim.

[21] Ms. Kim submits that this court should not address the merits of the appeal from the order of Steele J. because the appellant remains in breach of many orders: *Dickie v. Dickie*, 2007 SCC 8, [2007] 1 S.C.R. 346. There is considerable force to this submission, especially as it relates to the issues other than bias. We will, however, address both the merits of Steele J.'s decision to proceed with an uncontested trial and the merits of the order she made after that uncontested trial.

[22] Steele J. proceeded with an uncontested trial on the basis that the appellant had not complied with the order of Shore J., made several months earlier. Shore J. had made it clear that non-compliance with her order could result in an uncontested trial. The order of Shore J. was interlocutory and cannot be the direct subject of an appeal to this court. Her order is, however, the basis upon which Steele J. exercised her discretion to proceed with an uncontested trial. As the order of Shore J. was integral to the order of Steele J., we will, in the interests of fairness, consider the merits of the order of Shore J.

[23] The appellant's repeated non-compliance with numerous court orders fully justified the order made by Shore J. Despite the appellant's many prior breaches, Shore J. gave the appellant a reasonable opportunity to bring himself into compliance with the outstanding court orders. He chose not to do so. When the

matter came before Steele J., she had the appellant's further non-compliance with the terms of the extension granted by Shore J. The appellant's further and complete non-compliance with the conditions imposed by Shore J. provided ample justification for Steele J.'s order to proceed by way of uncontested trial.

[24] The appellant cannot escape his obligation to comply with court orders by pleading impecuniosity. Steele J. made a finding that the appellant was intentionally unemployed and capable of earning a good income. There was evidence to support that finding. This court defers to factual findings, absent a determination that the finding is either unreasonable, or based on a misapprehension of evidence. The finding of Steele J. suffers from neither defect. There is no reason for this court to interfere with her findings of fact.

[25] The appellant's failure to comply with any of the costs orders, or the security for costs order, even in part, must be viewed as intentional. We see no error in Steele J.'s decision to proceed with an uncontested trial.

[26] Having determined that Steele J. did not err in proceeding with an uncontested trial, it is doubtful that the appellant has standing to challenge the merits of the order made in the uncontested trial: *Lamothe v. Ellis*, 2022 ONCA 789. We need not decide that issue, as we see no error in the order made by Steele J. Despite the appellant's decision that he would not comply with the court orders and, therefore, would not participate in the trial, the order imposed by Steele J.

reflects a full consideration of the relevant statutory provisions and the evidence before her. In particular, the parenting time order recognizes that the children would benefit from continued significant contact with their father, the appellant.

[27] The appeal from the order of Steele J. is dismissed.

C. THE OMNIBUS MOTION

[28] There are several issues raised on the omnibus motion, including the reasonable apprehension of bias claims. We will deal with the other issues raised first, and then return to the bias submissions.

(i) The refusal to remit the proceedings to the trial court

[29] In March 2022, Rouleau J.A. heard a motion brought by the appellant to de-list the appeal so that he could bring a proceeding under r. 25(19) of the *Family Law Rules*, O. Reg. 114/99 ("*FLR*s") in the trial court to set aside the decision of Steele J. Rouleau J.A. dismissed the motion (M53227, M53271), holding that the order of Steele J. was a final order, appealable to the Court of Appeal.

[30] We agree with the reasons of Rouleau J.A. The order of Steele J. clearly determined the substantive rights in the proceedings and stands as a final order. The appellant relies on *Gray v. Gray*, 2017 ONCA 100, 137 O.R. (3d) 65. That case confirms the final nature of the order in issue here: see *Gray*, at para. 34. *Gray* also stands for the proposition that this court may, in the exercise of its discretion, adjourn an appeal to allow a party to bring a motion in the trial court

under r. 25(19) of the *FLRs*. *Gray* does not suggest that this court must delay pending appeals whenever a party indicates a desire to bring a motion under r. 25(19).

[31] Rule 25(19) does allow for a motion in the trial court to "change" an order. That authority can be exercised only in certain situations. Section 25(19)(d) would appear to be the only provision applicable here. It provides:

> The court may on motion, change an order that,
>
> (d) was made without notice

[32] The order for an uncontested trial was not made without notice to the appellant. The order of Shore J. put the appellant on notice many months before the matter proceeded by way of uncontested trial. The appellant knew that if he did not comply with the terms set by Shore J., the trial could proceed as an uncontested trial.

[33] In any event, if the appellant had brought a motion under r. 25(19), he would not have been entitled as of right to proceed with a trial. He would have had to convince the court that the prior order directing an uncontested trial should be set aside for some reason. The appellant would not be entitled to ignore the order of Steele J. simply because he was proceeding by a r. 25(19) motion, rather than by way of an appeal from the order of Steele J. The appellant has not convinced this court that there is any reason to set aside the order of Steele J. There is no reason to think he would fare any better on a r. 25(19) motion.

(ii) The Voice of the Child Report

[34] The appellant submits that this court should make an order requesting the OCL to prepare a Voice of the Child Report. We reject this submission. There is nothing in the appeal record that would warrant the reception of this evidence on appeal. Furthermore, the appellant's request for this order is an attempt to alter the evidentiary record on which the order of Steele J. was made. To permit the appellant to do so would be inconsistent with our determination that the order for an uncontested trial was properly made. The appellant disentitled himself from any involvement in the trial. He cannot circumvent that order by asking this court to supplement the trial record.

(a) Delay in hearing motions in this court

[35] The appellant submits that two motions brought by him in this court were not heard in a timely fashion. There is nothing in the material to support that claim and no basis upon which to conclude that the timing of the hearing of any of the many motions brought by the appellant prejudiced him in this proceeding.

(iii) The order for an uncontested trial

[36] In his omnibus Notice of Motion, the appellant submits "it is in the best interests of the children and justice to allow evidence from both parties". This submission is a restatement of the argument made on the appeal from the order

of Steele J. As indicated above, Steele J. did not err in proceeding with an uncontested trial.

(iv) The reasonable apprehension of bias arguments

(a) Overview

[37] There are two questions to be resolved on the reasonable apprehension of bias claim advanced by the appellant:

- What material should this court look at in determining the claim?
- Should the claim succeed?

[38] The appellant's reasonable apprehension of bias claim originates with a case note made by Shore J. on January 12, 2021 (the "case note"). The case note is found in the Case History Report, a document which constitutes a kind of running record of family law proceedings in the Superior Court. Shore J., who was seized with motions in the litigation, made the case note in the exercise of her case management responsibilities.

[39] Certain language in the case note precipitated a motion by the appellant in the Superior Court for an order recusing any judge who had seen the case note from further participation in any aspect of the proceeding. In response to the recusal motion, in February 2022, the Associate Chief Justice of the Superior Court, in her capacity as head of the Divisional Court, directed that all Divisional Court proceedings relating to any of the appellant's matters be heard by judges

from outside of the Toronto Region. She further ordered that the case note in question be removed from the Case History Report. Regional Senior Justice Firestone made a similar order in respect of matters in the Family Court in Toronto. He directed those matters should be heard by judges from outside of the region.

[40] The appellant's contention that the case note gives rise to a reasonable apprehension of bias has led the appellant to seek:

- the recusal of any members of this court who may have seen the case note while sitting in the Superior Court;
- the setting aside of any orders made by judges of the Superior Court who received or read the case note; and
- the setting aside of the order of Shore J., the author of the case note.

(b) What material should the court look at in considering the bias submission?

[41] The appellant submits that this court cannot look at the case note in issue in determining his bias allegations. He takes the position that any judge, including judges of this panel, who see the contents of the case note, will be automatically and permanently tarred with a reasonable apprehension of bias against him in these proceedings.

[42] In support of his submission, the appellant points to the actions taken by the Associate Chief Justice and the Regional Senior Justice to ensure that further

matters in the proceedings were heard by judges from outside of the Toronto Region, and the steps taken to remove the case note from the Case History Report. The appellant submits that those actions demonstrate that the Associate Chief Justice and the Regional Senior Justice had concluded that the case note would raise a reasonable apprehension of bias in relation to any judge who read the case note. The appellant submits that the same inference can be drawn from this court's order directing that any reference to the content of the case note be redacted from the material presented to the panel on this appeal.

[43] The inferences urged by the appellant from the actions of the Associate Chief Justice and Firestone R.S.J. cannot be drawn. Both orders were made in the face of a recusal application brought by the appellant. In that circumstance, it is not unusual that a Chief Justice, or a Regional Senior judge, would take precautionary measures to avoid the participation by a judge in a proceeding, if there was any possibility that the participation of that judge could give rise to a reasonable apprehension of bias. Precautionary measures taken to avoid the possibility of court proceedings being tainted by a reasonable apprehension of bias do not amount to a determination that the claim of a reasonable apprehension of bias, if brought, would succeed. The order of the Associate Chief Justice, and the Regional Senior Justice, support only the conclusion that they determined that the safest and most efficient way to proceed, in the face of the appellant's recusal application, was to bring in a judge from outside of the region. An administrative

decision to avoid the risk of a proceeding tainted by a reasonable apprehension of bias is not a finding that there was, in fact, a reasonable apprehension of bias: *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] S.C.R. 259, at para. 78.

[44] Any attempt to draw inferences from this court's order redacting certain references from the material suffers the same fate. The appellant wanted the material redacted, presumably because he intended to advance the argument that the court could not look at the material before determining the reasonable apprehension of bias claim. The order of this court was made to preserve the appellant's submission that this court should not look at the case note when considering the reasonable apprehension of bias argument. The court's redaction order says nothing about the merits of the appellant's argument that reading the case note would give rise to a reasonable apprehension of bias.

[45] We agree with the respondent's submission that, were this court to consider the reasonable apprehension of bias without looking at the contents of the case note, there would be no evidentiary basis upon which this court could conclude that the contents of the case note created a reasonable apprehension of bias. If, as the appellant initially insisted, this court did not look at the endorsement, the appellant's reasonable apprehension of bias argument would have no support in the record and would inevitably fail.

[46] When questioned on this point by the court during oral argument, the appellant maintained his position that the court would be tainted by a reasonable apprehension of bias if it looked at the case note. The appellant did, somewhat reluctantly, acknowledge that if the court determined that it could only adjudicate on the merits of the reasonable apprehension of bias claim by first looking at the case note, that the court should do so.

[47] The court concluded that the only way the appellant's reasonable apprehension of bias claim could be properly considered was for the court to look at the case note.

(c) Should the bias claim succeed on its merits?

[48] The case note of Shore J., dated January 12, 2021, reads:

> No steps should be taken in any of these files (I think there are about 4 ongoing file numbers for *Kim v. McIntosh or McIntosh*/*Barrie v. Kim*) without first running it through me. Mr. McIntosh is a dangerous individual. I do not want any correspondence from the office going out to him without coming through me first. The timelines have been put in place via court orders for a reason and should not be changed without an order from me. I am seized of all motions. I cannot recall if someone else is seized of conferences, but there needs to be a coordinated approach in this file.

[49] Shore J. was concerned with the appellant's conduct of the litigation, including the multiplicity of proceedings, presented a danger to the timely and fair adjudication of the merits of the dispute. In her case management function, Shore

J. determined to take control of the progress of the litigation on a go-forward basis. As a step in the case management process, she placed other judges, who might encounter the file, on notice that she had assumed carriage of all matters connected to the file, including correspondence with the appellant, fixing timelines, and hearing motions.

[50] The actions of Shore J. are consistent with the philosophy of the *FLR*s and the exercise of her case management function: see the *FLRs*, rr. 2(2)(3)(5). This proceeding had been before the court for almost two years. The record provided a firm basis upon which Shore J. could conclude that the appellant was not conducting the litigation in a manner that was consistent with a timely and fair resolution of the issues, particularly the issues relating to the interests of the children. The history of this matter fully justified Shore J.'s placing of a firm judicial hand on the tiller of this litigation.

[51] The focus of the reasonable apprehension of bias claim is Shore J.'s description of the appellant as "a dangerous individual". The appellant submits that Shore J.'s characterization of him gives rise to a reasonable apprehension of bias in respect of Shore J. He further submits that a reasonable person would reasonably apprehend a bias against him by any judge who read the case note of Shore J. The reasonable apprehension of bias would apply with particular force to judges addressing issues like access to the children.

[52] Judicial impartiality is a cornerstone of the Canadian justice system. The appearance of impartiality is as important as actual impartiality: *Wewaykum Indian Band*, at paras. 57-59; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, per Cory J., at paras. 92-93. There is a long history in Canada of judicial independence and impartiality. That history and tradition justifies a strong presumption of judicial impartiality, displaceable only by "cogent evidence": *S. (R.D.)*, per Cory, at para. 117; *Bailey v. Barbour*, 2012 ONCA 325, 110 O.R. (3d) 161, at paras. 18-19.

[53] The court in *Wewaykum Indian Band*, at para. 74, framed the reasonable apprehension of bias inquiry in these terms:

> The question once more, is as follows: What would an informed person viewing the matter realistically and practically – and having thought the matter through – conclude?

[54] As framed, the inquiry requires an assessment of the relevant facts as those facts would be viewed by a reasonable informed person, looking at the matter realistically. As "an informed person", the reasonable person is taken to understand how the litigation process operates and to appreciate the strong presumption in favour of judicial impartiality. The reasonable observer is also taken as understanding the context in which a particular impugned judicial statement or conduct arises.

[55] The reasonable informed person, conversant with the case management practices and responsibilities in family law matters, and viewing the case note

realistically and practically, would appreciate that the comments were made in reference to the conduct of the litigation by the appellant, and not in reference to the ultimate substantive merits of any facet of the litigation.

[56] Judges are required to make interim or procedural rulings on a variety of matters in the course of ongoing litigation. Many of those orders are in the nature of case management directions. The assessments are recorded so that judges who deal with the file at some subsequent point can understand the history and dynamics of the proceeding.

[57] It is inevitable, in the flow of litigation, perhaps particularly family law litigation, that some assessments recorded in a Case History Report will reflect unfavourably on the conduct of one or more of the litigants. Judges who read these case notes appreciate they are designed to explain the case management judge's directions, which are intended to move the proceeding forward in a timely and fair manner.

[58] The order of Steele J. fortifies the view that a reasonable informed person would not take the reference to the appellant as a "dangerous individual" in the case note of Shore J. as relevant to any subsequent adjudication of the merits of the dispute between the appellant and the respondent. Assuming Steele J. saw the case note, her order provided significant parenting time and access to the children for the appellant. Had she read the case note of Shore J. as a reference

to any physical threat posed by the appellant to the respondent or the children, Steele J. would not have made the order she did. The order of Steele J. is inconsistent with any suggestion that she regarded the appellant's "dangerousness" as relevant to any order she would make on any of the issues raised at the uncontested trial.

[59] With the benefit of hindsight, it is almost always possible to think of a better turn of phrase that could more accurately capture the intent of the writer. It may have been better had Shore J. expressly tied her reference to the appellant as a "dangerous individual" to the manner in which he was conducting the litigation and the potential danger that litigation conduct posed to the emotional well-being of the respondent and the children. Used in that sense, the reference to the appellant as a "dangerous individual" was justified on the record and relevant to future case management decisions.

[60] We are satisfied that an informed person, looking at the matter realistically and practically, and having regard to the context in which the comment was made, would take the comment as a reference to the appellant's conduct in the litigation. Viewed in that light, and having regard to the nature of the reasonable apprehension of bias inquiry as described in *Wewaykum Indian Band*, we reject the appellant's reasonable apprehension of bias claim, both as applied to Shore J., and to any Superior Court judge who may have seen the case note . As no one on this panel had read the case note until the panel decided it was necessary to

read the case note to decide the merits of the appellant's claim, there is no basis for any recusal of anyone on this panel.

CONCLUSION

[61] The appeals and the motions are dismissed. The respondent appeared on her own behalf at the hearing. She did, however, have legal assistance in the preparation of her factum. That factum was of considerable assistance to the court. The respondent is entitled to costs. We fix those costs in the amount of $5,000, inclusive of disbursements and relevant taxes.

Released: "May 18, 2023 DD"

"Doherty J.A."
"B. Zarnett J.A."
"L. Sossin J.A."