NOVA SCOTIA COURT OF APPEAL
Citation: *Williams v. Pellicer*, 2025 NSCA 12

Date: 20250220
Docket: CA 528020
Registry: Halifax

Between:

Paul Williams

Appellant

v.

Rocio Pellicer

Respondents

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	October 17, 2024, in Halifax, Nova Scotia
Facts:	The appellant and respondent, who have been divorced since 2011, have two children. The appellant was ordered to pay child support based on imputed income, but arrears accumulated due to inconsistent payments. The appellant claims the respondent engaged in parental alienation and failed to provide information about the children, contrary to a court order (paras 1-2).
Procedural History:	*Williams v. Pellicer*, 2012 NSSC 267: Imputed annual income of $25,000 to the appellant for child support. Supreme Court of Nova Scotia (Family Division), September 14, 2023: Justice Cormier rejected the appellant's request to retroactively adjust child support arrears and set prospective support based on imputed income (paras 3, 19).
Parties Submissions:	Appellant: Argued for retroactive variation of child support arrears to reflect actual income, prospective

	support based on current income, and court-ordered counselling to re-establish a relationship with the children. Claimed the respondent failed to provide information about the children (paras 2, 13-15). Respondent: Opposed retroactive adjustment of arrears but accepted the appellant's CRA income as accurate. Agreed not to seek prospective support if arrears were paid and requested no contact unless initiated by the child (para 16).
Legal Issues:	Did the appellant receive a fair trial? Do the trial judge's conclusions demonstrate legal error?
Disposition:	The appeal was allowed, and the Variation Order issued on October 6, 2023, was set aside. The matter was remitted for a new hearing before a different judge (paras 72-73).
Reasons:	Per Bourgeois J.A. (Bryson and Beaton JJ.A. concurring): The appellant did not receive a fair trial due to the trial judge's pre-determination of issues and interference with the appellant's ability to present his case. The trial judge improperly created and relied on her own evidence, failed to conduct a proper analysis of the retroactive variation request, and imputed income without considering the appellant's current circumstances. Additionally, the trial judge erred in varying the appellant's right to information about the child and improperly included past cost orders in the current order (paras 24-71).

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Respondent

Judges:	Bryson, Bourgeois and Beaton, JJ.A.
Appeal Heard:	October 17, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed without costs, per reasons for judgment of Bourgeois, J.A.; Bryson and Beaton, JJ.A. concurring
Counsel:	Lola Gilmer, for the appellant Rocio Pellicer, respondent, not participating

Reasons for judgment:

[1] The appellant, Paul Williams, and the respondent, Rocio Pellicer, have been divorced for some time. The appellant had been ordered to pay child support based on imputed income. Sometimes he did, sometimes he didn't and sometimes he paid more than he was ordered. Arrears accumulated. Although he exercised parenting time with his two children for a number of years, he has not seen them since 2016. The appellant asserts the respondent has engaged in parental alienation and has ceased providing him information about the children contrary to the existing court order.

[2] The appellant brought an application in which he sought to retroactively vary his arrears of child support to reflect his actual past income, and to prospectively set child support based on his current income. He also sought court-ordered counselling in an attempt to re-initiate a relationship with his children and that he be provided with information regarding their health, education and general well-being.

[3] The application was heard by Justice Cindy G. Cormier of the Supreme Court of Nova Scotia (Family Division). By that time, the parties agreed the older child was no longer a child of the marriage. Justice Cormier rejected the appellant's request to retroactively adjust the child support arrears. She set prospective support based upon imputed income, and ordered that the appellant must undertake counselling before he was entitled to receive information about the remaining child of the marriage.

[4] The appellant appealed to this Court. Although he served the respondent with the Notice of Appeal along with all other subsequent filings including the appeal book and his factum, she did not participate in the appeal.

[5] At the conclusion of the appeal hearing, the panel advised the appeal was allowed as it was unanimously of the view the appellant had not received a fair hearing and Justice Cormier's oral decision and written order demonstrate legal error. We promised written reasons to follow.

Background

[6] The parties were married in March 2003 and subsequently had two children, the first born in June 2003 with a sibling following in June 2006.

[7] The parties separated in May 2009 and were divorced in March 2011. There are two Corollary Relief Orders ("CRO") which are relevant to the matters on appeal.

[8] The first CRO was issued on December 6, 2011 following a contested hearing and addressed matters pertaining to the custody of the children.

[9] That order provided the two children were in the joint custody of the parties with their primary residence being with the respondent. A detailed schedule was set out providing significant parenting time with the appellant. The CRO further ordered that the parties shall:

> a) Consult on all substantial questions relating to [the children], including but not limited to, religious upbringing, education, significant changes in social environment and non-emergency health care. Neither parent shall make a major developmental decision regarding [the children] without the consent of the other, except on an emergency basis; and
>
> b) The parents shall make reasonable efforts to share any information regarding [the children], including information as to health, education, recreational activities and the like and may request and obtain information from third parties regarding the health, education, and general well-being of [the children], including but not limited to, access to daycare, school and medical reports and copies of all of [the children's] medical, educational and religious records.

[10] The other CRO, entitled "Corollary Relief Order – Child Support" was issued by Associate Chief Justice O'Neil in August 2012 following a contested hearing. That order imputed annual income of $25,000.00 to the appellant and directed he pay monthly child support of $363.00 to the respondent based upon the *Federal Child Support Guidelines*. Given the ages of the children at that time, the appellant was also ordered to contribute to child care expenses. Payments were to be made through the Office of the Director of Maintenance Enforcement.

[11] The appellant filed a Notice of Variation Application on June 24, 2022 and subsequently filed an amended Notice on April 28, 2023. The respondent filed a Response to Variation Application on August 5, 2022.

[12] Both parties were self-represented during the proceedings. They participated in case management hearings and both filed affidavits, supplementary

affidavits, Statements of Income and other financial information. A Voice of the Child Report was ordered and received in relation to the younger child.

[13] In terms of his position, the appellant raised concerns regarding parental alienation and the respondent's failure to follow through with the terms of the December 2011 CRO. In his written submissions to the trial judge he asserted the respondent had failed to consult with him or keep him informed of the children's circumstances, including their health and educational issues. He alleged he had been prevented from having contact with the children since 2016. In his affidavit, he provided evidence to support these allegations.

[14] Regarding financial issues, the appellant sought to have the child support arrears retroactively varied. In particular, he sought to have the arrears adjusted to reflect his actual income as opposed to the income imputed to him in 2012. This would also include determining whether the older child had remained a child of the marriage during the timeframe that the arrears had accrued.

[15] With respect to prospective support, the appellant sought to have the payment of support reflect that the older child was no longer a child of the marriage and to have the quantum for the younger child to be based on his current income.

[16] As for the respondent, she asserted there should be no retroactive adjustment to the outstanding arrears. She did accept however, that the information the appellant filed from the Canada Revenue Agency ("CRA") was an accurate reflection of his past income. She filed a statement from Maintenance Enforcement demonstrating that as of July 13, 2022 arrears of $16,687.45 were owing. The respondent indicated that if provided with the arrears, she would not seek prospective child support from the appellant. She further asked the court to order the appellant was no longer entitled to information regarding the remaining child of the marriage and that there be no contact unless initiated by the child.

[17] The hearing was held on September 14, 2023. At that time, current financial information was entered into evidence respecting the appellant's income. Further, an updated statement from Maintenance Enforcement was submitted into evidence which demonstrated that as of April 24, 2023, arrears had decreased to $15,903.35.

[18] At her own initiative, the trial judge entered as an exhibit an "Amended Conference Memorandum" dated January 9, 2023. That memorandum included a

chart prepared by the trial judge following an earlier conference attended by the parties in the lead up to trial. It purported to show the amount of arrears outstanding if the appellant's actual income from his CRA notice of assessments had been used to calculate his child support obligation instead of the imputed income of $25,000.00. The chart claimed to establish that even if the appellant's reported income as accepted by CRA was used to calculate his past child support obligations, the amount of the arrears was the same as calculated by Maintenance Enforcement on July 13, 2022 - $16,687.45. More will be said about the trial judge's use of her own calculations and their inaccuracy later in these reasons.

[19] Immediately after the close of evidence, the trial judge rendered an oral decision. An order was issued on October 6, 2023. The trial judge declined to retroactively vary the arrears and found the current amount outstanding to be $16,687.45 based upon the chart she had prepared. She also determined the appellant owed the respondent costs in the amount of $3,500.00 arising from earlier court orders issued in 2012 and 2013 and added that amount to the arrears to be collected by Maintenance Enforcement.

[20] With respect to the child of the marriage, the trial judge ordered:

> 12. Should Mr. Williams wish to obtain third party records from the children's service providers while they are under the age of 19, he is required to obtain a letter from a therapist stating he has considered what role he may have played in not being in touch or unavailable to his children, past issue of assault conviction, recent incidents of him questioning Rocio Pellicer about her private life, and long lasting effects of abuse and violence on young children. He is to provide the counsellor with the written decision of Associate Chief Justice O'Neil and a transcript of Justice Cormier's oral decision from the September 14, 2023 appearance. At that point, if he would like to come back before Justice Cormier specifically to review this issue he may do so. Should Paul Williams receive third-party information in the future, he shall not disseminate it to anyone else.

[21] The appellant filed his Notice of Appeal on November 2, 2023.

Issues

[22] In his factum, the appellant sets out a number of concerns and alleges his hearing was unfair due to the conduct of the trial judge and further, that she had erred in law and misapprehended the evidence. He asserts:

- He was treated in a particularly harsh and unfair manner by the trial judge;
- The trial judge's non-analysis and subsequently incorrect determination of when the older child ceased to be a child of the marriage for child support purposes constituted an error of law;
- The trial judge's inclusion of the older child in the prospective and ongoing orders, despite determining they were no longer a child of the marriage constituted an error of law;
- The trial judge's lack of legal analysis in relation to the claim for a retroactive variation of child support constituted an error of law;
- The trial judge's lack of legal analysis and incorrect factual determination in relation to imputing income to him, including the failure to consider his current and previous circumstances, and the failure to consider the statutory framework and the legal principles relating to the imputation of income constituted a misapprehension of evidence and an error of law;
- The trial judge's incorrect application of legal principles and deciding, without an evidentiary foundation, to deprive him of continued access to significant information regarding the remaining child of the marriage constituted an error of law;
- The trial judge's speculative determination, contrary to and without an evidentiary foundation, of the reasons for the estrangement between him and the children of the marriage and her consequently ordering him to attend counselling as a pre-condition to receiving third-party information about the remaining child of the marriage constituted an error of law;
- The trial judge's inclusion of previously ordered costs in the order under appeal constituted an error of law; and
- The inexplicable and serious discrepancies between the trial judge's oral reasons and the order under appeal, justify this Court's intervention.

[23] In his written and oral submissions the appellant explained and expanded upon the above concerns. I take no pleasure in concluding all of the appellant's complaints are justified. I will not address each in detail; however, I will address most under two broad questions:

1. Did the appellant receive a fair trial?

2. Do the trial judge's conclusions demonstrate legal error?

Analysis

1. Did the appellant receive a fair trial?

[24] I am satisfied the appellant did not receive a fair trial for two overarching reasons. Firstly, it is apparent from the record the trial judge had pre-determined certain matters thus depriving both parties of an independent and impartial adjudication. Secondly, the record demonstrates the trial judge repeatedly interfered with the appellant's ability to present his case.

Predetermination of issues

[25] I will address two examples of the trial judge having pre-determined issues the appellant was attempting to have adjudicated: the amount of arrears outstanding and the status of the older child as a child of the marriage until their 19th birthday.

[26] This Court has recently re-affirmed the principles relating to judicial bias and the critical importance of a judiciary that is, and appears to be, impartial.[1] As noted by this Court in *R. v. Schneider*, 2004 NSCA 99:

> [68] Nothing is more important in the legal system than the impartiality of judges. This standard of impartiality which judges must meet is a stringent one.
> . . .

[27] A lack of impartiality is a hallmark of bias. In *R. v. Nevin*, Farrar, J.A. observed:

> [47] Bias has been defined as "a predisposition to decide an issue or a cause in a certain way which does not leave the judicial mind perfectly open to persuasion or conviction".[2]

[1] *R. v. K.J.M.J.*, 2023 NSCA 84; and *R. v. Nevin*, 2024 NSCA 64. See also the chambers decision in *Fraser v. Nova Scotia Barristers' Society*, 2024 NSCA 79.
[2] Quoting Watt, J. (as he then was) in *R. v. Gushman*, [1994] O.J. No. 813 (Gen. Div.), at paras. 29 and 30.

[28] In the present case, the record demonstrates the trial judge, well in advance of the hearing, considered whether the arrears of child support ought to be varied and created her own "evidence" in the form of the chart she later attached to her order. A judge providing evidence in a trial is highly problematic. However, the concern deepens when the judge-made evidence is not only faulty but is preferred over evidence properly adduced by the parties.

[29] The appellant submits, and I agree, the trial judge's chart did not demonstrate what she asserted it did. Although the chart references the appellant's taxable income for each year, the trial judge simply restates the arrears based on what Maintenance Enforcement found to be owing (as of July 13, 2022) by calculating child support owing according to the appellant's imputed income. The trial judge's "recalculation" matches the Maintenance Enforcement's arrears to the penny. The chart, prepared by the trial judge before the trial and then relied on by her in dismissing the appellant's claim for a retroactive variation did not, contrary to her assertion, "recalculate" what the appellant would have paid if his actual income had been applied to the *Federal Child Support Guidelines*.

[30] At the hearing, the trial judge placed a burden on the appellant to demonstrate why her "recalculation" of arrears should not be ordered. Several passages from the trial judge's preliminary comments to the parties are instructive:

> THE COURT: . . . I've asked you several . . . don't speak while I'm speaking. I've asked both of you several times to go through the chart. It took me a bit of time to go through all of the evidence and create them and the fact that you had . . . you don't even have one with you, you don't know where it is, is concerning to me. So over the lunch hour, I expect you both to look at that chart and . . . and know what it means. If I'm the only one comparing your case, that's a . . . that's a problem.
>
> All right. So you have a copy of the conference memorandum. You'll see that there's a chart that was provided at page 6, it goes through and that's the chart I was talking about. …

[31] Later, the trial judge explained to the parties how in creating the chart she had reviewed the financial information submitted by the appellant to determine what arrears would be outstanding if he had paid support based on his taxable income as opposed to the imputed amount:

> THE COURT: And then I did an arrears line and I said this is what it seems that you might have been owing, based on what you were asked to pay and

> you paid, right. Right? And then I went by . . . and did a final column, adding it all up according to the information I have, right.
>
> . . .
>
> And then it appeared to me, based on all of those, that the arrears were at 16,687.45. . . . Well, he provided his financial information recently and it still comes out to about the same thing MEP was asking about, right.
>
> . . .
>
> And then there's a retroactive recalculation, which I want you to look at those numbers and just tell me what I'm supposed to do. And what I mean by that, sir, is even if you're arguing with me that I should recalculate or look at your . . . your financial information, I did look at your financial information, I recalculated it according to your financial information and it still comes out at 16,000. So what are you asking me to do? I don't know what you want me to do. I'm not . . . I'm not going to recalculate and lower . . .
>
> . . .
>
> So I'm not sure what you want me to do with this because I provided you the numbers a long time ago and I've had these discussions with you. Now we're at trial, so I want you to know that you should, over the lunch hour, look at those numbers, tell me what you're really asking me to do because I don't know what . . . what possible thing I could do. And come back ready to answer the questions and then make your arguments, okay.

[32] After the lunch break the appellant took the stand. The trial judge had him identify various documents he had filed. She did not invite him to comment on the chart she had prepared.

[33] For her part, the respondent testified she was prepared to accept, for the purposes of any retroactive calculation, that the appellant's income for past years was as reflected in his CRA returns. Notably, the evidence before the court demonstrated that for some years, the appellant's income fell well below the $25,000.00 per annum income imputed to him in 2012.

[34] During the appellant's cross-examination of the respondent, he asked about her knowledge of his past employment attempts. The trial judge interjected:

> THE COURT: Sir, if you have already agreed that you're going to pay the 16,000, because that's all . . .

MR. WILLIAMS: I haven't.

THE COURT: Well, what . . . what's your argument then? What are you asking me to do?

MR. WILLIAMS: My argu- . . . my argument is . . .

THE COURT: You don't have an undue hardship argument because I've told you, you don't have enough information.

MR. WILLIAMS: I do have an undue hardship argument.

THE COURT: I told you, you don't have the information you need for it and I'm not granting it. So there's nothing there for you to argue.

MR. WILLIAMS: So the question . . . okay, so that's . . . and I . . . I hear what you're saying.

THE COURT: Okay. **The next argument from anybody would be a retroactive recalculation for me to look at what you actually earned. I did look at what you actually earned . . .**

MR. WILLIAMS: Right.

THE COURT: . . . **and that's what you would owe. So you have no argument, sir. You have no argument. I've tried to say that as clear as I can until now.**

(Emphasis added)

[35] The trial judge returned to her chart in the midst of her oral decision:

THE COURT: . . . So I've outlined . . . and we should just input the chart into the order, attached an exhibit to the order, to show the calculations, that she accepted that he only earned 11,000, for instance, in 2011, that he only earned 3,000 in 2014, 14,000 in 2015, 2016 that he earned 9,000, that he earned 4,000 in part of 2017. She's accepted all of that and, even then, he owes arrears of $16,687.45.

So I'm very comfortable to say that he should be paying those. If I had been . . . she's given you quite a deal, because I wouldn't have probably allowed . . . without the evidence, I wouldn't have . . . I would have imputed your income at 25 all the way through, sir.

[36] The trial judge's conclusion that the appellant owed arrears of $16,687.45 as of the date of the hearing (September 14, 2023) was based on her incorrect calculations and reflected she had closed her mind to the actual evidence before her. Furthermore, the trial judge's chart reflected arrears owing to July 2022. However, the appellant had filed updated information from Maintenance Enforcement, showing that as of April 24, 2023, his arrears had lowered to $15,903.35. The trial judge, wedded to the calculation of arrears she had prepared prior to the hearing, did not mention or seemingly consider the appellant's more current evidence of the outstanding arrears.

[37] The trial judge's second pre-determination involved the status of the older child as a child of the marriage. As noted previously, there was no dispute that as of the date of the hearing, the older child was no longer a child of the marriage. However, the question of when that child ceased being a child of the marriage was relevant to the appellant's request to have his retroactive arrears varied.

[38] Until the child's 19th birthday, (June 13, 2022) Maintenance Enforcement had calculated arrears based on two children. However, there was some evidence before the court, notably in the respondent's affidavit, that suggested the older child may have withdrawn from parental care prior to that time. In particular, the respondent had acknowledged in her affidavit that after graduating from high school in 2021, the older child started an educational program in September but had withdrawn shortly thereafter. By December, 2021 the child was working full-time. It was unclear from the respondent's affidavit when the child had started working and whether that continued to their 19th birthday.

[39] The *Divorce Act* defines a child of the marriage as follows:

> ***child of the marriage*** means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority **and who has not withdrawn from their charge**, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;[3]
>
> (Emphasis added)

[3] R.S.C. 1985, c.3 (2nd Supp.) s. 2(1).

[40] The trial judge's comments throughout the proceeding demonstrate she did not have an open mind with respect to whether the older child had ceased to be a child of the marriage prior to their 19th birthday. In her preliminary comments to the parties at the start of the trial the trial judge stated:

> THE COURT: . . . Mr. Williams filed a Notice of Variation Application and asked the Court to address parenting decision-making and he wanted to vary child support and the child support arrears. It was . . . he has acknowledged that he hasn't seen the younger child, born in 2006, since 2016. It has been made clear, and it has always been made clear, that I'm not being asked to address the issue of [S], as she's over 19 years of age. Although, I think that there's a note from the Maintenance Enforcement Office that suggests that the Order should be changed, as they're not enforcing it but they need an order specifying. So that's fine; that can be done. And so then [S], or [J],[4] they're not eligible as of the date of 19 years old and she was born in June 13, 2003. So what's . . . that would have been 13 . . . 2022 she turned 19? Yes. So we all agree we don't need to argue that point as of June 13, 2022, [J.], or [S.], are . . . is no longer eligible for child support and Maintenance Enforcement can address that. So we just want to make sure that we flag that to be in an order. That's a final . . . that's agreement . . . both of you are nodding your heads but I'd prefer that you state, for the record, yes or no.
>
> MR. WILLIAMS: I agree, however, there's some circumstances that . . .
>
> THE COURT: Sir, it's either yes or no or what other date do you want? What's the date you're asking for, in which case, we're going to have to litigate it. The date, sir, all I'm asking for. I'm not asking you to give evidence . . .
>
> MR.WILLIAMS: Yeah.
>
> THE COURT: . . . I'm asking you for the date. What's your position? Either she's not or they are not . . .
>
> MR. WILLIAMS: **I want to know when she started paying room and board.**
>
> THE COURT: Well, if you haven't figured that out yet . . .
>
> MR. WILLIAMS: Right, so I think . . .
>
> THE COURT: . . . then you have a position or you don't.

[4] The evidence indicated that at some point the older child had changed their name. The use of [S.] is a reference to the child's former name and the use of [J.] is a reference to their new chosen name.

MR. WILLIAMS: Right

THE COURT: What's your position? What's the date? This isn't a discussion, this is a trial. What is your position?

MR. WILLIAMS: I believe we need to figure that in in trial.

THE COURT: No. What's your position? Your position is you don't agree with June 13, 2022? You don't agree with that date. What date are you suggesting? We're not figuring it out today. The evidence is either here or not and I'll be making a decision.

MR. WILLIAMS: Okay. I guess we can just let it . . . let it go. She's 19 . . .

THE COURT: You either agree or you don't sir. This is a trial.

MR. WILLIAMS: I'd like to have my word . . .

THE COURT: No, you don't get another day . . . you don't get more evidence. The evidence that's here is applicable, that's it. This is the evidence. If it's not in there . . .

MR. WILLIAMS: **Would there not be a cross** . . .

THE COURT: . . . this is the evidence that I'll be deciding upon. If I don't have any evidence that suggests that [J.], or [S.] . . . they're different than somebody else who's 19, who usually gets child support up to that point, I likely will decide June 13, 2022, is the date. If you don't agree, you have to present evidence. If you haven't presented evidence, that's probably what I'll decide if you're not consenting. You're either consenting or not, yes or no.

MR. WILLIAMS: Is trial presenting evidence?

THE COURT: Did . . . is the evidence in there?

MR. WILLIAMS: Yes.

(Emphasis added)

[41] The hearing commenced. When the respondent was called to the witness stand, prior to the appellant commencing cross-examination, the trial judge gave him the following direction:

THE COURT: Okay. Before I start . . . before we start . . .

> MR. WILLIAMS: Yes.
>
> THE COURT: . . . you ask a question, she answers it. You don't like the question . . . or the answer . . . you can't argue with her.
>
> MR. WILLIAMS: It's a court process question.
>
> THE COURT: Excuse me. That's what I'm ask . . . I'm telling you the court process.
>
> MR. WILLIAMS: Okay. Okay.
>
> THE COURT: You're allowed to ask questions. She gives you an answer you're unhappy with, you can't argue with the answer. You can ask another question about it, you can't argue with her. Okay? That's why lawyers take weeks preparing for these things. They don't want to ask questions they don't want answers to. **So, you remember, as well, that I only want relevant questions. [S.], not relevant. No questions about [S.] or [J.]** . . .
>
> MS. PELLICER: [J.]
>
> THE COURT: . . . or whatever name we're using . . .
>
> MS. PELLICER: It's [J.]
>
> (Emphasis added)

[42] There was evidence to suggest the older child had ceased educational pursuits and had started working full-time prior to turning 19. There was an evidentiary foundation to at least explore if the child ceased being a child of the marriage earlier than the age of majority. If they had, then the appellant's request to vary the retroactive arrears to reflect this fact would have been fortified.

[43] However, given the appellant's lack of contact with the children, he had no means of providing direct evidence on that issue. It is clear from his exchange with the trial judge, he intended to address the older child's circumstances through cross-examination of the respondent. Yet the trial judge inexplicably expected the appellant to state at the commencement of the hearing what date he proposed the older child had ceased being a child of the marriage. In the circumstances, it was improper and unreasonable for the trial judge to pressure the appellant to articulate a specific date without him having first had the opportunity to cross-examine the respondent.

[44] Further, the trial judge's mid-trial declaration that questions the appellant may have wanted to pose to the respondent in cross-examination relating to the older child were "irrelevant" is troublesome. Given the obvious relevance of the child's circumstances to when they ceased being a child of the marriage, the trial judge's comment indicate she had already decided the issue. Indeed, without any analysis or reference to the relevant evidence that may suggest otherwise, the trial judge concluded the older child remained a child of the marriage until their 19th birthday.

Interference with the conduct of the hearing

[45] In addition to having demonstrated a pre-determination of the above matters, I am satisfied a review of the record demonstrates the trial judge did not conduct the hearing in a fair manner. There are multiple examples of the trial judge declaring a question the appellant wished to pose to be irrelevant either before he finished asking it, or where it was clearly relevant to the issues raised in his Notice of Variation.

[46] Further, on occasion the trial judge would answer a question the appellant had posed to the respondent instead of permitting the witness herself to provide evidence. On other occasions the trial judge chastised the appellant for posing questions to the respondent that suggested an answer notwithstanding it was cross-examination. An objective reading of the record demonstrates that as the trial judge's interjections continued, the appellant became more unfocused and frustrated with the process.

[47] Trial judges, for good reason, are given wide latitude to control the proceedings unfolding in their courtrooms. It is not unusual for trial judges to closely control proceedings especially with self-represented litigants. However, this control must be reasonable and not impede the fairness of the proceedings. Here, the record documents the magnitude of the trial judge's numerous interjections during the trial, far surpassed what could be considered a proper exercise of her trial management responsibilities.

2. *Do the trial judge's conclusions demonstrate legal error?*

[48] Although the appeal can be allowed on the basis of the appellant being deprived of a fair trial, I will note several instances of the trial judge falling into legal error.

Failure to undertake an analysis of the retroactive variation request

[49] Although it is implicit in the reasons above, the trial judge's pre-determination of the retroactive variation issue led to her not undertaking a proper analysis of whether the appellant's request ought to be granted.

[50] The hearing judge did not reference any legal principles governing a payor's request for retroactive variation. She did not undertake a review of the evidence properly before her, including the appellant's income tax returns from the previous decade, and as explained above, she did not consider whether the arrears should be adjusted to reflect the status of the older child.

[51] Perhaps a properly conducted analysis may have resulted in the trial judge declining to retroactively reduce the arrears. It would have been open to the trial judge to reject the appellant's request to have the child support retroactively varied to reflect his income, but only after a consideration of the applicable legal principles and the evidence before her. Before his request was dismissed, the appellant was entitled to have a proper analysis undertaken. It was not.

Imputing income to the appellant without a proper analysis

[52] The trial judge imputed income to the appellant for the purpose of prospective support. The appellant says the trial judge failed to undertake a proper analysis of whether, given the evidence before her, imputing income to him was appropriate. I agree.

[53] Section 19 of the *Federal Child Support Guidelines* governs the imputation of income. It 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;
> >
> > **(b)** the spouse is exempt from paying federal or provincial income tax;

> **(c)** the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
>
> **(d)** it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
>
> **(e)** the spouse's property is not reasonably utilized to generate income;
>
> **(f)** the spouse has failed to provide income information when under a legal obligation to do so;
>
> **(g)** the spouse unreasonably deducts expenses from income;
>
> **(h)** the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
>
> **(i)** the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[54] The evidence before the court demonstrated the appellant had engaged in a variety of employment in previous years, including leaving Nova Scotia several times to obtain gainful employment. His attempts to find employment since the 2012 CRO were documented in his affidavits.

[55] The appellant's CRA returns demonstrated that at times his employment income was higher than the $25,000 which had been imputed to him in 2012, but at other times it was lower. The Maintenance Enforcement records demonstrated that at times, the appellant paid the amount ordered, but at other times, when he was receiving a higher income, he voluntarily paid more than the ordered amount. At times, he paid less than ordered, or paid nothing at all.

[56] In the Statement of Income filed with the court in advance of the hearing, the appellant attached documentation showing he was not presently working and in receipt of social assistance benefits.

[57] The trial judge did not reference section 19, nor any of the above evidence. In fact, it would appear that she did not turn her mind to consideration of the appellant's financial circumstances at the time of the hearing. In the midst of her oral decision, the trial judge seemed to be unaware of the appellant's employment circumstances, asking "I don't know . . . is he self-employed though?"

[58] What the trial judge did reference was the 2012 Corollary Relief – Child Support decision of Associate Chief Justice O'Neil in which he determined the appellant should be imputed income of $25,000.00. The trial judge read extensively from that written decision. She said:

> THE COURT: Okay. And for all the reasons that were enunciated and argued are reflected in the decision of Associate Chief Justice O'Neil back in 2012. Nothing much has changed, except that the minimum wage has changed and, certainly, since 2012, you would have expected that his findings would have been even more, I suppose, relevant I would have to say, given the passage of time and his instructions that, you know, he should . . . he's had more than enough time to find a job . . .

[59] Instead of looking at the evidence in front of her, the trial judge relied on the findings of another judge, made 11 years previously. Without considering the evidence of the appellant's more recent employment attempts and income, the hearing judge summarily determined that "nothing much had changed" since the 2012 order in terms of the calculation of the appellant's annual income for child support purposes. With respect, the trial judge did not meet her obligation to undertake a legally sound analysis of the application of the *Federal Child Support Guidelines* to the evidence before her. Again, a proper analysis might have led the trial judge to the same conclusion. That possibility, however, does not relieve her of her obligation.

Varying the appellant's right to information

[60] By virtue of the 2012 CRO, the appellant was a joint custodial parent with specified parenting time with his children. He was entitled to be consulted in relation to decisions pertaining to the children's health, education and welfare, and he also had the right to receive information from the respondent and third parties, about the children. In bringing his application, he asserted the respondent had alienated the children, was not consulting him in decision-making and was not providing him with information. His affidavit evidence set out examples of this conduct. The appellant wanted the judge to order counselling with an aim of re-initiating contact with the younger child, and to safeguard his right to receive information about her.

[61] At the conclusion of the hearing, the appellant had not only ceased being a joint custodial parent, the trial judge placed a burden on him to undertake

counselling, including in relation to his "past issue of assault conviction", before being able to receive from the respondent or others, any information regarding the younger child. The appellant submits that the trial judge's conclusion was built on error. I agree, but need only address one aspect of the argument put before the Court.

[62] The unrefuted evidence before the trial judge was that the appellant had contact with the children in accordance with the 2012 CRO until 2016. Sometimes that contact was in person; however, there were times when the appellant resided out-of-province for his employment. He used electronic means to engage with the children during those periods.

[63] The appellant said he did not know why the children stopped wanting to have contact with him in 2016. The respondent also said she was not aware of the reason, but believed it was related to something the appellant had said to the children during a visit. In her evidence the respondent acknowledged that she had blocked the appellant's number on her telephone "years ago" and would not have checked any messages received from him.

[64] The appellant tried to cross-examine the respondent as to the source of the children's unwillingness to have contact with him. The trial judge stopped the cross-examination, interjecting:

> THE COURT: I'm going to stop everybody there for a minute because I'm starting to feel a bit uncomfortable about this line of questioning, not because it's not relevant but because, sir, my recollection of the file, and I have to look back to the orders and see what the variation is, is that you were convicted of assault years back in 2012. So the questioning that's going on and on about what could be fearful, I don't have any of the evidence from that trial. I know that you were convicted and I know that you couldn't have contact with her for a period. So I am obligated, under the *Divorce Act*, to consider family violence. And you can keep questioning her in relation to this all you want, but I need you to know that I know that you were convicted of assault back then. You didn't give any evidence about what happened or what . . . what happened from then on. **My understanding is you didn't live with the children after that, so maybe they're afraid of the fact that you assaulted the mother, I don't know.**
>
> MR. WILLIAMS: See, you're making up a story too.
>
> THE COURT: I'm not making up a story, it's in the last decision, sir.

MR. WILLIAMS: So they're scared of me because of something that happened in 2012?

THE COURT: I don't . . . I don't know. I . . . I'm telling you I don't have the evidence. All I know . . .

MR. WILLIAMS: So don't make it up . . . don't make it up.

. . .

THE COURT: Don't speak to me like that. Don't speak to me like that. I'm taking it from the decision and I can read it you and I'm going to read it into the record . . . from Justice . . . and I'm required to look at what's been decided before, okay. I'm required to think . . . and I'm required to consider family violence. So I'm looking through this and I'm going to find what he says. Please, everybody just bear with me 'til I find the . . . the particular paragraphs of the family violence that took place in, at least, I think, 2012.

He describes . . . this is paragraph 31 of the decision that's, obviously . . . and it was rendered by Associate Chief Justice O'Neil at . . . and this is *Williams v. Pellicer*, 2012 NSSC 267, in this file that I'm required to consider.

(Emphasis added)

[65] The trial judge proceeded to read a passage of the earlier decision which referenced the appellant having been convicted of assaulting the respondent in 2009. She continued:

THE COURT: . . . I don't have . . . I . . . I could go all through the evidence as to what those issues were, but I need you to know that, as a judge presiding in this matter, I have to consider family violence and it . . . I'm not saying that what you're talking about now and . . . and that things didn't change up to 2018, but, sir, I'm aware of that and that . . . that's an issue that could have affected the children. **And I don't know if they were there or not but I can certainly go back and look at that evidence and I probably will**.

MR. WILLIAMS: It's speculative and it's just . . .

THE COURT: It's not speculative, sir. Go ahead.

MR. WILLIAMS: Yeah, it is.

THE COURT: It's . . . how could it be speculative? You said it and you were convicted. It's not speculative.

(Emphasis added)

[66] The trial judge viewed the appellant's assault conviction as relevant in determining that he must undertake counselling before he was entitled to receive information about the younger child. I am satisfied she erred in doing so, and note:

- Neither party introduced evidence of the 2009 assault conviction, nor did the respondent suggest that it played any role in the children's desire to terminate contact with the appellant. There was no evidentiary foundation to suggest it was relevant in anyway to the children's current views;

- The trial judge engaged in improper speculation when she mused the children's desire to have no contact with their father was due to them observing the assault in 2009. There was no evidence to permit the trial judge to ascertain the children were present, or the nature of the assaultive behaviour;

- The trial judge said she was going "to go back and look at the evidence" to ascertain whether the children were present at the time of the assault. This begs the question – what was the trial judge intending to reference? A trial judge must make determinations based upon the evidence properly before them. If the trial judge intended to undertake her own investigation of what occurred in 2009 by referencing other material, that would constitute a clear error;

- The trial judge was not wrong when she said that judges have an obligation to consider family violence. However, the legislative direction is much more nuanced than the trial judge's broad pronouncement. The *Divorce Act* requires that in making a parenting or contact order, a judge must consider only the best interests of a child (s. 16(1)). One of the factors in determining the best interests of a child is the presence and impact of family violence (s. 16(3)(j)). In considering the impact of family violence, a judge is to consider **"(i)** the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and **(ii)** the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child". Section 16(4) further provides:

> **(4)** In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:
>
> **(a)** the nature, seriousness and frequency of the family violence and when it occurred;
>
> **(b)** whether there is a pattern of coercive and controlling behaviour in relation to a family member;
>
> **(c)** whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
>
> **(d)** the physical, emotional and psychological harm or risk of harm to the child;
>
> **(e)** any compromise to the safety of the child or other family member;
>
> **(f)** whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
>
> **(g)** any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
>
> **(h)** any other relevant factor;

- In concluding the appellant should be precluded from receiving information regarding the child until he obtains counselling in relation to the 2009 conviction, the trial judge did not reference, at all, the best interests of the child, nor did she undertake any analysis, much less one that referenced the above provisions.

[67] I am satisfied the trial judge improperly interjected reference to the 2009 assault into the matter before her and then erroneously used it to speculate why the appellant's contact with the children had ended. Family violence is a serious concern in our communities. However, as the above statutory provisions demonstrate, trial judges must consider its existence and its impact on their decisions in a reasoned manner. Here, the trial judge did not do so.

Inclusion of costs ordered by other judges

[68] In the order under appeal, the trial judge directed:

> 3. Paul Williams owes outstanding costs to Rocio Pellicer in the amount of $3,500.00. $3,000.00 awarded on November 21, 2012 and $500.00 awarded on March 28, 2013.
>
> 4. The total amount owing of arrears and costs is $20,187.45; this is to be paid at the rate of $150.00 per mouth. This amount shall be treated as child support and collected by Maintenance Enforcement as such.

[69] In her oral decision, the trial judge reviewed the history of the parties' involvement before other justices including:

> THE COURT: . . . And there was a further variation application before Justice Dellapinna, January 28, 2013, which was adjourned to allow Mr. Williams to address the issue of change of circumstances. Ms. Pellicer suggested that Mr. Williams had failed to comply with providing disclosure to Ms. Pellicer and should explain why.
>
> In March 2013, Mr. Williams had that date to comply with the previous orders, including the order for costs ordered by Associate Chief Justice O'Neil in November 2012. Mr. Williams' variation application was dismissed by Justice Dellapinna, with costs payable of $500 . . . June 2000- . . . sorry, June 2013.
>
> So there's costs payable of three . . . of five . . . of 500 and there's some of 3,000 that **I don't know if they've been taken care of, but they're carried over to this decision**. . . .
>
> (Emphasis added)

[70] It was an error for the trial judge to add past cost awards into the current order under appeal. In reaching that determination, I make the following observations:

- The trial judge had no jurisdiction to re-order the appellant to pay costs previously ordered by other judges;
- Although the respondent had referenced in her affidavit that the appellant had not paid a $3,000.00 cost order in the past, she gave no

detail of when that was ordered, or by whom. She made no reference, at all, to a second order directing the payment of $500.00;

- In the course of her oral reasons, the trial judge was uncertain whether previous costs orders had been paid. However, in her order she stated the costs were unpaid. It is evident that following the hearing, the trial judge referenced other information to satisfy herself regarding the non-payment of the two cost orders, without giving the parties an opportunity to comment.

[71] As a final matter, I agree with the appellant that the order issued by the trial judge contained other errors and puzzling inconsistencies. Given my conclusions, it is not necessary to address other issues raised in the appellant's argument.

Disposition

[72] For the reasons set out above, the appeal is allowed. The Variation Order issued October 6, 2023 is set aside. The matter shall be returned to the Nova Scotia Supreme Court (Family Division) for a new hearing before a different judge.

[73] As the appellant did not seek costs, none will be awarded.

Bourgeois, J.A.

Concurred in:

Bryson, J.A.

Beaton, J.A.