FAMILY COURT OF NOVA SCOTIA
Citation: *Kelley-Frost v. MacQuarrie,* 2014 NSFC 13

Date: 2014 08 26
Docket: FLBMCA No. 032111
Registry: Bridgewater

Between:

Lisa Ann Kelley-Frost

Applicant

v.

Jeffrey Ronald MacQuarrie

Respondent

Judge:	The Honourable Judge William J. Dyer
Heard:	August 26, 2014, in Bridgewater, Nova Scotia
Written Release:	September 3, 2014
Counsel:	Tabitha Webber, for the Applicant Jeffery MacQuarrie, the Respondent, on his own behalf

By the Court:

[1] Internet users know that many social networking services, forums, blogs and news sites feature "like" buttons and "dislike" buttons. Sometimes, there are neutral buttons. The buttons give the user a chance to express an opinion (favourable, unfavourable, or neutrality) about the content. Some service providers post the likes and dislikes as soon as they are entered on their site. Whether this is populism at its best (or worst) is not for me to say.

[2] The assignment of judges to cases is not based on popularity. And removal of a judge from a case is not as easy as pushing a button.

[3] The father, Mr. MacQuarrie, was stirred to action when he learned I was assigned to the present case. He hit the dislike button. If neutral and like buttons were on the screen, they were of no interest to him. And he initiated a recusal motion.

[4] Later, after a chambers hearing, I dismissed the motion in a truncated oral decision. I said a full written decision would follow. This is it.

Recent History

[5] Mr. MacQuarrie and Ms. Kelly-Frost are the parents of a teenager who plans to start her post-secondary school education in September, 2014 at a Nova Scotia college.

[6] In early June, the mother applied to vary the existing child support regime to address the child's changing financial needs, and to review and retroactively recalculate the father's support obligations which were last set out in a 2004 consent order. She believes the father's income has increased in the intervening years and that he may have been under-paying basic support for at least three years of them. Under section 7 of the **Child Maintenance Guidelines ("CMG")**, she also wants financial help with their daughter's education expenses. She has submitted affidavit and other evidence about the expected costs.

[7] Soon after the mother started her variation application, she tendered evidence that the father was not responding to the merits of the case, and likely would not do so, unless compelled. Consequently, an order authorizing personal

service and financial disclosure was granted. Before the end of July, the father presented himself to court officials to complain about the mother's application, to demand that the case be heard by someone other than me, to ask that staff give effect to his interpretation of the last order, and other matters. Staff carefully logged what occurred. He was encouraged to seek legal advice, and provided with general information on process and about resources such as Summary Advice Counsel, the LISNS Lawyer Referral Service, and the NS Family Law website. And, of course, he could consult with a private lawyer (as he has done in the past). He chose to represent himself.

[8] To this point, there is no evidence from either parent to explain why child support has not been reviewed and adjusted (if warranted) for about 10 years.

[9] The mother asserts that the father unilaterally stopped support payments in April, 2014 and that he has refused to cooperate with her and submit bills (for specified professional services) to his employer for reimbursement purposes - as contemplated by the last order. For his part, the father denied her allegations and, in a "table top" affidavit, claimed he has been making direct deposits (in undisclosed amounts) to the child's bank account for her benefit. Where does the truth lie? It remains to be seen.

[10] Stoppage (or redirection) of child support in April, 2014 was coincidental with the child's 18th birthday. There is no question that the father acted unilaterally and that he did not first seek court approval. On the sparse evidence before me, it's possible the father may be under the mistaken belief that his support obligation automatically ended with his daughter's 18th birthday. Or he may think he can - on his own initiative, at any time – vary the support and parenting arrangements, without court approval, and do what he thinks is best. Time will tell.

[11] Whatever the father's rationale, he is alerted to section 8 of the **Maintenance and Custody Act ("MCA")** which provides that every parent of a child under the age of majority is under a legal duty to provide for the child's reasonable financial needs unless there is a lawful excuse for not doing so. Under section 2 (c) of the **MCA,** "dependent child" means a child who is under the age of majority and may include a child over the age of majority in some circumstances. The age of majority in Nova Scotia is 19 years; the child is 18. Moreover, the last order continues in full force and effect, unless and until varied.

[12] Back to more recent events. By mid-August, the father had appeared in court and filed some, but not all, of the required financial disclosure. He still has not

submitted all that was ordered back in July. And, he has not filed a formal Reply or cross-application. However, in early August, he submitted the first of two handwritten affidavits in which he raised a variety of issues dealing mainly with parenting issues. In it, he delivered a litany of complaints about the mother's conduct, their conflicted relationship (i.e., her fault), etcetera.

[13] Around the same time, with some assistance from court staff, the father launched his recusal motion and requested that another judge be assigned to hear what is expected to be a fully contested hearing on the mother's application and the parenting issues that he seems to want addressed.

Scheduling

[14] The father has made it abundantly clear to court staff and to me that he would prefer not to attend court when it conflicts with his work schedule at a local manufacturing plant. He has insisted that his preferences be respected. He disclosed he works shifts and holds a critical job at the plant. If he is absent from the job, temporary or substitute workers are usually unavailable; and all will suffer if he must attend court before 4:00 p.m. on any given day. We know these things because the father says so.

[15] Nonetheless, over his protestations, I set the current motion down for a 1:00 p.m. hearing, and encouraged him (once again) to consult with a lawyer. I was reminded of his work commitments. In turn, I reminded him of the practicalities: At present, we do not have evening or "night court" sessions; nor is the court open for business on weekends; in contested hearings, time is often needed to hear testimony from various witnesses; time is usually needed for submissions regarding the evidence and the law – especially when there are multiple issues such as entitlement (which he raised), retroactive support, section 7 **CMG** claims, parenting issues, etcetera; and the presiding judge may need time to reflect on the case before delivering her or his decision. I informed the father that a 4:00 p.m. start for contested motions and hearings, to suit his convenience, was not going to happen.

[16] That said, I assured the father that scheduling of the present case was being managed, and would continue to be managed, no differently than others before the court. And, in setting the father's recusal motion down for hearing, I was careful to allow him ample time to consult with a lawyer and to prepare his case. He was informed that I would hear the motion; and I stressed the importance of legal research and providing evidence to support his contentions and submissions.

[17] I should add that the time slotted for the interlocutory contest was something of a concession by the mother who was ready, willing and able to start earlier. Unfortunately, based on information obtained between court dates, any good faith by her was undermined by evidence suggesting that on at least one other occasion when the father said he could not attend court because of work, he was actually on vacation.

The Hearing

[18] The father adopted his (second) affidavit during testimony. He was invited to elaborate and expand his evidence, if he saw fit. But, he added little to what he had written. Counsel for the mother waived cross-examination, and offered no countervailing evidence.

The Not So Recent History

[19] The father challenges my characterization of the litigation history as "lengthy". And he took offence when, on an earlier occasion, I raised the voluminous file from the bench to demonstrate the point.

[20] As the hearing unfolded, it struck me that somebody was standing on shaky ground. But, it wasn't me. The first indication was when the father admitted he did not recall that other judges have been involved. And, he was unable to specify when complained-about events occurred. Although he could not remember precisely when I "misconducted" myself, he was convinced I had done so and reiterated that I should not hear the present case.

[21] Because my version of the legal history is at odds with the father's, I am taking pains to regurgitate it. I told him I would do so. In many ways, it goes to the heart of the recusal motion he has made.

[22] Keeping in mind the child was born in 1996, the file discloses a legal history dating back to 1997. That year, before another judge, the parties agreed to a joint custody regime with primary care vested in the mother and liberal access to the father.

[23] In March 1998, before another judge, a new consent order was authorized. It refined the access arrangements, established child support, and imposed annual income tax return disclosure on the parties. (Recently, the father wrote that the

mother did not give him her returns and did not ask for his. Ostensibly, this excused his own non-compliance.)

[24] In May, 1999, another judge endorsed yet another consent order which reaffirmed joint custody, and further refined and amplified the parents' understandings and agreements regarding parenting. The 1999 order spanned six pages.

[25] I underscore that I was not the judge who approved any of the foregoing orders, and that there were no hearings and no appeals.

[26] I entered the picture in November, 1999. That is when I conducted a hearing to deal with the last of the orders that had been approved by a colleague only about six months earlier. By then, the parents had decided to represent themselves in court. Not without irony, the immediate issue was the import of a clause intended to reduce interpersonal conflict and reduce, if not eliminate, future litigation.

[27] The following passages from my written decision in mid-November, 1999 are relevant:

> A review of the file suggests that there has been a lengthy history of litigation between the parties. That said, the January 14th, 1999 order was consensual and contained comprehensive terms and conditions dealing with custody and access.
>
> Of particular significance is paragraph 7 of that order which reads as follows:
>
> > The parties, in the event they are unable to resolve a conflict respecting the child, shall seek appropriate competent assistance and if necessary agree that the dispute shall be referred for mediation and if unsuccessful, for arbitration to one of the following:
> >
> > A counsellor or a lawyer or a professional person skilled in the area of resolution of the problems of children and their families;
> >
> > It is further agreed that this procedure shall be followed to its conclusion prior to either party seeking relief from the Court on the understanding that while the dispute is being resolved, the Applicant, shall continue making day to day decisions as are necessary but shall take no substantial action in the area of an issue that is in disagreement which would prejudice or take unfair advantage of the Respondent, by use of the custodial status to her own benefit;"

> From the foregoing I conclude the parties agreed that if they were unable to resolve future conflicts regarding Kailee, they were first to seek appropriate professional help. Should that prove unsuccessful, they were to refer the particular issue or dispute for mediation. Should mediation fail, arbitration by one of the listed professionals was to occur. Arbitration is not defined, but its ordinary meaning implies a binding, final decision by a third party.
>
> In reviewing the affidavit material filed before the Court, I find that the immediate issues for determination were not referred to mediation or arbitration, as agreed and as ordered. (I should add that I entertained verbal submissions just in case the absence of references [in their materials] to mediation and arbitration was inadvertent.)
>
> In their submissions to the Court, both parties described a lengthy history of past unsuccessful mediation attempts and some recent consultations with a psychologist. Nonetheless, both agreed the immediate problems were not formally submitted for either mediation or arbitration.
>
> Most important to me is the clear agreement that if mediation proved unsuccessful, there must (not may) be arbitration. The last order spells out who will qualify to perform this task.
>
> The last order is unambiguous in establishing a process leading from professional assistance, to mediation, and arbitration, if need be. These processes must be exhausted before either party may seek relief from the Court.
>
> A reasonable inference is that the parties wanted to avoid future litigation over the very kinds of issues that are now before the Court. I have no hesitation in finding that MacQuarrie's default of access allegations, and the counter-allegations disclosed by Ms. Kelley's affidavits, fall within the dispute scenarios contemplated by paragraph 7 of the January order.
>
> Given that the parties have not complied with the agreed prerequisite conditions for court applications, my ruling is that the court ought not to proceed to judicial determination of the application on the merits.
>
> As a postscript, I am mindful that the parties asserted before me that they did not fully appreciate the import of the crucial paragraph and, in particular, what an arbitration process might involve. Because the last order (which bears their signatures) was entered into by consent, after independent legal advice from experienced counsel, I can only respectfully suggest these concerns be referred to their lawyers.

[28] My 1999 decision was not appealed. Neither parent brought the matter back to court until May, 2000 when there was a summary application by the mother for help with daycare expenses. The father (unrepresented on that occasion) consented to the request. I approved the order. Parenting issues were not on the table.

[29] There was relative calm – for several years.

[30] Then, in June 2004, the mother applied for a review and variation of child support. At the time, there was evidence that the father had not responded to the mother's application by ordinary process and would not do so unless compelled. I authorized an arrest warrant and routine disclosure. This prompted the intercession of lawyers and discussions in aid of settlement.

[31] In mid-November, 2004 I was presented with, and approved, a comprehensive consent order which fixed child support arrears, established a repayment schedule, and set a new monthly rate for current child support (among other things). Importantly, the so-called mediation/arbitration clause that I had dealt with in 1999 was rescinded. Both parents had independent legal advice from senior counsel.

[32] I draw particular attention to removal of the mediation/arbitration clause in 2004 because some of the father's current evidence and his remarks suggest that he may believe the clause is still alive and well. Quite simply, this is not so.

[33] In 2004, there was no formal hearing. I heard no testimony. I made no fact-findings. I did not assess the credibility of either parent. And there was no appeal. I am unaware of any complaints about my conduct surrounding presentation and approval of the lawyer-crafted order.

Complaints In Aid of Recusal Motion

[34] Which brings me to the central issue - the father would like another judge. The relevant portions of his [second] affidavit evidence follow:

> "A judge's job in any court is to make a ruling on fact and the law. Every Canadian has a constitutional right to a fair trial. One is innocent until proven guilty.
>
> Dyer's previous behavior and actions showed no regard for fact and no consideration for my suggestions to get the facts. He disregarded evidence that was provided to him. He was rude and inconsiderate to my legal counsel. He accepted her allegations a (sic) fact and was totally insensitive to my situation.
>
> One of family laws directives is to assist families in every way the law allows. I was already struggling with the challenges of providing a good environment for my daughter and his actions and ruling created incredible

hardship. This gave Lisa Kelley-Frost the realization that she could do as she pleased with no consequence.

I registered a complaint with the Chief Justice and because of his biased and incredible disregard for fact; my rights will be violated if made to appear in front of him.

I expect to be informed of a different court date and who will be named as judge."

Discussion/Decision

[35] Justice Lee Anne MacLeod-Arthur recently summarized the principles to be considered when considering recusal motions in *Nova Scotia* (*Community Services*) *v. A.M.*, 2014 NSSC 251. She wrote:

> The case law sets out some principles to be considered in recusal motions:
>
> 1. The starting presumption is one of judicial impartiality, thus the burden is on the Applicant to prove disqualification.
>
> 2. The standard is that of a reasonable and right minded person, reviewing the matter realistically and practically with a full opportunity to consider the matter.
>
> 3. The grounds alleging bias (or reasonable apprehension of bias) must be specific and serious.
>
> 4. A prior judicial finding against the person alleging bias does not create a reasonable apprehension of bias, nor does it preclude a judge from hearing another matter involving that person.
>
> Justice Oland in the Court of Appeal decision of *C.B. v. T.M.*, 2013 NSCA 53 held that to successfully argue lack of impartiality, the party raising the issue must demonstrate that the beliefs, opinions, or biases held by the judge preclude reaching a fair decision.
>
> In the case of *Littler v. Howie*, 2013 NSSC 84, Justice Forgeron held that the husband's four complaints to the judicial council did not result in a finding of bias or raise a reasonable apprehension of bias. Nor did comments made by the Court encouraging the parties to retain legal counsel, discussions about costs consequences at a Pre-Trial Conference, and a past ruling and decision which were unfavorable to the husband create bias or a reasonable apprehension of bias.

[36] As exemplified by *Doncaster v. Chegnicto-Central Regional School Board*, 2013 NSCA 59, no judge is immune from potential recusal applications. In *Doncaster*, Justice Jamie Saunders recounted his own experience and mapped out the approach to be taken. The factual situation was much different than the present one; but the principles that were applied are instructive and binding on judges of lower courts. After reviewing the record, Justice Saunders wrote (in part):

> The law in such matters is clear. I need not recite it in detail. Obviously the mere filing of a complaint with the Canadian Judicial Council does not pull the trigger for recusal. If that were the case, one could simply file a complaint and "pick off" a judge, one by one until the complainant either found one to his liking ("judge shopping") or there were no judges left to hear the case. Such a result is neither the law nor in the public interest.
>
> The law directs that this is an inquiry I conduct myself. The grounds put forward suggesting bias or a reasonable apprehension of bias must be serious and specific. There is a strong presumption of judicial impartiality. The law does not lightly or carelessly evoke the possibility of bias in a judge whose oath of office and authority depends upon that presumption. The test for reasonable apprehension of bias is settled law:
>
> 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 …
>
> Mr. Doncaster does not assert that I ought to recuse myself because he lost a case at a previous trial or Chambers appearance over which I presided. It is obvious but perhaps bears repeating that such an assertion would hardly be a basis for recusal in any event. That isn't how things work. Otherwise disgruntled litigants would invariably demand the recusal of any judge who had found against them, eventually whittling the juridical pool down to zero.
>
> The mere fact that a party has lost some motion or suit before a judge (without a jury) does not entitle that litigant to be thereafter free of that judge. That is so both in later suits of a broadly similar nature and in later motions in the same suit …

[37] As stated at the outset, recusal motions are not governed by likes and dislikes. They call for a principled approach - including careful consideration of the evidence and the relevant law. Undoubtedly, there are members of the public who would like to have the final say in who is assigned to hear her or his case, or, who should not conduct it. If litigants had the final say, our dockets would soon be in chaos and driven solely by personal whims and preferences. More importantly, any notion of an independent and impartial judiciary would be severely

undermined. So, to invoke Justice Saunders' words: that is not the way things work.

[38] At the risk of repetition, I have only conducted one contested hearing that involved the parties – about 15 years ago. I confess that I would have no memory of the hearing were it not for my written release.

[39] Because the father now alleges that I have previously disregarded evidence, that I have been insensitive to his situation, and that I have favoured the mother's position, I thought it prudent to revisit and reproduce the relevant portions of my 1999 decision. That done, to be frank, the foundation for the father's allegations of bias, or perception of bias, escapes me.

[40] In 1999, I would not (and did not) deal with any of the competing claims and counter-claims about parenting. That was the whole point of the ruling. The 1999 outcome was neutral. That seems to have escaped the father. Both parents were directed to comply with their own agreements as captured by a previous consent order – an order they signed; an order I did not endorse. As mentioned, there was no appeal and neither party did anything more for several years.

[41] If the father is referring to the 1999 hearing, his allegations about rudeness and inconsiderate conduct (directed towards his lawyer) do not add up. There were no lawyers involved.

[42] If the father is referring to court appearances in later years, I remind him that there were no contested court hearings, no testimony, and no adversarial arguments by the lawyers, etcetera. Counsel presented orders which they had prepared on instructions from their respective clients and made only brief remarks.

[43] The father's position is not helped by his frank admission that he cannot recall when the incidents he now complains about actually occurred. Because he has been in court many times, and because he has had the benefit of legal advice in the past, he knows that all proceedings are recorded, and that he has access to the recordings and to the court file. However, with that knowledge, he presented nothing from the recordings or the file to support his contentions about unfair treatment or misconduct. Nor is there affidavit or other evidence from any of the lawyers (or anyone else who was in the courtroom in the past) to support or corroborate his historical account.

[44] If a complaint was lodged with the "Chief Justice" at any time in the last 15 years, a copy is not before the court. And, I can say with confidence that no complaint has been brought to my attention.

[45] Applying the law to the evidence before me, I find the father has not met the required threshold for his recusal motion to succeed. His motion is dismissed.

Dyer, J.F.C.