

CANADA / JUDGMENT

Willms v. Willms

2020 BCCA 51

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 51 Willms v. Willms

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Willms v. Willms,

2020 BCCA 51

Date: 20200207

Docket: CA45843

Between:

Patricia Eileen Willms

Respondent

(Claimant)

And

Arnold Willms

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

December 14, 2018 (Willms v. Willms, 2018 BCSC 2231, New Westminster Docket E033084).

Counsel for the Appellant:

B.D Hastings

A. Oberoi

Counsel for the Respondent:

J. Dreyer

Place and Date of Hearing:

Vancouver, British Columbia

December 9, 2019

Place and Date of Judgment:

Vancouver, British Columbia

February 7, 2020

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Butler

Summary:

This is an appeal from an order made pursuant to s. 17(1) of the Divorce Act increasing the appellant's spousal support obligations retroactive to the 19th birthday of the youngest child of the marriage, on the basis the cessation of child support obligations constituted a material change in circumstances. The judge, in dismissing the appellant's cross application for a reduction in spousal support, declined to impute income to the respondent and found the appropriate quantum should remain in the mid-range of the SSAG. Held: Appeal allowed in part. The judge erred in making the award retroactive, as the evidence did not provide a sufficient basis to depart from the general rule of the date of effective notice. It was open to the judge to find the evidence did not establish the respondent was underemployed for the purpose of imputing income. Although it was appropriate to continue the support order in the mid-range, the judge made a calculation error under the SSAG and the quantum is varied accordingly. Finally, there is no basis to give effect to the appellant's submission that there was a reasonable apprehension of bias.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] On March 7, 2018 the respondent, Patricia Willms, applied for an order pursuant to s. 17(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), increasing the spousal support obligation of the appellant, Arnold Willms, on a retroactive basis to August 5, 2016, the date the youngest child of the parties' marriage reached the age of 19 years. She contended spousal support had been calculated on the basis she was also receiving child support and, that no longer being the case, there had been a material change in circumstances calling for a re-assessment of the appropriate level of spousal support.
- [2] In response, Mr. Willms argued the children's adulthood was contemplated at the time the original order was made on June 9, 2010. Further, he argued, the parties had agreed periodically to adjust his child support obligations as a compromise of claims and that the compromise reflected changes in the parties' circumstances and should preclude a retroactive variation of spousal support.
- [3] In response to the motion (but not at the hearing), Mr. Willms took the position the matter was too complex to be dealt with on an application to vary support without the benefit of examinations for discovery and other pretrial procedures because there had been inadequate disclosure for the court to adjudicate the application on its merits.
- [4] Mr. Willms brought on his own application, for an order reducing his spousal support obligations, arguing Ms. Willms was underemployed and additional income should be imputed to her.
- [5] The competing applications came on for hearing on September 7, 2018. For reasons indexed as 2018 BCSC 2231, the appellant's application to impute income to the respondent and to reduce his spousal support obligation was dismissed. In giving effect to the respondent's application, the judge ordered the appellant's spousal support obligation be increased to an amount in the mid-range described by the "without child support formula" of the Spousal Support Advisory Guidelines (SSAG), retroactively to August 1, 2016 and thereafter for an indefinite period.
- [6] Mr. Willms appeals the variance of his spousal support obligations and the dismissal of his application for a reduction.

Background

- [7] Ms. Willms is 51 years old; Mr. Willms is 58. They began cohabiting in 1988 and were married in July 1991. They have two children, one born on September 20, 1995 and the other on August 5, 1997.
- [8] The parties separated in May 2009 but continued to jointly occupy the matrimonial home until February 2010. Meanwhile, divorce proceedings had been commenced in June 2009.

- [9] Those proceedings resulted in an order made by Mr. Justice Truscott on June 9, 2010 for reasons indexed as 2010 BCSC 803. By consent, the parties agreed to share joint custody and joint guardianship of their children, who were to live primarily with Ms. Willms.
- [10] Mr. Willms' Guideline income for child support purposes, earned as a branch manager for a company where he had been employed for 23 years, was set at \$139,000 per year. His child support obligation for the two children was accordingly set at \$1,927 per month and was payable until the children were no longer children of the marriage or until further adjustment.
- [11] Ms. Willms was found to have Guideline income for spousal support purposes, which she earned as a receptionist, of \$31,200 per year. Mr. Willms' spousal support obligations, assessed using the "with child support" formula in the SSAG, was set at \$2,100 per month. Orders were made with respect to s. 7 expenses and insurance. The family assets were divided.
- [12] The order provided the parties would exchange copies of their income tax returns annually "for the purposes of adjusting [the appellant's] child maintenance obligation on June 1 of each year according to the income shown on [the appellant's] income tax return and notice of assessment, BY CONSENT". The order further provided the spousal maintenance payment would be made monthly "for an indefinite period of time subject to variation on their being a material change in circumstances".
- [13] In the years following the divorce, Ms. Willms quit her job and trained to become a nursing unit assistant through the University of the Fraser Valley. She had financial difficulty and, at some point, a decision was made that her eldest child would move from her home and live primarily with Mr. Willms.
- [14] It was Mr. Willms' evidence the eldest child of the marriage was living with him most of the time beginning in the fall of 2012. He says in or around July 2012, he agreed with Ms. Willms that he would reduce the monthly child support he paid to her directly so he could give money directly to the children. Child support was reduced to \$1,661 per month and each of the children received \$150 per month directly.
- [15] In July 2013, child support was adjusted to \$1,751 to reflect Mr. Willms' increased income, despite the fact the eldest child was primarily living with him.
- [16] In June 2014, the parties again agreed to vary child support. From that point forward, Mr. Willms was to pay \$1,000 per month for the support of youngest child only. That agreement was confirmed in writing.
- [17] The youngest child moved out of the respondent's home in September 2014 to live in Hope, B.C. From this point, until April 2015, Ms. Willms used the \$1,000 per month she received to pay for the youngest child's expenses while she was living away.

- [18] Ms. Willms says in an effort to assist her youngest child she paid her \$350 per month while she lived on her own, but stopped doing so when she turned 19.
- [19] The appellant ceased paying any child support, by agreement, in April 2015, when the youngest child started to live with him full-time.
- [20] The judge found the respondent had earned \$48,379.67 in 2017, working on a permanent part-time basis but supplementing her regular income by working premium shifts on weekends and nights and overtime hours.
- [21] The appellant's income had varied between approximately \$163,000 and \$188,000 from 2015 to 2017.

Judgment below

- [22] After considering the judgments in *Wooldridge v. Wooldridge*, 1999 ABCA 124; *McIntosh v. McIntosh*, 2007 BCSC 1331; and *Goodkey v. Goodkey*, 2015 ABCA 394, the judge concluded the end of the child support obligation was a material change of circumstances. He relied, in particular, upon the view expressed by Chamberlist J. in *McIntosh* at para. 58:
- [58] The Divorce Act clearly gives priority to child support and indicates in s. 15.3 that, if spousal support is less than it would otherwise had been as a result of the child support, then when the child support terminates, it is a change of circumstances which allows for a variation in the spousal support order.
- [23] He rejected the submission that additional income should be imputed to Ms. Willms, concluding, at para. 33:
- [33] The evidence presented by affidavit is disputed and no finding can be made thereon by a justice sitting in chambers. Further, evidence as presented does not contain a basis in fact to calculate an imputed income in addition to the claimant's present salary, which includes both premium and overtime shift payments. The claim that additional income should be imputed to the claimant is therefore dismissed.
- [24] Relying upon *Wooldridge* at para. 24 (citing *Moge v. Moge*, [1992] 3 S.C.R. 813 at 870), the judge was of the view that a significant disparity in standards of living between individuals who had a 21-year relationship should not exist. Accordingly, he increased spousal support with a view toward improving Ms. Willms' lifestyle "to a standard closer to the standard of the lifestyle of [the appellant]" (para. 35).
- [25] He noted, of the original order, at para. 36:

- [36] The Order did not fix a review date and the spousal support obligation was binding upon the estate of the [appellant]. Entitlement to spousal support was clearly canvassed and determined by Mr. Justice Truscott, who decided that the [respondent] was entitled to support in the mid-range of the table amounts provided by the Spousal Support Advisory Guidelines. This finding provides some guidance in regards to the use of the ranges in this case.
- [26] Taking the material change into effect but not undertaking a "wholesale review" of the circumstances, the judge fixed spousal support at \$3,727 as of August 5, 2016. He described this as the mid-range of the "without child support formula" of the SSAG for parties with incomes of \$163,543 and \$47,382, respectively.

Grounds of Appeal

- [27] The appellant advances arguments under four heads:
- a) he says the judge erred in increasing spousal support retroactively to August 5, 2016 without addressing the basis upon which a retroactive award should be made;
 - b) he says the judge erred in law by dismissing the argument income should be imputed to Ms. Willms when he expressly concluded no finding could be made on the evidence with respect to imputation;
 - c) he says the judge erred in law by failing to consider relevant factors on the application to vary spousal support without addressing the application of the SSAG to post-separation increases in income and by miscalculating the mid-range spousal support amount prescribed by the SSAG;
 - d) he says a reasonable apprehension of bias arises from the cursory manner in which his arguments were addressed by the judge and the dismissive manner in which submissions were addressed.

Analysis

Retroactive Spousal Support

- [28] In *Kerr v. Baranow*, 2011 SCC 10, Cromwell J., for the Court, described the approach that should be taken to applications for retroactive spousal support at paras. 207-212. He noted, at para. 208, while we should consider factors that apply in retroactive child support cases (the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse), "concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support".

- [29] The "application based" regime described in *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175 (C.A.) at para. 24, was recognized in *Kerr v. Baranow*. That regime is founded upon the rule that, in the absence of a reason to order otherwise, the date of effective notice of the application to seek a variation of spousal support should, as a general rule, be the commencement date of the variation. The interests underlying that regime were: giving certainty to the payor's legal obligations; and placing proper incentives on the applicant to proceed with claims promptly.
- [30] In *Reis v. Bucholtz*, 2010 BCCA 115, this Court considered an appeal from an award of retroactive spousal support. The judge had said nothing about the basis for making a retroactive award. Groberman J.A. for the Court, wrote:
- [66] Retroactive orders for child support, while not exceptional, are also not automatic. In *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, 31 R.F.L. (6th) 1, the Supreme Court of Canada discussed the factors that a court must consider in making an award retroactive. While *D.B.S.* dealt specifically with retroactive awards for child support, a similar analysis applies to determine whether an award of spousal support should be made retroactive: *Kerr v. Baranow*, 2009 BCCA 111, [2009] 9 W.W.R. 285, 66 R.F.L. (6th) 1, leave to appeal to S.C.C. granted [2009] S.C.C.A. No. 193.
- [67] While it is not mandatory for a court making a retroactive order to explicitly refer to *D.B.S.* or expressly discuss each of the factors discussed in the case (see *E.R.H. v. B.W.H.*, 2009 BCCA 573, [2009] B.C.J. No. 2505 at para. 38), some discussion of the reasons for a retroactive award is to be expected.
- [Emphasis added]
- [31] In *Reis*, this Court engaged in its own analysis and concluded a retroactive award of spousal support from March 2005, the date upon which the issue of spousal support was first raised by the applicant, was appropriate. Spousal support was first formally sought in pleadings filed in October 2005.
- [32] There was some evidence of blameworthy conduct in *Reis*. The husband had, from the outset, taken the position he had completely fulfilled his obligations. He discouraged the wife from proceeding with an application for support orders, and did not disclose his financial position to her. There was also some evidence before the Court of the wife's hardship, and some evidence suggesting the order made by the judge would not impose hardship on the payor.
- [33] The respondent says we should engage in the same exercise and come to the same conclusion in this case. She submits there was evidence before the judge which could have permitted him to find Ms. Willms had asked Mr. Willms to increase spousal support after their youngest child reached the age of majority, and the appellant had disregarded that request. There was evidence upon which the judge could have concluded the respondent suffered from some hardship. The court could have taken notice of the fact some time would

be necessary to engage counsel and prepare a variation application. There was evidence of the appellant's means, upon which the judge could have concluded the appellant would not suffer undue hardship as a result of having to pay a large retroactive spousal support award.

- [34] In my view, the evidence does not set out a sufficient basis to depart from the general rule. The application for a variation of support was commenced on March 7, 2018. The only evidence of notice to Mr. Willms of Mrs. Willms' intention to seek increased spousal support prior to that date is vague. Ms. Willms deposes, in a March 6, 2018 affidavit, that she had asked the appellant to increase spousal support "now that child support is no longer an issue and the [appellant] will not agree to this". She does not say when the request was made. There is in evidence correspondence between the parties, after the youngest child reached the age of majority, in which the matter of child support is discussed and an agreement is reached to terminate child support, without reference to a claim to spousal support.
- [35] This is not a case where it is evident the husband would have an increased obligation to a spouse after the children reached the age of majority. Not only was there some question with respect to whether that was contemplated when the original order was made, but, further, there is some evidence of a compromise that might have led the appellant to believe the respondent was satisfied with the support payments made prior to the issuance of the notice of the application for a variance (he contends he overpaid for a period).
- [36] In my view, it was an error not to address the basis for making a retroactive order in this case and we should not, on the evidence before us, make such an order. I would therefore allow the appeal, set aside the order for retroactive spousal support, and substitute in its place an order increasing spousal support effective on the date of the application for that variation: March 7, 2018.
- [37] The appellant alleges it was an error to set the retroactive spousal support at an amount that reflected 2018 income when the record indicated that his income varied from year to year. In light of the fact I would order that spousal support be varied from the date of the application, it is not necessary to address this argument.
- [38] The appellant argues, further, that the judge erred in failing to give weight to an agreement entered into between the parties in early 2015 that child support would be terminated and spousal support would continue at the current amount. In support of that argument, the appellant sought to introduce fresh evidence (documentary evidence of the agreement). However, the appellant acknowledged in argument that, while such an agreement might have stood as an obstacle to retroactive variation of the spousal support, it did not stand as an obstacle to the application to vary support brought in March 2018. Accordingly, neither the argument on this point, nor the application to adduce fresh evidence need to be addressed.
- [39] Last under this head, the appellant argues the trial judge erred in not considering the negative tax implications of a large retroactive award for spousal support, despite the fact the issue was not raised in chambers. There was no evidence of the tax consequences before

the judge. In the course of submissions it became clear to us there are ongoing efforts to confirm there are no such implications, because the order made describes the award as one made in respect of periodic payments. Given the question of the tax consequences of a retroactive order was not raised before the judge, and given it is still uncertain whether there will be any tax implications, we cannot conclude the trial judge erred, as alleged. I would not accede to the argument that he did so.

Imputation of income

- [40] The error alleged in relation to the imputation of income arises in this case from the manner in which the judge expressed himself. On one hand, as I have noted above, he said the evidence presented by affidavit was disputed and "no finding can be made thereon by a justice sitting in chambers". On the other hand, he dismissed the appellant's claim that additional income should be imputed to the respondent. It is apparent, however, that the judge concluded the appellant had not discharged the burden of showing income should be imputed to the respondent, rather than finding no conclusion could be reached on the evidence, one way or the other.
- [41] In the course of submissions to the judge, the appellant's counsel acknowledged the leading case in British Columbia on imputation of income, *Marquez v. Zapiola*, 2013 BCCA 433, confirms the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding. He cited propositions drawn from *Marquez*, which are found at paras. 36-38 of the judgment of Madam Justice Smith in that case:
- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.
- [38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65

B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, Moge at 870, Bracklow at para. 36. "Means" has been interpreted to include all capital and other sources of income (Leskun v. Leskun, [2006] 1 S.C.R. 920 at para. 29).

[42] As the judge pointed out, in his exchange with counsel, the evidence was that the respondent routinely added extra shifts and overtime to her regularly-scheduled, part-time work and therefore worked the same number of hours as a full-time employee. Counsel agreed with that suggestion but argued overtime shifts would also be afforded to full-time employees. The judge pointed out that was not established on the evidence before him. He suggested to counsel that the record established how many hours the respondent worked and, unless that number of hours could be regarded as underemployment, a case could not be made out for imputation of additional income. Read in light of this exchange, it is clear the judge concluded there was evidence the respondent was employed full-time and no evidence of underemployment. No finding of underemployment could therefore be made on the record.

[43] I would dismiss this ground of appeal.

[44] While advancing the argument the judge erred in addressing the imputation of income argument on the basis of an inadequate evidentiary record, the appellant noted that in the written response to the motion he had argued the dispute was unsuited to resolution on a summary application and there had been inadequate disclosure. That response, however, was filed in April 2018 and the motion was not heard until September. In the meantime, there had been additional discovery and production of significant documentation of the respondent's income. When the motion came on for hearing, the appellant's counsel did not take the position the evidentiary record was insufficient, the motion could not be heard, or the matter was unsuitable for disposition in a summary manner. In the circumstances it was appropriate for the judge to hear the application, consider the appellant's argument and rule upon whether a case had been made out for imputing income.

Limited review of the evidence on a variation

[45] Under this head, the appellant argues the judge erred by simply continuing mid-range spousal support without considering the circumstances of the parties and determining whether such an award was appropriate on the evidence. However, the appellant acknowledges where a variation must be made as a result of a change in circumstances, the court should limit itself to making only the variation justified by that change: *L.M.P. v. L.S.*, 2011 SCC 64. As Abella and Rothstein JJ., writing for the majority in that case, noted:

[47] If the s. 17 threshold for variation of a spousal support order has been met, a court must determine what variation to the order needs to be made in light of the change in circumstances. The court then takes into account the material change, and should limit itself to making only the variation justified by that change. As Justice L'Heureux-Dubé, concurring in Willick, observed: "A variation under the Act is neither an appeal of the

original order nor a de novo hearing" (p. 739). As earlier stated, as Bastarache and Arbour JJ. said in Miglin, "judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescission, rather than a mere variation of the order" (para. 62).

[46] And, later added, at para. 50:

[50] A court should limit itself to making the variation which is appropriate in light of the change. The task should not be approached as if it were an initial application for support under s. 15.2 of the Divorce Act.

[47] That being the case, a relatively limited reassessment of the appropriate level of support was appropriate in this case. The only material change was the fact spousal support needed to no longer be determined with reference to the "with child support" schedule in the SSAG. The judge was correct to say he ought not to engage in a wholesale analysis of the parties' circumstances.

[48] The appellant says the judge did not consider whether his income and current lifestyle were a result of events that occurred during the relationship. The appellant further argues the trial judge did not consider whether the respondent had made reasonable efforts to obtain self-sufficiency. The appellant submitted in chambers there should be a "step down" of spousal support in light of the fact the parties had been separated for close to ten years and divorced for eight years. He argued the respondent had been afforded a reasonable period of time to become self-sufficient.

[49] In considering those submissions we should bear in mind that the evidence was that the appellant continued to enjoy the benefits of the same employment in which he had engaged during the parties' lengthy marriage. The respondent had taken significant steps to become self-sufficient by retraining and finding new and more lucrative employment, but continued to have limited income earning capacity. The judge observed:

[36] The Order in this case followed a 21-year relationship between the parties. The ability of the wife to work had been seriously restricted by childcare requirements during the marriage while the husband was developing a career which included extensive travel away from the family home. The Order did not fix a review date and, as noted, the spousal support obligation was binding upon the estate of the [appellant]. Entitlement to spousal support was clearly canvassed and determined by Mr. Justice Truscott, who decided that the claimant was entitled to support in the mid-range of the table amounts provided by the Spousal Support Advisory Guidelines. This finding provides some guidance in regards to the use of the ranges in this case.

- [50] The appellant acknowledges: first, it is appropriate to limit re-consideration to factors affected by the change in circumstances; second, it was appropriate to refer to the initial spousal support order as one that provided "some guidance" in regards to the appropriate range of spousal support; and third, the judge could properly consider the relative standards of living of the parties at the time of the application.
- [51] He says, however, inappropriate weight was placed upon these factors. That argument hinges upon the submission that the trial judge ought to have expressly referred to other significant factors in his reasons for judgment, including the passage of time, the efforts made by the respondent to become self-sufficient (more particularly her failure to become self-sufficient) and changes in the parties' incomes over the years. In my view, it was not necessary for the trial judge to do so, and it was sufficient for him to mention those factors that weighed most significantly in his analysis. I would not accede to the argument that the reasons for judgment reflect an erroneous appreciation of the relevant factors that should be considered on an application to vary spousal support.
- [52] Last under this head, the appellant says the trial judge miscalculated the mid-range of spousal support in the SSAG, which ought to have been \$3,473, not \$3,727. The respondent concedes this calculation error was made by the trial judge and consents to the award being varied to reflect the error.
- [53] Aside from giving effect to that variance, I would not accede to this ground of appeal.

Apprehension of bias

- [54] The appellant says a reasonable apprehension of bias arises from a number of facts, taken collectively, which individually might not have given rise to such apprehension. First, the appellant says the trial judge failed to consider the appellant's case, dismissing arguments without careful consideration and without reference to the material. Second, the appellant says the trial judge regularly interrupted appellant's counsel in a manner that was inappropriate. Last, the appellant says the judge discouraged counsel from completing submissions and ended the trial without hearing all submissions.
- [55] In my view, while the reasons for judgment in this case might have more amply addressed the arguments made in chambers, they are sufficient to permit appellate review, particularly in light of the exchanges between counsel and the judge during the course of submissions. The judge can certainly not be faulted for failing to address arguments not made, in particular the argument the case was unsuitable for resolution in a summary fashion, the argument the tax consequences of the award for retroactive spousal support were not considered and the argument the award should not be retroactive at all. While in circumstances such as those discussed in *R. v. Sheppard*, 2002 SCC 26, inadequate reasons may undermine a judgment, it is difficult to conceive of circumstances in which an apprehension of bias might arise as a result of some inadequacy in the reasons. In any event, this is not such a case.

[56] There were certainly lively exchanges between counsel and the judge in the course of submissions. Counsel drew our attention to two points in the proceedings, in particular, said to demonstrate some bias on the part of the judge. First, what counsel described as an inappropriately harsh reaction on the part of the trial judge to counsel's suggestion the respondent had misled the court; and, second, the judge's unwillingness to consider extensive argument in relation to the appellant's cross application.

[57] In the course of her submissions with respect to the imputation of income, counsel submitted the respondent had "intentionally deposed statements that are deceiving the court". The judge, in no uncertain terms, took issue with that submission. The affidavit evidence to which counsel was referring was not tested. There had not been cross-examination on the affidavit and the respondent's evidence was uncontradicted. The trial judge said:

Don't call somebody a fraud based on this kind of material. And don't suggest they're deceiving the court. It's a very serious allegation - - could end somebody in jail. And a conclusion like that based on assumptions is on very, very thin ice indeed. Don't do it again.

[58] From that point counsel carried on, suggesting there was at least "an inconsistency" in the respondent's evidence. The transcript appears to demonstrate respectful attention to the balance of the submissions. I cannot see how an apprehension of bias might arise out of that exchange.

[59] After submissions were complete on the question of whether to allow the respondent's application for an increase in spousal support arising from the change in circumstances, counsel for the appellant began to make submissions with respect to his application to vary the spousal support by reducing it. The judge indicated all of the evidence with respect to that question had been canvassed in the course of submissions on the respondent's application. Counsel for the appellant noted, in addition to seeking a reduction in the spousal support, he was seeking termination of the requirement to pay support. There was some question with respect to whether that had been clearly identified in the pleadings. Counsel stated when he filed an application for a "step down" of spousal support he intended to seek reconsideration of both the amount and duration of the spousal support. At that point the following exchange occurred:

The Court: Well, wouldn't it be helpful if you put it in English - -

Counsel: It would - -

The Court: - - so I can understand?

Counsel: Yeah, it would have been helpful, yeah. But - -

The Court: Because I see this as identical to the reply.

Counsel: Oh, fair enough - -

The Court: The response.

Counsel: - - in the legal basis it is very similar, and it's essentially all based on the same materials. All I'm getting at is the response is a shield, and this is just our chance to have a sword. But if it wouldn't please the court to go further then we don't have to do that. But we technically have a notice of application before the court.

[60] After a short further exchange, the trial judge indicated he would take the submission into account.

[61] In my view, there is nothing in this exchange or any others to which counsel referred which would give rise to an apprehension of bias on the part of an impartial observer, cognizant of the matters that had preceded the exchange, and accepting at face value the trial judge's indication he would take counsel's submissions into account.

[62] There is no basis in this case on which to say a reasonable apprehension of bias might arise from any of the matters brought to our attention by counsel.

[63] I would dismiss this ground of appeal.

Conclusion

[64] I would allow the appeal to the extent I would order the spousal support to be varied to \$3,473 per month, payable from March 2018 onward.

[65] I would give the parties leave to make written submissions with respect to costs, if they cannot agree on an appropriate order.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Hunter"

I agree:

"The Honourable Mr. Justice Butler"

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