NOVA SCOTIA COURT OF APPEAL
Citation: *Zenner v. Zenner*, 2015 NSCA 100

Date: 20151110
Docket: CA 435892
Registry: Halifax

Between:

Rainer Zenner

Appellant

v.

Denyse Zenner

Respondent

Judges:	Beveridge, Bryson and Scanlan, JJ.A.
Appeal Heard:	September 23, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Beveridge, J.A.; Bryson and Scanlan, JJ.A. concurring
Counsel:	Peter C. Ghiz, for the appellant Murray Judge, for the respondent

Reasons for judgment:

INTRODUCTION

[1] This is an appeal from the refusal by the Honourable Justice Pierre L. Muise to confirm a provisional order to forgive all of the appellant's arrears of spousal and child support.

[2] At the conclusion of the appellant's submissions, we announced that we did not need to hear from counsel for the respondent as it was the unanimous opinion of the Court that the appeal be dismissed. Reasons would follow. These are they.

[3] Background information is necessary to understand the appellant's complaints of error and why we found no merit in this appeal.

BACKGROUND

[4] The story starts 25 years ago with the divorce judgment of McQuaid J., as he then was, in *Zenner v. Zenner*, [1990] P.E.I.J. No. 144 (S.C.). Justice McQuaid granted sole custody of their two young boys, then ten and eight years old to Mrs. Zenner. I will detail later Justice McQuaid's reasons with respect to child and spousal support. For now, it is sufficient to say that Justice McQuaid refused Dr. Zenner's request to reduce child support from $1,200 to $600 per month. He awarded Mrs. Zenner spousal support of $400 per month. Assets were divided.

[5] Both Dr. Zenner and Mrs. Zenner appealed, each seeking different relief. The order for child and spousal support was affirmed. There was a modest adjustment to the division of assets ([1991] P.E.I.J. No. 122).

[6] The record shows that since 1994, Dr. Zenner has not voluntarily paid much, if any, child or spousal support. He has instigated numerous proceedings seeking to have his support obligations reduced to zero and forgiveness of all arrears.

[7] He has not been successful. In 1995 he applied in Ontario for an order to vary Justice McQuaid's Corollary Relief Judgment of November 16, 1990. He sought a reduction of his support obligations to zero, cancellation of all arrears, and a stay of enforcement. Justice West issued a provisional order on February 15, 1996 granting that relief.

[8] But when the provisional order was sent to British Columbia (where Mrs. Zenner was then living) Justice Fisher of the British Columbia Supreme Court refused to confirm the provisional order. No reasons for either judgment appear to be available.

[9] Dr. Zenner's residence has fluctuated between Prince Edward Island and Ontario. In 2000 he applied to MacDonald C.J.T.D of the P.E.I Supreme Court for a provisional order to again vary the 1990 order of Justice McQuaid. He sought cancellation of all support payments, and for forgiveness of $135,000 in arrears.

[10] The children of the marriage were then age 20 and 18. Dr. Zenner claimed his only income was welfare in the amount of $5,700 per year. Chief Justice MacDonald refused to vary the support order as he was not satisfied that the applicant's claimed inability to pay was not the result of deliberate conduct by Dr. Zenner.

[11] Chief Justice MacDonald had no current information about the children of the marriage. He therefore referred the matter to the British Columbia courts to determine their status. If they were no longer children of the marriage, then child support should terminate, and arrears adjusted accordingly.

[12] Justice Warren of the British Columbia Supreme Court issued an order on January 31, 2001 confirming that the two boys were still children of the marriage.

[13] In 2008 Dr. Zenner again applied to the P.E.I. Supreme Court for an order varying his support obligations. Justice Taylor heard the application. He thoroughly reviewed all of the relevant litigation between the parties, and Dr. Zenner's claims of earning little or no income.

[14] Justice Taylor rejected the appellant's evidence. In clear and definitive language, he dismissed the request to forgive the bulk of the accumulated arrears. He wrote:

> [54] Dr. Z. had not given any explanation as to why his income has been so low since 1990. I do not know why he left his practice in Prince Edward Island and moved to Ontario where he seems not to have practised much, and then not at all. I do not know why he got into a trucking business for an unspecified period of time, earning an income of $400 per month, or how he came to end up on welfare for years. I do not accept his attempted justification of why he left Ontario, where he could have practised optometry, and moved to Prince Edward Island to be here for his dispute with the Optometrist Association. I do not believe him when he

says he now works as an optometrist in both Prince Edward Island and New Brunswick but only earns about $4,000 per year after deducting professional fees.

[55] Had Dr. Z. stuck with what he knew in Prince Edward Island or Ontario in the first place, I presume he would have continued to enjoy success in his profession. I conclude:

a) Dr. Z. continues to be a person who is not credible; he lies to the court about his income; or is intentionally underemployed, or both;

b) Dr. Z. has the ability to earn an optometrist's income and to make significant payments on the arrears he owes before he reaches the age and ability level where he is no longer able to work.

[56] Dr. Z. remains a highly trained professional capable of earning a substantial income. He did not present any evidence of ill health or of mental or physical disability. In the past, he chose to remain on Prince Edward Island ostensibly to carry on a fight with the Optometrist Association, rather than practice his profession in Ontario, which he was qualified to do, and did in fact do for a period of time. He presented no evidence of why his presence was required, and it does not appear to me any valuable purpose was served by his remaining here full time on welfare while remunerative employment was available to him elsewhere. I have to conclude he stayed here for other reasons.

[57] Dr. Z. has made very few payments since the parties separated, and no payments at all in the past 12 years according to the records I have seen. He has been called before this Court at the behest of the Director of Maintenance Enforcement on many occasions and he was sentenced to serve time in jail in default of payment on at least one occasion. (I do not know if he actually served the time, or made a payment instead.)

[58] Having ignored his support responsibilities, and defied court orders for over 20 years, Dr. Z. now comes before the Court and asks he be relieved of the near $200,000 support he ought to have paid over the years. According to the Court findings at past hearings, he had the capacity to pay in the past and his refusal to do so prevented his children and his ex-wife from becoming self-sufficient. Had he paid what he should have, when he should have, I expect the total amount paid would have been far less than he now owes.

[59] I find Dr. Z. continues to have significant earning potential. Dr. Z.'s conduct may have been self destructive to some extent, but I see no reason to reward his 20 plus years of very objectionable behaviour by wiping the slate clean for him. I dismiss his request that arrears be eliminated in whole or in part, except as provided below as a result of retroactive variation of child and spousal support.

(2008 PESCTD 41)

[15] Justice Taylor did provide some relief to Dr. Zenner. He made a provisional order that child and spousal support end in 2005 and 2006. If confirmed, this order would reduce his arrears by $55,200.

[16] On June 27, 2011, Justice Arnold-Bailey presided at the confirmation hearing in British Columbia. The reason for the two and a half year delay is unknown. In any event, Arnold-Bailey J. gave oral reasons that day. She confirmed Justice Taylor's provisional order stopping child and spousal support in 2005 and 2006, which reduced the accumulated arrears by $55,200, but dismissed the request for elimination of the balance. She had harsh words about the conduct of the appellant:

> [35] It is a shocking tragedy that the spousal and child support owing in this matter have not been paid over the years. The hardship this has caused to D.Z. and the two children of the marriage has been very significant.
>
> [36] The current application brought by R.Z. to terminate child and spousal support obligations and cancel the huge amount of outstanding arrears verges on a serious abuse of process.

[17] As acknowledged by counsel for the appellant, Justice Taylor's provisional order was not a favourable outcome. The record is silent as to what steps, if any, the appellant attempted to take to become involved in the British Columbia confirmation process.

[18] Following confirmation by Arnold-Bailey J., the appellant attempted to appeal from her order. The problem was he was out of time. Under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, the appellant had 30 days from June 27, 2011 to file a notice of appeal. He did not do so.

[19] The appellant claimed that he had no notice of the confirmation hearing or of Justice Arnold-Bailey's order until September 2011. With the assistance of counsel, he brought an application to extend the time to file. Lowry J.A. heard that application on March 16, 2012, and dismissed it. He found that: 1) Dr. Zenner did not have a *bona fide* intention to appeal, having taken no steps for five months after his stated awareness of the order; 2) Mrs. Zenner had since relocated to Nova Scotia creating the burden of additional cost if faced with an appeal proceeding in British Columbia; 3) the proposed appeal had little merit; 4) Dr. Zenner had produced no convincing explanation for being in default for twenty years. In sum, Justice Lowry found it was not in the interests of justice to extend the time to appeal.

[20] Dr. Zenner also sought an extension of time to appeal to the P.E.I. Court of Appeal from Justice Taylor's provisional order of 2008. On April 11, 2012, Jenkins C.J. granted the request to extend time to appeal (2012 PECA 5). But on February 12, 2013, the Court unanimously dismissed the appeal on the basis that the Court did not have the jurisdiction to hear such an appeal (2013 PECA 2).

THE PRESENT PROCEEDINGS

[21] Just a few months following the dismissal of the appeal from Justice Taylor's provisional order, on May 8, 2013 Dr. Zenner applied for another provisional order. This time, in Ontario. He again requested a variation of Justice McQuaid's 1990 order.

[22] The relief was the same he has always sought: cancellation of all arrears since 1990 and his "overpayments" returned. The foundation for his motion was his assertion that there were significant income discrepancies throughout the years, and a "consistent imputation of income to him without evidence".

[23] The record shows that the only evidence of previous proceedings produced before Justice Broad was Justice McQuaid's Corollary Relief Judgment dated November 16, 1990 and the provisional order of Justice West which had not been confirmed in British Columbia.

[24] Justice Broad heard the motion on August 15, 2013. In addition to his motion materials, Dr. Zenner testified and made submissions. The only mention of Justice Taylor's 2008 provisional order came when Justice Broad asked the appellant if he had brought any proceedings in PEI. Dr. Zenner volunteered that there was an order by Justice Taylor that reduced the arrears, but "they were not satisfied with it". Dr. Zenner also advised Justice Broad that Justice Taylor's provisional order had not been confirmed.

[25] Justice Broad ruled that there had been a material change of circumstances since the 1990 Corollary Relief Judgment. A provisional order was duly issued by Justice Broad on November 1, 2013 varying paragraphs 3 and 4 of Justice McQuaid's Corollary Relief Judgment by reducing child and spousal support to zero and rescinding all arrears of child and spousal support.

[26] Even before Mrs. Zenner was served with a notice of a confirmation hearing, Dr. Zenner prepared and filed a supplementary affidavit on November 12, 2013 for use at the confirmation hearing to be held in Nova Scotia. Mrs. Zenner duly filed

an affidavit. Both parties had counsel during the confirmation hearing process in Nova Scotia. Briefs were filed, supplemented by oral submissions at the hearing, completed on December 19, 2014.

[27] Justice Muise gave an oral decision that day, later released on January 26, 2015, and reported as *Zenner v. Zenner*, 2015 NSSC 16. The parties did not dispute that the applicant had to demonstrate a material change in circumstances since the "last order". Dr. Zenner took the position that he need only show a material change since the 1990 order, and, in any event, there had been a material change since the 2008 order.

[28] The hearing judge therefore identified two preliminary issues:

1. Is Mr. Zenner required to show a material change in circumstances from 1990 or from 2008?
2. Has Mr. Zenner shown a material change in circumstances from the applicable date?

[29] Justice Muise observed that Taylor J. had ruled on the issues of retroactive termination and elimination of support obligations in 2008. Had Justice Broad been aware that Justice Taylor's 2008 decision had been confirmed, Broad J. would have looked at 2008 as the relevant date to assess if a material change had since occurred. Hence, 2008 was the relevant date.

[30] Justice Muise rejected the six circumstances that Dr. Zenner argued constituted a material change since 2008. There is no need to review all of them as the appellant only focuses on some of these on appeal. It is to the appellant's complaints of error that I now turn.

ISSUES

[31] The appellant contends that the hearing judge erred:

1. In finding that a material change in circumstances had not occurred since the date of the order in *R.Z. v. D.Z.*, 2008 PESCTD 41;
2. In finding that a material change in circumstances had not occurred since the date of the Divorce Judgment dated the 16th day of November, 1990;
3. In misinterpreting and applying s. 14(c) of the *Federal Child Support Guidelines*;

4. In not finding that the denial of the appellant's right to natural justice did not amount to a material change in circumstances since November 16, 1990, the date of the Divorce Judgment;

5. In his interpretation or application of ss. 18 and 19 of the *Divorce Act*, *supra* and in particular, the role of a confirming Judge under s. 19 thereof;

6. In his assessment of the evidence; and

7. In his assessment of the appellant's credibility and its relevance to the proceeding before him.

STANDARD OF REVIEW

[32] The standard of review is uncontroversial. A judge who fixes or varies spousal support makes a discretionary decision, balancing a variety of factors, guided by the particular facts of the case. Appellate courts owe deference to such decisions, and will not intervene unless satisfied that the judge erred in principle, significantly misapprehended the evidence or made an award that is clearly wrong. (See *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 10-12; *Saunders v. Saunders*, 2011 NSCA 81 at para. 17.)

[33] In sum, a high degree of deference is owed to the judge who fixes support directly, or in the bifurcated process provided for in the *Divorce Act* (see: *Koval v. Brinton*, 2010 NSCA 78 at paras. 17-22).

[34] We see no error in law or principle, misapprehension of evidence or palpable and overriding errors of fact or mixed law and fact by the hearing judge. Instead, we see a fundamental flaw in the approach by the appellant. In effect, he sought, and continues to seek, a redetermination of his spousal and child support obligations, as if the decision by McQuaid J. in 1990 were flawed, and that his earlier applications in 2000 before MacDonald C.J. and in 2008 before Taylor J. never happened. Indeed, if the ***reasons*** from those proceedings had been before Justice Broad it is difficult to imagine any outcome but one that would have been unfavourable to the appellant.

[35] As noted earlier, the appellant's 2013 motion materials sought a variation of child and spousal support back to 1990. He claimed it was new evidence that the respondent had started working in 1990. But the appellant only provided Justice McQuaid's Corollary Relief Judgment that ordered, among other things the

appellant to pay child support of $7,200 per year per child and spousal support of $4,800 per year.

[36] Not included were Justice McQuaid's actual ***reasons*** for ordering that level of support. Once again, it is evident that if these reasons had been before Justice Broad, a different outcome would very likely have ensued. I will explain.

[37] In Justice Broad's oral reasons for making the provisional order, he reasoned:

> The applicant testified that, shortly after the judgment of Justice McQuaid, the respondent moved to British Columbia with the two children of the marriage who at that time were in about the ages of eight and ten, having been born in 1980 and 1982 respectively. He testified that, to the best of his knowledge and belief, she became employed in British Columbia with a university as an administrative assistant but he did not have details with respect to her income.
>
> It is not apparent from a reading of Justice McQuaid's reasons for decision regarding specific findings about the parties' respective incomes upon which he based the orders for support. The applicant here testifies that his income was not such in 1990 as to justify or support the orders for support that were made in the judgment, but in any event his income has changed in the years subsequent to the year of the order and has been reduced substantially. He is now a pensioner drawing Canada Pension, Old Age Security and Guaranteed Income Supplement being his only sources of income, at a total of $14,200 per year. He is of the belief that the respondent is in the same or similar situation as a retired person but he does not know her income.
>
> I am satisfied first of all based upon the order being made by the Honourable Justice West in 1996 based upon the material that was before him at that time that there has been a material change in circumstances from that of the order of Justice McQuaid that would justify a variation in support.

[38] The respondent's employment in British Columbia was not new. It was known before and at the time of the proceedings before Justice McQuaid. In Justice McQuaid's reasons ([1990] P.E.I.J. No. 144) he observed:

> The petitioner is a professional optometrist who carries on practise in Summerside. **The respondent presently is employed in an administrative position at Simon Fraser University in British Columbia, where she resides together with the two children.**
>
> [Emphasis added]

[39] As to how Justice McQuaid fixed child and spousal support, his reasons explain. Justice McQuaid did not accept Dr. Zenner's claim that his annual income was little higher than subsistence level. Among other things, Justice McQuaid observed:

> Several days of court time were consumed by the evidence of Dr. Zenner's accountant attempting to explain to the Court the convolutions of his financial arrangements. In addition, Dr. Zenner himself devoted a considerable amount of time, throughout his own testimony, to the same end. Throughout it all, I could scarce but feel empathy with the lines of the Rubaiyat:
>
> ... and evermore came out through that same door as in I went.
>
> such a tangled web it was. Some brief background information may, (possibly), be helpful.
>
> It is clear throughout the evidence that Zenner was a dominating personality, driven by a fanatical obsession with the expedient imperative of the bottom line. The aggrandizement of his own personal financial well being was, and apparently continues to be, the motivating force behind all of his activities and enterprises.

[40] After referring to the financial arrangements created by Dr. Zenner's five corporations, Justice McQuaid wrote:

> The true purpose of all of the corporations was freely volunteered by Zenner. They were to be for the financial benefit of himself, and himself alone; not for himself and his wife; not for himself and his family, but for Rayner Zenner personally. If and when he considered it appropriate to do so, in the future, his intention would be that he would extend his beneficence to such members of his immediate family as he might select. It is now apparent that Denyse Zenner will not rank high on his list.
>
> He explained that he was now, and had for the past number of years, been working on a ten year plan which would bring about his personal financial independence, and that the plan was, as of this time, ahead of schedule.

[41] Justice McQuaid found that he was satisfied beyond any reasonable doubt that Dr. Zenner was fully able to pay support. He rejected Dr. Zenner's request to reduce by half the existing child support ($1,200 per month) and spousal support ($400 per month) - indeed if Mrs. Zenner had requested more, he may have been disposed to order it. He put it thus:

> The purpose of all of the foregoing is not to assess, or indeed, to question, the financial integrity of Dr. Zenner. The purpose is solely to attempt to ascertain whether he has the capacity to pay reasonable spousal and child maintenance. My conclusion, founded largely on the financial records produced by the accountant,

> buttressed as they are by the *viva voce* evidence of the petitioner himself, is that I am satisfied beyond any reasonable doubt that such capacity does exist, and in full measure.
>
> With respect to the issue of child support, the onus lay upon Zenner to satisfy the Court that the fixed amount of $1,200 per month is inappropriate and should be reduced by half. After all, it is he who has made the application to vary. He has not adduced evidence which, in my opinion, is sufficient to warrant any reduction.
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> […]
>
> The respondent seeks spousal support of $400 per month. Having regard to all of the circumstances of this case, as reflected by the evidence adduced, I might have been disposed to increase that figure. However, I do not think that I can properly exceed the amount which she herself sought.

[42] All of these findings were undisturbed on appeal ([1991] P.E.I.J. No. 122).

[43] Justice Broad also accepted Dr. Zenner's evidence and representations that there had been a material change in circumstances with respect to child support since 1990 because the children had reached the age of majority in 1998 and 2000, and even before then they had not been living with the respondent. He reasoned:

> In addition to that, the applicant testified that the children attained the age of majority in 1998 and 2000 respectively at which time they were no longer children of the marriage. In any event, prior to that, they may have been not in the actual or physical custody of the respondent as they became involved in drug and criminal subculture and became incarcerated for varying points of time or lived on the street. That would also justify the existence of the material change in circumstances.

[44] As earlier noted, Dr. Zenner failed to disclose to Justice Broad the true state of affairs with respect to his 2000 application to MacDonald C.J. where he had sought the same relief: termination of child support since his sons had reached the age of majority, and forgiveness of all spousal and child support arrears.

[45] MacDonald C.J. refused both requests for relief. With respect to ongoing child support he referred the matter to British Columbia to obtain evidence on the current status of the children. Warren J. of the B.C.S.C. subsequently determined on January 31, 2001 that they remained children of the marriage.

ANALYSIS

Material change in circumstances since 1990 or 2008

[46] The appellant's factum and oral argument lumped the first three grounds of appeal together. We will do likewise. The appellant's Notice of Appeal and factum claim the hearing judge erred in finding there had not been a material change of circumstances since Justice McQuaid's order of November 16, 1990.

[47] Justice Muise specifically ruled that he had to be satisfied that there had been a material change in circumstances since Justice Taylor's order of 2008 - not the order of 1990. The appellant does not actually articulate any argument that Muise J. erred in this ruling. What then is the material change of circumstances since 2008 that would trigger a variation of child and spousal support?

[48] There is none. In 2008, Justice Taylor terminated spousal support as of 2006, and child support for one child in 2005, and the younger child as of 2006. What the appellant seeks is a redetermination of what Justice Taylor provisionally ordered.

[49] The appellant argues that the introduction of the *Child Support Guidelines* in 1997 constituted a material change in circumstances; and because the appellant's child support obligations have never been fixed in accordance with those *Guidelines*, there has been a material change of circumstances since 2008. With respect, we do not agree.

[50] Justice Muise acknowledged that because the child support obligations were ordered before the *Guidelines* came into force, the coming into force of the *Guidelines* constituted a material change of circumstances that could trigger a variation. But that change in circumstances existed in the variation applications heard by MacDonald C.J. in 2000 and by Justice Taylor in 2008. Both jurists rejected the appellant's claim of earning little or no income.

[51] We see no error by Justice Muise's finding that there had been no material change of circumstances since 2008, and consequent refusal to confirm the provisional order.

Denial of Natural Justice

[52] The appellant argues that he was denied due process in the litigation involving the provisional order of Justice Taylor and its confirmation by Justice Arnold-Bailey. In particular, he posits that because he did not receive notice of the confirmation hearing in British Columbia he was not able to make submissions, and he was not able to file a timely appeal.

[53] His factum puts it this way:

> 15. The process following Justice Taylor's order did not follow the process outlined in the *Act*. The hearing took place on June 23, 2011 after a three year delay, without notice and without providing the appellant with the documents filed by the respondent. He received the decision and order on November 2011, and the transcript on January 6, 2012 after the appeal period had expired. This denied him his right to appear at the hearing and his right to appeal.

[54] There are a number of problems with this argument. First, the appellant had counsel at the confirmation hearing before Justice Muise. This complaint was not advanced in that hearing; yet he now suggests that Muise J. somehow erred in not finding that the putative breach of natural justice amounted to a material change of circumstances justifying a retroactive variation of support and forgiveness of arrears.

[55] Secondly, although there was a delay of almost three years in the holding of the confirmation hearing in British Columbia, he fails to identify how the delay amounted to a breach of natural justice (which he also phrased as being an abuse of process). Instead, he cites a portion of this Court's majority judgment in *Waterman v. Waterman*, 2014 NSCA 110 where the process under the interjurisdictional support legislation (ISO) was examined, and found to be wanting in terms of natural justice.

[56] The appellant's reliance on *Waterman* is misguided. The ISO legislation did not expressly, or by necessary implication, displace the common law requirement of notice and an opportunity to be heard. But the *Divorce Act* spells out the process for provisional and confirmation hearings.

[57] Section 18(2) of the *Act* provides that a court "shall make a variation order with or without notice to and in the absence of the respondent." Section 19 prescribes what happens following a provisional order:

> Transmission
>
> 19. (1) On receipt of any documents sent pursuant to subsection 18(4), the Attorney General for the province in which the respondent is ordinarily resident shall send the documents to a court in the province.
>
> Procedure
>
> (2) Subject to subsection (3), where documents have been sent to a court pursuant to subsection (1), the court shall serve on the respondent a copy of the documents and a notice of a hearing respecting confirmation of the provisional order and **shall proceed with the hearing, in the absence of the applicant**, taking into consideration the certified or sworn document setting out or summarizing the evidence given to the court that made the provisional order.
>
> [Emphasis added]

[58] Furthermore, even if we were to assume that the failure to give to the appellant notice of the confirmation hearing, and an opportunity to be heard, breached the rules of natural justice, his argument has no merit.

[59] Justice Arnold-Bailey confirmed the provisional order without variation. The confirmation hearing added nothing new. The appellant's actual complaint stems from the provisional order of Justice Taylor before whom he was represented by counsel. In that hearing, he adduced evidence and made submissions.

[60] To the extent that lack of notice of the confirmation hearing impacted on his right to appeal, that issue was one that he either did or should have pursued in his application to the British Columbia Court of Appeal to extend the time to file a notice of appeal.

[61] As described earlier, the appellant's request to extend the time to file a notice of appeal was rejected by Lowry J.A. The appellant had the assistance of counsel in that process. Justice Lowry saw "little merit" in the proposed appeal, and ultimately, "it would not be in the interests of justice to grant an extension". As to the lack of notice and resultant delay, he reasoned:

> [8] Dr. Zenner maintains he did not have notice of the confirmation hearing or Arnold-Bailey J.'s order until the limitation period had expired. He deposes he found out about the confirmation order in September 2011, and would have appealed at an earlier date had he known about it. However, Dr. Zenner took no steps to appeal the confirmation order until February 16, 2012, five months after he says he learned it had been made, when he filed a Notice of Appeal. Similarly there is no evidence that Mrs. Zenner was informed of Dr. Zenner's intention to

> appeal until January 28, 2012 when he served her with material for this application. This does not evince a bona fide intention to appeal. Dr. Zenner's excuse for the delay, that he had no knowledge of the hearing or order, is not convincing. He has not provided any satisfactory explanation for the delay between September 2011 and February 2012.

[62] We do not give effect to the appellant's complaint of a flawed process that he says deprived him of natural justice or amounted to an abuse of process.

[63] As to the remaining grounds of appeal, they have no merit. The appellant fails to identify how Justice Muise is said to have erred in his interpretation and application of his role as a judge acting under s. 19 of the *Divorce Act*. As far as we can discern, the appellant's complaint seems to be that because the appellant swore an affidavit for use in the confirmation hearing that his income from 1987 to 2012 never exceeded $25,000, that child and spousal support had to be fixed accordingly; if it was not, then he needed to be confronted and given an opportunity to explain.

[64] In light of how the case was presented, Justice Muise needed to resolve whether he was satisfied on a balance of probabilities, in light of the evidentiary record from the provisional hearing before Justice Broad, and with the benefit the evidence adduced at the confirmation hearing, that there had been a material change of circumstances warranting a variation in child and spousal support. We see no error in his approach or conclusion.

[65] The appellant lastly argues that Justice Muise erred in his assessment of the evidence, in particular an adverse finding of credibility against the appellant. In the course of his reasons, Justice Muise wrote:

> [55] As already indicated, I must take Justice Arnold-Bailey's decision as being correct. **In my view, this proceeding brought by Mr. Zenner, and his deliberate erroneous representation to Justice Broad that Justice Taylor's provisional decision had not been confirmed**, show a continued attempt at manipulation and abuse of the justice system on his part.
>
> [56] However, now that it has been revealed that the most recent variation arose from the 2008 provisional order, the question of material change in circumstances must be determined against a backdrop which differs from that against which Justice Broad determined it. In my view, there has been no material change in circumstances established.
>
> [Emphasis added]

[66] Assessment of evidence and the drawing of inferences are fact finding processes. Appellate courts are not to intervene absent legal error, misapprehension of evidence, or palpable and overriding error of fact.

[67] We see no such errors. The appellant asks us to review the transcript of the provisional hearing and reassess the failure by the appellant to disclose to Justice Broad that Justice Taylor's 2008 order had been confirmed by Justice Arnold-Bailey. He quotes isolated exchanges from the provisional hearing before Justice Broad to build an argument that the appellant just did not understand the legal landscape of provisional and final orders. In other words, he seeks a different factual interpretation from the record. That is not our function.

[68] The conclusion by Justice Muise quoted above is fully supported by the record.

[69] The appeal is dismissed. The respondent did not request costs. None are ordered.

Beveridge, J.A.

Concurred in:

Bryson, J.A.

Scanlan, J.A.