SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Penney v. Tufts*, 2014 NSSC 411

Date: 20141031
Docket: SFHMCA-070941
Registry: Halifax

Between:

Jason Penney

Applicant

v.

Angela Tufts

Respondent

Revised Decision:	The text of the original decision has been revised according to the attached erratum dated November 25, 2014.
Judge:	The Honourable Justice Mona M. Lynch
Heard:	October 31, 2014 in Halifax, Nova Scotia
Written Release:	November 18, 2014
Counsel:	Jason Penney, Applicant, self-represented Amber Penney, for the Respondent

By the Court: (orally)

[1] This is the Tufts and Penney matter. Mr. Penney filed a Variation Application on March 28, 2014. His application was to vary a child support order arising from a hearing on February 19, 2014 and the order that was issued on March 17, 2014. He is seeking to vary the amount of child support starting May 22, 2013.

[2] In the affidavit sworn on March 28th, Mr. Penney provided information about child care expenses in 2013, expenses for driving the child to school from September 2013 to March 2014 and provided some information of his earnings in 2013. Mr. Penney says he is self-employed -- a part-time fisher from December to April and collects EI from May to November. He indicated that he had a long-standing back injury and sees a chiropractor for that injury. He says he has high expenses to earn the income and he says at Paragraph 13, "I would like the court to take into consideration the expenses incurred to earn that income of 2013, as this business is fairly new".

[3] He is asking to change the costs from the May 2013 trial and February 2014 hearing based on the income he provided in March 2014 for his 2013 income.

[4] In a letter filed July 10, 2014 Mr. Penney complained about the Conference before Justice MacDonald on June 18th and he says in the letter, "Whomever decided that I own or run a business is deceived", although he made reference to that business in his affidavit in March.

[5] The first thing I will deal with is Mr. Penney's request that I recuse myself. Mr. Penney asks that I recuse myself in this matter as I have already heard a case between the parties and ruled against him. Mr. Penney must show that there is a reasonable apprehension of bias. Just having a judge rule against a party in a prior proceeding does not raise a reasonable apprehension of bias. The Court of Appeal dealt with this recently in *Turyk v. Lonergan*, 2014 NSCA 21. At Paragraph 11 it says:

> In conclusion, while some of the exchanges may have sounded sharp or offensive to Mr. Turyk, they do not give rise to a reasonable apprehension of bias on the part of the judge when the context is considered as a whole. Put simply, I am not persuaded that a reasonable person, fully informed of the circumstances, would view any of the conduct or comments on the part of the judge in that case as indicative of a bias against Mr. Turyk.

They cite, for example, *R. v. S.(R.D.), [1997]3 S.C.R.*

There is also the case from the Ontario Court of Appeal, *R. v. Boyle*, 2014 ONCA 705. At paragraphs 3 – 6:

> 3. The fact that the trial judge presided at the appellant's unsuccessful bail review application and then at the trial, did not create a reasonable apprehension of bias.
> 4. The trial judge had no recollection of the bail review, was not provided with the transcripts, and no formal recusal application was made.
> 5. Moreover, the trial judge's comments during the bail review do not reveal any predisposition to decide the issues at trial and there is no basis in the judge's reasons to believe that he considered matters arising in the bail review in making his determinations of credibility at trial.
> 6. The allegation of an apprehension of bias is entirely speculative and does not suffice to displace the strong presumption of judicial integrity and impartiality.

Based on those cases I do not see Mr. Penney's application for recusal as anything other than speculative. He has not shown that a reasonable person fully informed of the circumstances would view any conduct or comments on my part as indicative of a bias against Mr. Penney.

[6] I dismiss the recusal motion. He has not displaced the presumption of judicial integrity and impartiality.

[7] Ms. Penney asks that I not consider the material that Mr. Penney provided in October as it was after the date that Justice MacDonald ordered all of the material to be filed which was September 19th for Mr. Penney. Also there is the case of *Dickie v. Dickie*, (2007 SCC 8) from the Supreme Court of Canada. It is my understanding that Mr. Penney has not paid the costs awards from both my order and Justice Williams' order. In *Dickie v. Dickie*, that would be a reason for me not to hear his Variation Application at all.

[8] I am going to go through and give the decision from the evidence that I have.

[9] The principles of child support are set out in the *D.B.S.*, (2006 SCC 37) case from the Supreme Court of Canada. Child support is the right of the child. Section 1 of the Child Maintenance Guidelines sets out the objects of the Guidelines. The objects are:

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

[10] Section 19 of the Child Support Guidelines and Child Maintenance Guidelines says:

> 19(1)The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) the parent is intentially under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or health needs of the parent;
>
> (f) the parent has failed to provide income information when under a legal obligation to do so.

[11] Mr. Penney applied for a variation of the order of February 2014. He must show a material change in circumstances from the date of the order.

[12] Although *Gordon v. Goertz* [1996] 2 S.C.R. 27 dealt with a change in custody and access, there is a discussion about the test for a variation at paragraph 11:

> The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued.

The same is true for a variation in child support or child maintenance.

At paragraph 44 of *LMP v. LS*, 2011 SCC 64 the SCC said at paragraph 44:

> In sum, it bears repeating that the threshold question under s. 17, whether or not there is an agreement, is the one Sopinka J. described in *Willick*, namely:
>
> > In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

[13] What Mr. Penney is asking me to do is to find that there is a material change in circumstances. This is not a do-over. It is not an appeal. It is not a correction.

Mr. Penney has provided the information that he failed to provide at the time the order was made but that is not a material change in circumstances. That was information available at the time that the hearing was held and he did not provide it as directed. Mr. Penney had the opportunity to provide the information in February which he is now asking me to consider.

[14] In family matters there is a need to have certainty and failing to produce at the time does not allow a person to later produce the information and, in effect, have a re-hearing of the original matter.

[15] Our Rules require the "just, speedy and inexpensive determination of every proceeding". Certainty and finality in family matters is important and it would not be fair to re-do the hearing because Mr. Penney decided to file the material he failed to provide for the prior hearing. Ms. Tufts filed everything and complied with all of the directions. There would be an enormous prejudice to her and other recipient parents if the matter had to be re-done when the parent sees fit to file the material that was directed in the prior proceeding. This would cause recipient parents to have two hearings on the same issue and to pay for counsel twice.

[16] So the information that Mr. Penney now wants to put forward that was available at the time of the original hearing does not constitute a change in circumstances.

[17] Mr. Penney also put forward that his Employment Insurance will run out at the end of the month. However, the evidence shows that Mr. Penney is self-employed, doing seasonal work, including construction and fishing. Mr. Penney has not provided anything to verify that EI runs out. He has not provided anything to show his EI payments and collecting EI for part of the year is not unusual with seasonal employment. He has not provided anything to show that this year is different from other years. In his affidavit he indicates that he is self-employed, part-time fisher and his income is derived from December to April from fishing and from May to November from EI.

[18] On July 10, 2014 Mr. Penney provided a letter from a chiropractor that included many things that are reported by Mr. Penney. Mr. Penney, in his affidavit of March 28, 2014, describes a long-standing back injury. The material he provided in July indicates it is a chronic back injury. The long-standing back injury is not a change in circumstances as it would have been in existence in February 2014. So I do not find that to be a change in circumstances.

[19] He has put forward that the income that Ms. Tufts has shown is a change in circumstances. I do not find it is a material change in circumstances. It certainly would not change the table amount of child support.

[20] I would also note that Section 19 of the Child Maintenance Guidelines allows for imputation of income. The Guidelines and case law do not restrict the court to actual income earning but rather the court may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills and employment history. A parent is not excused, as shown in the *Parsons* case (2012 NSSC 239) from Justice Forgeron, from support obligations in furtherance of unrealistic or unproductive career aspirations, and as a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income. In Nova Scotia the minimum wage is almost $19,000.00 and the $21,000.00 found to be the income of Mr. Penney was based on the evidence both before me and before Justice Williams.

[21] Mr. Penney is complaining that the prior order is wrong. As I have indicated, the correctness of the decision is assumed. He says the order should be set straight. Again, this is not a re-do or an appeal.

[22] Mr. Penney also has complaints about other things that Ms. Tufts is doing with regard to the custody order but that is not a matter that is before me.

[23] So I do not find that there is a change in circumstances and I dismiss the application.

Lynch, J.

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Penney v. Tufts*, 2014 NSSC 411

Date: 20141031
Docket No. SFHMCA-070941
Registry: Halifax

Between:

Jason Penney

Applicant

v.

Angela Tufts

Respondent

ERRATA TO DECISION DATED OCTOBER 31, 2014

Judge: The Honourable Justice Mona M. Lynch

Heard: October 31, 2014, in Halifax, Nova Scotia

Written Release: November 18, 2014

Date of Erratum to Decision: November 25, 2014

PLEASE NOTE

Erratum:

At Page 8, Paragraph 17 (*in line 2*), the name "Tufts" shall be replaced with the name "Penney".