Docket: CA157080
Date: 20000105

NOVA SCOTIA COURT OF APPEAL

[Cite as: Montgomery v. Montgomery, 2000 NSCA 2]

Chipman, Pugsley and Bateman, JJ.A.

BETWEEN:

ANDREW NEIL MONTGOMERY	)	
	)	Mr. Montgomery in person
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	
HELEN CHRISTINE MONTGOMERY	)	Anne Malick, Q.C.
	)	
	)	
Respondent	)	
	)	Appeal Heard:
	)	November 23, 1999
	)	
	)	Judgment Delivered:
	)	January 5, 2000
	)	
	)	

THE COURT: The appeal is dismissed, per reasons for judgment of Pugsley, J. A.; Chipman and Bateman, JJ.A., concurring.

Pugsley, J.A.:

[1] Andrew Montgomery appeals from the June 2, 1999 decision of Kennedy, C.J., of the Supreme Court, dismissing Mr. Montgomery's application for an order decreasing the amount of child support, and terminating or alternatively decreasing, the amount of spousal support payable by Mr. Montgomery to his former wife, the respondent Helen Montgomery.

[2] The grounds of appeal provide that the Chambers judge erred in law:

- in interpreting the scope of s. 19(1) of the Child Support Guidelines "so broadly as to effectively preclude a successful application for temporary variation in support under any circumstances that would allow a payor a rational and legitimate opportunity to significantly improve his income producing potential";
- in characterizing the circumstances and actions of the appellant in such a manner as to find that the appellant was wilfully under-employing himself in order to avoid his maintenance obligations.

[3] It is further alleged that the reasons provided in the judgment of the Chambers judge disclose a reasonable apprehension of bias.

Background

[4] The parties were married on October 8, 1977, separated on December 31, 1993, and were divorced by judgment dated October 20, 1997. A corollary relief judgment, dated October 20, 1997, resolved by agreement, provided that the parties should have

joint custody of the four children of the marriage (Sarah, 13, Deborah, 11, Andrew, 9, and Anna, 7). The respondent was awarded primary care of the children. The appellant was granted generous access. The parties had resided at Truro until the appellant moved to Halifax in 1997.

[5] The appellant agreed to pay the sum of $1,864.33 monthly as combined spousal and child support.

[6] Since 1997 he has held a managerial position in the Department of Environment. His salary in 1998 aggregated $60,000 per annum and in that year he also received a one-time “pension holiday” of $6,000.00.

[7] In 1990, he was accepted into the part-time LL.B. program at Dalhousie Law School. He graduated from that program on May 24, 1999. He obtained an articling position with the Nova Scotia Department of Justice for a period of one year, commencing on June 1, 1999, at a salary of approximately $20,000.00. At the conclusion of the one-year period, he would be entitled to apply for admission to the Bar.

[8] In support of the application for elimination, or reduction, in his support payments, Mr. Montgomery deposed in his affidavit as follows:

> THAT it is obvious that my articling salary is a significant reduction in pay from my current employment salary, however, it is my firm belief that this year will represent “short-term pain for long-term gain”. ... THAT even if starting lawyers’

> salaries are lower than my present salary with the Department of Environment, I believe that with a few years experience, I will exceed my current income level, and equally important is my belief that my job satisfaction will increase significantly. THAT I am presently 45 years of age, and I would not be proceeding with my present career decision if I did not believe it would result in long-term financial gain and security for me and my family, as well as a higher level of job satisfaction for me.
>
> THAT effective June 1, 1999, I am prepared to pay child support in accordance with the Child Support Guideline amount for a salary of $20,159.88.
>
> . . .

[9] In December of 1997, the appellant married his present wife, who has been employed by the Halifax District School Board since 1977. She currently suffers from a progressive hearing loss and receives net partial disability payments of approximately $1,200.00 monthly.

[10] She will be required to leave her present position and hopes to start up a counselling practice.

[11] The respondent has Bachelor Degrees in both Education and Music from the University of Toronto.

[12] In her affidavit filed in opposition to the application she deposed, in part:

> The 1997 Divorce Order came as the result of long and arduous negotiations. At that time, Mr. Montgomery was already enrolled in law school and had consistently expressed an intention to article. It was a concern of mine at the time and I specifically agreed to an amount of maintenance/spousal support on the understanding that it would be long-term.
>
> . . .
>
> .... Mr. Montgomery's decision to attend law school was a personal decision and not a family decision. I have always maintained and continue to believe that it was against the best interests of his four children.
>
> . . .
>
> My ability to obtain employment in the local school system is very limited. . . .

> I found it very exhausting and emotionally draining to be working part time and be a single parent to four children.

[13] Mr. Montgomery filed a further affidavit in response, averring in part:

> That it has been suggested to me that there may be more profitable and more sensible private sector opportunities for me, as I am in the top third of my law school graduating class, and I won academic awards in both admiralty law and family law. Thus, depending upon what opportunities exist near the end of my articling year, I may pursue private sector employment. . . .

[14] The application was heard in Chambers on June 2, 1999. Both parties were represented by counsel and both were cross-examined on the contents of their respective affidavits.

[15] At the request of counsel for the respondent, Mr. Montgomery provided salary information respecting the pay scale for government lawyers.

[16] He was asked in cross-examination:

> Q. It applies to the Deputy Director of Public Prosecutions all the way down, and I would suggest to you based on this that it would probably take in the area of ten years for you to get to the position where you would be making the salary you were making last week or whenever it was you ceased working for the Department of Justice. Do you agree with that?
>
> A. Well, I won't dispute that that may very well be the case.

[17] Apart from the two parties, no other evidence was adduced.

Decision of the Chambers Judge

[18] At the conclusion of argument, the Chambers judge gave an oral judgment, saying in part:

> The essence of what I have to determine today is summed up in one word and that is “reasonableness”. Is it reasonable for this Court to vary, what appears to me to have been a proper order for maintenance, both child and spousal maintenance, at the time it was made? Is it reasonable for this Court to acknowledge the articling requirements for the practice of law and to allow those articles to be accomplished as of now, given what the ramifications are obviously going to be to the four children over the subject of the support order and the former wife the respondent in this matter? And the answer, quite simply, is no, it is not reasonable.
>
> . . .
>
> ...the suggestion that shortly those articles, that period of articling will be to the benefit of those children, to an extent that would justify the compromise in their lifestyle that would mean immediately the suggestion that shortly will be to their benefit is fanciful. That is fanciful and I know that job situation, too, I know it very well. I will not say it would never be to their benefit, but there was a suggestion that soon the ship will turn around some day. By the time that ship got turned around, those children may no longer be in a situation where anything is going to be to their benefit, . . .
>
> Bottom line, very simply, this is a conscious, voluntary decision on the part of the applicant who is subject to a court order. . . . I do not consider the request for a variance, the request for a conscious voluntary change in the income situation to be a reasonable one and if that change is made, there will be income imputed to the applicant sufficient to satisfy and to continue to satisfy that order. . . .

[19] The appellant was self-represented on this appeal.

Analysis

[20] The application to vary the terms of the October, 1997, order was made pursuant to the provisions of s.17 of the **Divorce Act**, R.S.C. 1985 c.3 (2nd Supp.).

[21] The appellant alleges that there was a material change in circumstances which had occurred since the consent order.

[22] Counsel for the respondent took the position that no material change had occurred as prior to, and at the time of the agreement resulting in the consent order, the appellant had formed the intention to article as soon as he graduated from law school.

[23] Section 17(4) of the **Divorce Act**, entitled “Factors for Child Support Order” provides:

> Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[24] Section 17(4.1) entitled “Factors for Spousal Support Order” provides:

> Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[25] The Chambers judge did not rule on this issue.

[26] In view of the conclusions I have reached respecting the disposition of this appeal, it is not necessary to express an opinion on this preliminary issue.

[27] A court making a variation order in respect of a child support order must do so in accordance with the Federal Child Support Guidelines (s. 17(6.1) of the **Divorce Act**).

[28] The parties agree that interpretation of s. 19(1)(a) of the Guidelines is determinative.

[29] The section provides:

> **Imputing Income**
>
> 19(1) The Court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) The spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse; (emphasis added)

[30] Any application of the provisions of the Guidelines must be made in light of the objectives set out in s. 1, which provide:

> 1. (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[31] We are directed to the remarks of Judge Vertes of the Northwest Territories Supreme Court in **Williams v. Williams** (1997) 32 R.F.L. (4th) 23, where in dealing with the interpretation of s. 19(1) of the Guidelines he stated at 29:

> It seems to me that the use of the word “intentionally” implies a deliberate course of conduct related to the purpose of the Guidelines, i.e., the provision of support. The intentional under-employment must be for the purpose of undermining or

> avoiding the parent's support obligation. The court should not impute income in the absence of such a motive since to do so would impose an onerous financial obligation on any parent who chooses to make a change in employment, for example, however *bona fide*. One may legitimately choose a career path with short-term pain for long-term gain. In such a case the child should benefit as the non-custodial parent's income eventually increases.

[32] The appellant acknowledges that there has been an evolution in the law since **Williams v. Williams** as new fact situations arise. One such situation arose in **Hunt v. Smolis-Hunt** (1998) 39 R.F.L. (4th) 143 when Justice Johnstone of the Alberta Court of Queen's Bench concluded that s. 19(1)(a) of the Guidelines encompasses situations "where a payor recklessly disregards the needs of his children in furtherance of his own career aspirations" (p.178).

[33] The appellant submits that there was no evidence before the Chambers judge that he was seeking either to frustrate or avoid his maintenance and support obligations, rather the change in employment arose from his desire to secure a type of employment which would be more satisfying to him, and which would, in the long run, result in an increased level of income for him, and also for those who are economically dependent upon him.

[34] He further submits that there is no evidence before the Chambers judge of any recklessness or wanton disregard on his part respecting the interests of the respondent or the children of the marriage.

[35] Section 19 does not establish any restriction on the court to imputing income only in those situations where the applicant has intended to evade child support obligations, or alternatively, recklessly disregarded the needs of his children in furtherance of his own career aspirations.

[36] The critical word, in my view, is the word “reasonable”. It is only the “reasonable” educational . . . needs of the spouse” which should be taken into account.

[37] The issue of reasonableness, in my opinion, should not be confined to an examination of the circumstances surrounding the applicant alone, but of all the circumstances, including the financial circumstances of the children, in order to ensure that they receive a fair standard of support as set out in the objectives to the Guidelines.

[38] Sections 11(1)(b), 15.1 and 17 of the **Divorce Act** were amended to enact the Child Support Guidelines on May 1, 1997:

> ...to require courts to ensure that reasonable arrangements have been made for the financial support of the children of the marriage “having regard to the applicable Guidelines” and courts are required to make child support orders “in accordance with the applicable Guidelines” (Veit, J. in **Strand v. Strand** (1999) A.J. No. 545.)

[39] The Chambers judge has, in effect, determined that the appellant’s election to work as an articled clerk for a period of twelve months at approximately one-third of his previous income, did not constitute a “reasonable educational need” of the appellant pursuant to the provisions of the Guidelines.

[40] Despite the appellant's submission that short-term pain will result in long-term gain for both him, and his dependents, his acknowledgment under cross-examination that it might take at least ten years after admission to the Bar for him to achieve a range equivalent to that he previously earned in the Department of Environment, casts considerable doubt on the validity of his assertion.

[41] The appellant suggested that if he was successful in securing a position in private practice after he completed his articles, his prospective earnings could exceed very shortly the salary he received from the Department of Environment. However, there was no evidence before the Chambers judge of the likelihood of this scenario. If it was a realistic game plan, one wonders why there is no evidence the appellant had made any attempt to arrange bridge financing from a financial institution before the one-year period.

[42] In **Pishori v. Levy** (1990) N.S.J. No. 9, the respondent, a professional engineer, earning a gross annual salary of $32,500.00, decided to improve his career opportunities by enroling in a two-year MBA program. At the time the decision was made, he was obliged to pay the sum of $250.00 per month for maintenance of a child which he fathered. The relevant statute in **Pishori v. Levy** was not the **Divorce Act**, but rather the **Family Maintenance Act**, S.N.S. 1980, c.6.

[43] Section 8 of that Act required a parent to "provide reasonable needs for the child except where there is lawful excuse for not providing the same".

[44] Section 12 obliged the court to consider the “reasonable needs of the child” when determining the amount of maintenance.

[45] The comments of Cacchione, C.C.J. (as he then was) are applicable to the present case:

> The evidence disclosed that the respondent’s change in circumstance was self-induced. It was as a result of his wish to advance his career prospects. . . . The situation the respondent found himself in was his own making and not unforeseen. In making plans for furthering his education the respondent should not have lost sight of his obligation to his son . . . In allowing the application to vary the learned trial judge effectively made the appellant and her child underwriters for the respondent’s career goals. He cast the appellant and her child in the role of short-term bankers for the respondent, in order to allow him to further his career plans. As such, the learned trial judge failed in his duty to ensure that the reasonable needs of the child were met.

See also **Tougher v. Tougher**, a decision of Justice Nash of the Queen’s Bench of Alberta (March 20, 1998, Doc. Edmonton 4803-100892).

[46] I agree entirely with the disposition made by the Chambers judge.

[47] He made no error of law and his conclusions were fully supported by the facts before him.

Reasonable Apprehension of Bias

[48] There was no suggestion by the appellant that the general conduct of the case by the Chambers judge gave rise to an apprehension of bias.

[49] The appellant submits that on a number of occasions during the course of the Chambers hearing he was referred to as “the defence”, or “the accused”. This, he submits, was indicative of the “mind set” of the Chambers judge, putting the appellant in the position of one who was before the court to defend himself against some “wrong doing” or “intended wrong doing”.

[50] Reference by the Chambers judge to the appellant as the “accused” on two occasions was obviously a slip of the tongue because the Chambers judge immediately corrected himself.

[51] The appellant further points to the following comments of the Chambers judge:

> There is no wrong or evil, I am not dealing with a criminal case here, I am not at the end of this day going to suggest that anybody is being anything other than unreasonable (sic) as we are all from time to time, but we can’t always do what we want when we want to do it and the suggestion that shortly those articles, that period of articling will be to the benefit of those children, to an extent that would justify the compromise in their lifestyle that would mean immediately the suggestion that shortly will be to their benefit is fanciful. That is fanciful. . .

[52] The appellant submits that the foregoing comments:

> ...characterize the appellant’s plan to complete articles as “fanciful” and that the idea that the appellant might be able to turn a law degree and call into the Bar into some form of successful career development was also fanciful. But such comments were, again, not predicated on the evidence.

[53] The use of the word “fanciful” was not a pejorative comment on the totality of the submissions advanced by the appellant, but rather, in my view, a response to the appellant’s position that his 12-month period of articling, with the consequent income

reduction from $60,000.00 to $20,000.00, was in the best interests of the children. To characterize the submission as fanciful was entirely justified on the appellant's acceptance that it could take him ten years employed with the Department of Justice as a lawyer to attain the same salary level he enjoyed with the Department of Environment.

[54] In **R. v. S. (R.D.)**, [1997] 3 S.C.R. 484, Justices L'Heureux-Dubé and McLachlin said at p. 502:

> The test for reasonable apprehension of bias is that set out by de Grandpré, J. in **Committee for Justice and Liberty v. National Energy Board**, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré, J.'s articulation of the test for bias was adopted by the majority of the court and has been consistently endorsed by this court in the intervening two decades. . . . De Grandpré, J. stated at pp. 394-95:
>
> > The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information . . . [T[hat test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."

[55] The appellant's submissions, in my opinion, reflect his totally subjective view. There is no merit in the other submissions advanced on this issue.

[56] The record does not support a reasonable apprehension of bias.

[57] I would dismiss the appeal, but in view of the position taken by counsel for the respondent, I would not award costs.

Pugsley, J.A.

Concurred in:

Chipman, J.A.

Bateman, J.A.