
CANADA / JUDGMENT

O.C.C. v. A.C.

2013 BCSC 682

COURT

Supreme Court of British Columbia

DECIDED

19 April 2013

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2013 BCSC 682 O.C.C. v. A.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

O.C.C. v. A.C.,

2013 BCSC 682

Date: 20130419

Docket: E42726

Registry: New Westminster

Between:

O.C.C.

Claimant

And

A.C.

Respondent

Before: The Honourable Mr. Justice N. Brown

On judicial review from: Provincial Court of British Columbia, March 20, 2012

([O.C.C.] v. [A.C.], Vancouver Docket 07-20753)

Reasons for Judgment

Counsel for Claimant:

Y.S. Leibovitz

Counsel for Respondent:

B. Brandon

Place and Date of Trial/Hearing:

New Westminster, B.C.

January 7, 2013

Place and Date of Judgment:

New Westminster, B.C.

April 19, 2013

A. Background:

- [1] This matter arises from a Provincial Court family case. The parties are spouses. The husband, O.C.C., is the petitioner ("petitioner"). He is applying for an order setting aside a March 20, 2012 decision of Hon. Judge Meyers ('the Judge') in which he made interim orders for child support and extraordinary expenses, to have retroactive effect. The petitioner also seeks a declaration that Judge Meyers conducted the hearing in a way that justifies a finding of a 'reasonable apprehension of bias'. Accordingly, he seeks an order that Judge Meyers recuse himself from any further hearings involving the parties. Lastly, the petitioner seeks an order for a rehearing on the matters of child support and extraordinary expenses.
- [2] Pursuant to s. 16(2) of the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA") [now s. 233(1) of the Family Law Act, S.B.C. 2011, c. 25 ("FLA")], an interim order made in Provincial Court cannot be appealed. This Court has jurisdiction to consider the matter as a judicial review of a "decision", as stated in s. 3 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241.
- [3] The petitioner is the biological father of the youngest child of the marriage, age 9; and stepfather of the oldest child, age 19. The mother of both children is, A.C., is the respondent ("respondent").
- [4] Before the March 20, 2012 hearing, the parties had appeared before Judge Galati in Provincial Court. In November 2008, Judge Galati pronounced orders for interim child support and special expenses, payable to the mother. Income of \$38,800 was imputed to the father and he was ordered to pay \$580 monthly child support for both children, plus extraordinary expenses of \$550 for the youngest child. Monthly support payable, therefore, totalled \$1,130.
- [5] Although not set out in the materials, from what counsel advised the Court, I understand that still other hearings had occurred before the November 2008 hearing before Judge Galati. On May 16, 2008, Judge Philips pronounced an interim consent order. There was at least one other hearing, in which some downward adjustments were made to the amount of the petitioner's child support obligations. The details of this hearing are vague; but it is clear,

at least, that before the March 20, 2012 hearing before the Judge, a final order had already been made on custody, guardianship and access. As well, prior to March 20, 2012, a "hearing review date" had been set for January 2, 2013, which eventually did occur.

- [6] Interim variations in the financial arrangements stemmed from the fact that the petitioner, who for a living drove a vehicle to deliver parcels, had lost his driver's licence, significantly lessening his income. Otherwise, the parties' incomes were comparable.
- [7] The petitioner appeared before Judge Meyers on March 20, 2012, to vary and reduce child support for both children, retroactive to January 1, 2007 and the final orders the Court had made for custody, guardianship and access. The orders sought were:
1. Mutual disclosure of income tax returns on or before May 1 of each year, commencing May 1, 2011.
 2. Retroactive variation in reduction in child support and section 7 contributions in accordance with the Federal Child Support Guidelines, SOR/97-175 ("Guidelines"), retroactive to January 1, 2007.
 3. Reduction of the oldest child's support to the sum of \$1 monthly retroactive to January 1, 2007 and that the mother not pursue any change in that child's support until she first obtains the maintenance order against the biological father.
 4. An order for joint custody and joint guardianship of the younger child with reasonable and general access to her to include, but not be limited to alternate weekend access from Fridays at 6 p.m. until Sunday at 6 p.m.; and specified access during Christmas holidays and summer holidays.
- [8] The respondent filed a response to the petitioner's application that included additional matters she wanted the Court to deal with:

§ disclosure of financial records;

§ an annual updating of child support based on the Guidelines;

§ an order that the petitioner contribute an appropriate share towards special costs she had incurred for the youngest child's testing for autism; and

§ a contribution towards the youngest child's school and day care expenses.

[9] Judge Meyer's order was brief:

UPON THIS MATTER coming on for hearing this day; AND UPON HEARING the Applicant, [Ms. A.C.], appearing in person; AND the Respondent [Mr. O.C.C.], appearing in person; AND UPON hearing the submissions made;

THIS COURT ORDERS THAT the Respondent, [Mr. O.C.C.], is to pay retroactive child support payments for the two children, [C.], born, [D.O.B.] 1993 and [K.], born, [D.O.B.] 2003, from June 1 2011 in the amount of \$486.00 per month plus \$600.00 special expenses for the child, [K.] only, for a total of \$1,086.00 per month continuing until March 1, 2012;

THIS COURT FURTHER ORDERS THAT from March 1, 2012 to September 1, 2012, the child support payments for the two children shall be \$486.00 per month plus \$200.00 special expenses for the child, [K.] only, for a total of \$686.00 per month;

THIS COURT FURTHER ORDERS THAT the Respondent, is to pay increased child support for the said children starting September 1, 2012, in the amount of \$1,053.00 per month plus \$1200.00 special expenses for the child, [K.] only, for a total of \$2,253.00 per month are to continue to be in place until the hearing review date;

THIS COURT FURTHER ORDERS THAT the arrears of maintenance, is hereby suspended until the hearing review date;

THIS COURT FURTHER ORDERS THAT the special expenses requested for the child [C.] is hereby suspended until the hearing review date;

THIS COURT FURTHER ORDERS THAT the within matter is adjourned to the Judicial Case Manager to set a hearing review date.

[10] When I heard this Petition, the parties had appeared, again, before Judge Meyer on January 2, 2013, a date, which I understand, had been scheduled as a review date sometime before the March 20, 2012 hearing.

[11] The petitioner requested an adjournment, producing a letter from counsel explaining he could not attend that day and advising the Judge of this pending hearing of the Petition.

[12] On February 28, 2013, counsel for the petitioner, responding to a query at this judicial review hearing, sent a letter summarizing what had occurred at the January 2, 2013 hearing. He enclosed with the letter a copy of a final retroactive order apparently varying the interim order pronounced after the March 20, 2012 hearing. Counsel stated in the letter that the respondent had not applied was not applying for.

[13] While I appreciate counsel making an effort to respond to the query, I cannot comment on the nature of the January 2, 2013 hearing, or its result. Although counsel for the petitioner urged me to dispose of both the March 20, 2012 hearing and January 2, 2013 hearing, the latter is not jurisdictionally before the Court on this judicial review. I have no jurisdiction to consider or quash it. I understand the petitioner has complaints related to Judge Meyer's refusal to grant an adjournment of the January 2, 2013 hearing to a date his counsel could be present and for after completion of this present hearing. But the only matter now before the Court is the conduct of the March 2012 hearing.

[14] Given the apparent final order made after the January 2, 2013. The outcome of this judicial review may, or may not have consequences for the efficacy of the January 2, 2013 order.

B. Position of the Parties:

1. Petitioner

[15] In his supporting affidavit, the petitioner complains that at no time during the hearing did he have an opportunity to give sworn or affirmed evidence. He states the "entire process was by way of submissions."

[16] In paras. 6 and 7 of his December 5, 2012 affidavit he deposes:

6. When I attended Court on March 20, 2012, I was prepared to provide evidence in connection with my position on child support and my contributions toward Section 7 expenses by way of giving evidence and cross-examination of the Respondent.

7. However, when I attended Court something altogether different transpired. The Judge started asking questions of the Respondent and I. My impression was that the Judge was listening more to the Respondent than I. Moreover, the Judge even gave me guidance on legal principles.

[17] The petitioner then goes on to describe how the Judge described the nature of his child support obligation he owed to his 19-year-old stepson. The petitioner's counsel characterizes the description as clearly wrong. I agree with counsel that it was at best incomplete.

[18] In para. 8, the petitioner further deposes that there was "no evidence nor an opportunity for me to cross-examine the Respondent in connection with her submissions for what she claimed were extraordinary expenses." He then mentions some matters on which he had wanted to cross-examine the respondent.

[19] In paras. 10 and 12, the petitioner further deposes:

10. Despite my current gross monthly income for guideline purposes of \$4,553.21, which translates to a net monthly income of \$3,731.99, Judge Meyers Ordered me to pay the sum of \$2,253 per month leaving me the net amount of \$1,478.99 per month. This amount is insufficient to cover my very basic expenses. Given this was done without evidence or an opportunity for me to cross-examine the Respondent, I have to conclude that Judge Meyers did so having a bias against me.

...

12. Prior to my appearance before Judge Meyers on March 20, 2012, I was not in arrears and had been paying my monthly maintenance on time. In 2011 my total income was \$30,907 (without any deduction for union dues). The Order of Judge Meyers automatically put me into arrears by the approximate amount of \$8,000. I was not in arrears prior to this.

[20] The petitioner has resiled from his early position that the Judge demonstrated "actual bias".

- [21] The petitioner further alleges what could be best characterized as a lack of due judicial process during the March 20, 2012 hearing. The petitioner submits this is shown by the Judge's failure to swear both parties, or to give the petitioner an opportunity to testify and to cross-examine the respondent after she first had been sworn or affirmed to tell the truth.
- [22] Counsel for the petitioner submits that the transcript reveals the Judge effectively treated the hearing as a kind of settlement conference combined with negotiations. He further submits the transcript shows the Judge failed to deal with the matters the petitioner had raised in his application, which had led to the hearing in the first place; and that because the Judge heard no sworn or affirmed evidence, he had no judicable basis upon which to vary or make any further orders.
- [23] The petitioner also criticizes the way the Judge dealt with the various receipts for special expenses relating to the younger child that the respondent said she had incurred. These receipts purportedly related to the younger child's special needs for treatment of her autism. These included items such as vitamins; a gluten-free diet; magazines; and dog expenses. I understand the dog expenses related to recommendations made by one of the child's treatment coordinators.
- [24] At the hearing, the respondent had not yet produced receipts for the expenses, as evident from statements made at page 20 of the proceedings at line 32.
- [25] A somewhat lengthy exchange between the Judge and respondent about the nature and extent of the child's autism condition then followed, concluding at page 25, line 37 where the Judge said to the petitioner:

All right. Let me go over to you, Mr. [O.C.C.]. You've seen now probably for the first time some of the expenses that [K.] is having for this various therapies and treatment for autism and epilepsy and your reaction to that? It's a lot of money every month obviously. What you do you say about that? That's what Mom is saying you should - -.

- [26] The petitioner then explains to the Judge his willingness to pay \$1,200 in total support and his inability to pay any more than that.
- [27] On page 28 of the transcript, at line 35, the Judge comments that the expenses total \$2,400 monthly. He notes that when the petitioner is earning his usual amount, the parties' incomes are roughly par, then comments, that since that is not the case, the petitioner ends up paying about a quarter of the expenses at \$600 monthly.
- [28] Later in the hearing, discussions occur about the hardship the respondent said she encounters trying to meet the child's special needs. The petitioner submits the transcript shows the Judge treated the hearing as a negotiating session that he was overseeing (see page 36, line 46 to page 37, line 36).

- [29] The petitioner says the Judge's refusal to grant him an adjournment on January 2, 2013, the date previously set for review of previous interim orders, makes the case for a finding of apprehension of bias even more compelling. I note here, again, that this Court does not have jurisdiction to consider the January 2, 2013 hearing by way of a judicial review hearing.
- [30] Grounds for a reasonable apprehension of bias were further compounded, he submits, by the Judge's criticism during the March 20, 2012 hearing about the accuracy of the legal advice the petitioner had received from his lawyer regarding the nature of his support obligation to the older child.

2. Respondent

- [31] Counsel for the respondent, addressing the fact the Judge did not did not have the parties sworn or affirmed, drew attention to Rule 20(2)(c) of the Provincial Court (Family) Rules, B.C. Reg. 417/98, O.C. 1444/98 ("PCFR") and *Lukyn v. Baynes*, 2008 BCSC 8 [Lukyn]. Counsel submits Lukyn is relevant to the present petition, both on the issue of bias; and on the admissibility of unsworn evidence in a family case hearing in Provincial Court.
- [32] The respondent also submits that although judicial review of an interim order was not procedurally improper, it was impractical. Counsel submits the petitioner should have scheduled this petition before the January 2, 2013 hearing. Alternatively, the petitioner ought to have waited on the final order and then decide on whether to appeal that prospective order.
- [33] In so far as costs and practicality is concerned, there is merit in this position.

C. Standard of Review:

- [34] Counsel made no submissions on the appropriate standard of review.
- [35] In *Panares v. Bieker*, 2003 BCSC 1312, the petitioner sought an order setting aside the decision of a Provincial Court judge granting interim custody of a child; in the alternative, that the judge reconsider his decision. At para. 9, Williams J. viewed the matter before him as "essentially in the order of appellate review" and proceeded to discuss the appropriate standard of review for an appellate court in custody cases.
- [36] This judicial review is not analogous to an appeal of retroactive support. The issues relate to procedural defects that may constitute a denial of due process and an apprehension of bias a denial of natural justice. Not swearing or affirming the parties raises the question of jurisdiction. I find the standard of review is correctness, as these issues are questions of law: see *Housen v. Nikolaisen*, 2002 SCC 33.

D. Analysis:

- [37] The underlying circumstances animating the petitioner's application to vary the existing interim orders stemmed from the decline in his income due to his previous loss of his driving privileges.

[38] As for custody and guardianship, as mentioned, these had been the subject of final orders, leaving only the financial matters appropriately before Judge Meyers on March 20, 2012.

[39] The various statements in the PCFR are somewhat indefinite as to whether a judge on a hearing can accept unsworn statements by the parties as a form of proof. The PCFR contemplate different types of hearing processes:

1. Rule 5(4) governs meetings with a family justice counsellor, which, unless a judge finds that urgent and exceptional circumstances exist as per Rule 5(8)(b), is a mandatory step before they can appear before a judge.
2. Rule 6(3) sets out what a judge may do in first and subsequent hearings.
3. Rule 7 governs family case conferences.
4. Rule 8 governs trial preparation conferences.

E. Necessity of Sworn Testimony:

[40] Rule 20(2)(c) states that a judge may at any time "permit any other means of proof instead of that required by these rules".

Rule 20 - General

Judge may adjourn trial or hearing

- (1) Whether or not the parties consent, a judge may adjourn a trial or hearing to a specific date or without setting a date.

Judge may waive or vary rules

- (2) A judge may, at any time,
 - (a) waive or modify a time limit set by these rules or by an order of the court, even after the time limit has expired,
 - (b) waive or modify any service, delivery or notice requirement under these rules, and
 - (c) permit any other means of proof instead of that required by these rules.

[Emphasis added.]

[41] In Lukyn, Justice A.F. Wilson considered an appeal of a decision made by a Provincial Court judge following three days of hearing. One of the grounds alleged a demonstrated bias, real or apprehended, based on the judge having (a) ordered access, on her own motion, after the applicant's case was heard, but before the parents' evidence was heard and (b) identifying herself as a grandparent in the Court in the midst of her questioning of a witness. The appellant in Lukyn also asserted that the judge lacked statutory jurisdiction to make the interim order.

[42] Justice Wilson referred to Rule 6(3)(iii) of the PCFR, which granted a judge jurisdiction to make an interim order under s. 9 of the FRA if the circumstances justify making a final order. At para. 53 Wilson J. states:

[53] Interim orders are routinely made during the course of trial, which, by their very nature, are made before the hearing of all evidence and the submissions of counsel. That is particularly so when the hearing of the matter takes longer than anticipated, and there is thus a delay in the determination of the matter. In doing so, a judge may make some preliminary determination of matters relating to an application, in particular whether the application appears to have any merit at all, or to be totally unfounded. Making such a determination does not indicate a bias on the part of the judge.

[43] Rule 6(3) provides options for the judge at the first or any subsequent appearance:

Options for the judge

- (3) The judge at the first appearance or any subsequent appearance may do one or more of the following:
- (a) make an order that all parties consent to in respect of all or any part of what is claimed in the application or reply;
 - (b) make an interim order under section 9 of the Family Relations Act;
 - (c) if a party has failed to provide financial information in accordance with rule 4,
 - (i) make an order requiring the party to file that financial information with the registry within a set time,
 - (ii) draw an adverse inference from that failure and impute an amount of income to that party that the judge considers appropriate,
 - (iii) make an interim order under section 9 of the Family Relations Act, and
 - (iv) if the judge considers that the circumstances justify it, make a final order;
 - (d) adjourn the case for a specified period of time that the judge considers appropriate;
 - (e)
 - (f) set a date for a family case conference under rule 7;
 - (g) set a date for a trial preparation conference under rule 8;
 - (h) if the judge does not set a date for a family case conference or for a trial preparation conference, set a trial date for the matter or set a date for a trial that is restricted to issues defined by the parties;
 - (i) with consent of the parties, refer the matter to private mediation;

- (j) hear evidence and make an interim or final order for spousal or parental maintenance or for child custody, access, guardianship or maintenance;
- (k) make any other order or give any direction that the judge considers appropriate.

[Emphasis added.]

[44] Counsel for the respondent submits that Justice Wilson's remarks confirm a judge can make interim rulings without having heard evidence. I note in *Lukyn*, however, that the trial judge had heard sworn testimony before she made her interim order granting one of the parties' interim access. The appellant directed their criticism at her having made an interim order without having heard all the evidence. In the present case, however, I understand neither of the parties swore or affirmed to tell the truth during the hearing; so that when Judge Meyers made his interim orders, neither party had given sworn testimony during the hearing.

[45] Counsel for the respondent also pointed to Rule 13(3).

Rule 13 - Affidavits

What form to use

- (1) Unless a rule provides otherwise or a judge orders otherwise, an affidavit must be in Form 17.

Exhibits

- (2) Any exhibits referred to in an affidavit must be identified and attached to the affidavit.

Affidavit evidence at trial or hearing

- (3) Subject to the requirements of subrule (4), evidence may be given by affidavit at a trial or hearing only if permission is granted by a judge, either on application brought by notice of motion under rule 12 or under rule 8(4)(g).

Affidavit must be filed and served

- (4) Evidence may not be given by affidavit at a trial or hearing unless
 - (a) the affidavit and 3 copies of it are filed with the registry, and
 - (b) a filed copy of the affidavit is delivered to each party at least 7 days before the date of the trial or hearing or such other period as the court may order under rule 20(2).

Permission to use defective affidavit

- (5) With permission of the judge presiding at the trial or hearing, an affidavit may be used in evidence even though it does not comply in form with this rule.

[46] Rule 13(3) states that evidence may be given by affidavit at a trial or hearing only if permission is granted by a judge, either on application brought by notice of motion under Rule 12, or under Rule 8(4)(g).

[47] Rule 13(3)'s clear restriction is modified by the mandatory language of Rule 12(3), which states evidence may be given in support of a motion (a) orally on oath or affirmation, or (b) by affidavit, but then goes on elliptically to refer the reader back to Rule 13.

Rule 12 - Applying By Notice Of Motion For Orders Or Directions

Applications to be made by notice of motion

- (1) If a person seeks an order or direction from a judge, the person must
 - (a) file with the registry the original and 3 copies of
 - (i) a notice of motion in Form 16, and
 - (ii) any documents in support of the motion, and
 - (b) at least 7 days before the date set for the hearing of the motion, serve a filed copy of the documents described in paragraph (a)
 - (i) on each party, and
 - (ii) if the order sought relates to the production of a record in the possession or control of a person who is not a party, on that person.

When service of the notice is not required

- (2) Subrule (1)(b) does not apply if
 - (a) the motion is for permission to use a different method of service or notice under rule 9(7), or
 - (b) a judge orders otherwise.

Affidavit evidence may be used to support motion

- (3) Evidence may be given in support of a motion
 - (a) orally on oath or affirmation, or
 - (b) by affidavit [see rule 13].

[Emphasis added.]

[48] I note that Rule 6(3)(j) forms part of a section dealing with first and subsequent appearances, and which also provides a judge the option to "hear evidence" and make an interim or final order for spousal or parental maintenance or for child custody, access, guardianship or maintenance.

- [49] As I interpret the PCFR, sworn oral testimony is the expected norm, both for hearings before a judge and for trials. Affidavits are permissible, but their use requires a judge's permission. And, although Rule 20(2)(c) gives a judge authority to permit any other form of proof other than that permitted by the PCFR, in the case of statements made by parties or witnesses during a hearing of an application or a trial, oral testimony, sworn or affirmed is the expected norm. Of course, sometimes, such as during initial or subsequent hearings, when parties appear briefly before the judge, or when the judge needs to gain a preliminary general understanding of matters, or needs to confirm certain matters for the record, statements made by counsel or unsworn statements by the parties can be considered. Judges generally sense when the nature and extent of unsworn statements being made at a hearing have crossed over the line that makes it clear parties' statements must be sworn or affirmed.
- [50] In my view, the statements made by parties at a hearing upon which the judge intends to render a decision should be ones the truthfulness of which the parties have sworn or solemnly affirmed are true. In my view, Rule 20(2)(c) does not allow a departure from this expectation, except in such limited circumstances as those mentioned above.
- [51] This conclusion is fortified by *Amanat v. Markazi*, 2011 BCSC 249. The major issue on an appeal from the Provincial Court was whether the parties had legally consented to an application within the requirements of s. 10 of the FRA. Section 10(1) permitted the Court to make an order without a hearing provided the person against whom the order was made had given written consent to it. This required the appeal judge to consider whether a hearing had taken place, which she considered entailed the giving of evidence. Justice Dillon refers at para. 21 of *Amanat* to *Foley v. Kurulak*, [1997] 1 W.W.R. 558 (S.C.) at para. 36:
- [36] In the submission of counsel, that section would allow a judge of the Provincial Court to make an order in the absence of any evidence. I reject that proposition. In my view, the words, "giving evidence", refer to the giving of oral testimony. Those words do not mean that court orders can be made in the absence of any evidence whatsoever, especially when custody and guardianship are at issue. In the ordinary course, one would expect evidence to be tendered in affidavit form.
- [52] I note as well the comments of Justice Martinson in *Earle v. Earle*, 1999 BCSC 283. Although Justice Martinson was commenting in *Earle* on the quality of evidence that a payor spouse seeking a reduction or cancellation in arrears in Supreme Court is expected to produce, her statement that a decision on a payor's application to cancel or reduce arrears requires sworn evidence that is reliable, accurate and complete is somewhat relatable to the issues raised here. At paras. 28-30, Martinson J. said:
- [28] The requirement that the information be under oath is an important one. A decision to cancel or reduce arrears can only be made on reliable, accurate and complete information. The Rules of the Supreme Court say that this can only be made based on sworn evidence unless a judge says otherwise. No judge will allow evidence that is not reliable and accurate.

- [29] If there is no such sworn evidence, it is as if the judge has no evidence at all on which to base a reduction or a cancellation of arrears.
- [30] Evidence cannot be hearsay either.
- [53] I fully realize that a judge hearing interim applications often has limited time to canvass facts, particularly when parties are unrepresented. In those circumstances, adopting an inquisitorial, issue by issue, procedure, with the judge asking most of the questions, or at least directing the areas of inquiry issue by issue, may be more workable than an adversarial process.
- [54] But irrespective of the procedure adopted, in any hearing that will see judicable matters decided, the parties and any witnesses called at an oral hearing must be sworn or affirmed. And whatever the procedure used, the parties' rights of cross-examination at an oral hearing should be reasonably accommodated - to the extent the nature of the hearing, the matters at issue, available time, the surrounding circumstances and all the practicalities proportionately call for. Ultimately, it is always a case of the hearing judge managing this so far as the circumstances allow. In my view, this comment says nothing new or departs from existing principle and practice.
- [55] The inquisitorial style of hearing process the Judge adopted was not inherently deficient, but the parties should have been sworn or affirmed. I note that the petitioner did not ask the Judge for an opportunity to cross-examine the respondent, but the Judge neglected to ensure his particular concerns regarding the nature and extent of the special expenses were canvassed with the respondent. This could have been achieved by asking her about those under oath, and giving the petitioner opportunity to cross-examine the respondent, or at least ensure the respondent addressed his major concerns under oath. In stating this, I appreciate that a certain element of procedural informality, especially with unrepresented litigants, is often necessary, even desirable, and that the new FLA explicitly calls for as much procedural informality as possible.

F. Reasonable Apprehension of Bias:

- [56] As for the petitioner's claim that the Judge's conduct of the hearing gives rise to a reasonable apprehension of bias, the test the petitioner must satisfy is set out in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 ["Wewaykum"] as cited at para. 37 of Lukyn:
- [57] Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.
- [58] The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as

a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case. (R. v. Bertram, [1989] O.J. No. 2123 (QL) (H.C.), quoted by Cory J. in R. v. S.(R.D.), [1997] 3 S.C.R. 484, at paragraph. 106.)

[57] In the case of a judge, their impartiality is presumed and carries considerable weight, and "the law should not carelessly evoke the possibility of bias in a judge, whose authority depends on the presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding the judge must be qualified": Wewaykum at para. 59.

[58] At para. 60 of Wewaykum, the Supreme Court confirmed the criterion for disqualification:

[60] ... The criterion, as expressed by De Granpré J. in Committee for Justice and Liberty v. National Energy Board, supra, at p. 394, is the reasonable apprehension of bias:

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. In the words of the Court of Appeal, that 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."

[59] On the distinction between actual versus apprehended bias, the Court noted at para. 66:

[66] Finally, when parties concede that there was no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. In the present case, as is most common, parties have relied on Lord Hewart C.J.'s aphorism that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (The King v. Sussex Justices, Ex parte McCarthy, [1924] 1 K.B. 256, at p.259). To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in Gough, supra, at p. 659, "there is an overriding public interest that there should be confidence in the integrity of the administration of justice".

[Emphasis in original.]

[60] The principles that Justice Wilson recounts at para. 38 of Lukyn are worth noting again here:

[74] The question, once more, is as follows: What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude? Would this person think that it is more likely than not that Binnie J., whether consciously or unconsciously, did not decide fairly?

...

[76] First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

The grounds for this apprehension must, however, be substantial, and I refuse to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". (Committee for Justice and Liberty v. National Energy Board, *supra*, at p. 395)

[77] Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd. v. Auckland City Council* (Judgment No.1), [2002] 3 N.Z.L.R. 577, [2002] UKPC 28, at par 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance."

[Emphasis added.]

[61] In the present case, I cannot find that any of the alleged indicia of judicial bias identified by the petitioner meet the test. The fact the Judge failed to swear or affirm the parties before hearing their evidence may establish a basis for establishing an error of law or a lack of jurisdiction to make any orders, or a denial of due process; but it does not establish a reasonable apprehension of bias.

[62] Neither does the fact the Judge employed an inquisitorial style of hearing process and spent more time questioning the respondent than the petitioner establish a reasonable apprehension of bias. A judge may require more information from one party than the other.

[63] The Judge's apparent mischaracterization of the law on a stepparent's obligation to support a former child of the marriage was not a statement of principle upon which the judge had made findings. Therefore, it is not a reversible error. Neither does it give rise to a reasonable apprehension of bias, considering all the circumstances. Further, the Judge deferred his decision on the petitioner's support obligation to his stepson to the January 2, 2013 review date. Unless the record shows, either directly or inferentially, that the Judge applied the errantly characterized principle, there is nothing upon which to find a reversible error or give rise to a reasonable apprehension of bias.

[64] As for the judge depriving the petitioner's of a chance to testify on various special expenses the respondent said she had incurred to treat the child's autism, here, the troubling point is that the petitioner never received the receipts beforehand. The Judge asked the respondent about them, but the petitioner was entitled to cross-examine the respondent on them, or at

least have his major concerns put to the respondent by the Judge. Unfortunately, the petitioner did not advise the Judge that he wished to cross-examine the respondent. But, as regards prior service of documents, I note the petitioner did not attend with clean hands: he had not yet delivered outstanding financial information to the respondent. Lack of current employment information made the Judge's task more difficult.

[65] I note in passing that the petitioner was applying in part for variation of interim orders. In *Newson v. Newson* (1998), 43 R.F.L. (4th) 221 (B.C.C.A.) the Court of Appeal made these pertinent comments at para. 11:

[11] The principle to be followed on an interlocutory application for relief pending trial was well expressed by Mr. Justice Wright of the Ontario Supreme Court, then sitting as a local judge, in *B.(R.) v. B.(M.)* (1989), 19 R.F.L. (3d) 92 (Ont. H.C.) at 98:

...

... Interim proceedings are not geared for the final determination of issues. Interim proceedings are summary in their nature and provide a rough justice at best. Interim proceedings cannot be bogged down and traditionally have never been bogged down with the merits of the case. ...

I see nothing different in the situation before me today. The merits of the case are not to be thrashed out on interim proceedings. The courts have not the time nor the facilities to render justice at that stage of the proceedings on matters of substance. Issues such as "causal connection" are too important to be allowed to be determined on what are otherwise interim proceedings. They are factual in nature and normally would call for a trial of the issue. ...

Such issues must be determined only after all of the facts have been laid before the trial tribunal and any attempt to short circuit the system by having these issues thrashed out on interlocutory proceedings can only serve to work an injustice in the long run.

G. Disposition:

[66] For all the reasons discussed, I find no reasonable apprehension of bias arising from the Judge's conduct of the hearing.

[67] I conclude, however, that the Judge erred in neglecting to swear or affirm the parties at the hearing. He had no evidence before him upon which to make findings of fact or make orders. He also ought to have given the petitioner opportunity to testify about his concerns on the respondent's additional claims for special expenses; and, depending on the nature of his concerns regarding the respondent's receipts and other matters, to cross-examine the respondent.

[68] The interim orders made on March 20, 2012 are set aside.

[69] The procedural flaws that occurred on March 20, 2012 do not give rise to a reasonable apprehension of bias.

- [70] The parties can ill-afford further litigation. In my view, the most practicable course open to the parties is to seek a narrow reconsideration of those specific matters that still concern the petitioner; alternatively, to engage in mediation. That is but an observation, though I note the parties are represented by experienced counsel, which fortifies the wisdom of their taking that path.
- [71] Otherwise, the petitioner will have to appeal the January 2, 2013 final orders. What part the findings made here might have on such an appeal is not for me to say.
- [72] Each party shall bear their own costs.
- "N. Brown J."

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