Date: 2023 03 08
Docket: S-1-FM-2012 000100

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARIE-SOLEIL LACOURSIÈRE

Applicant
(Respondent)

-and-

MARCO PENK

Respondent
(Applicant)

MEMORANDUM OF JUDGMENT

[1] The parties to this application are the parents of two children, now ages 15 and 11 respectively. The father, Marco Penk, is the "applicant" on this application. He seeks to vary two previous orders respecting custody of the children, access and child support. However, the most recent order, made in 2017, contained a proviso that Mr. Penk must seek leave to file any further materials or applications in this matter.

[2] These reasons, therefore, address only the question of whether Mr. Penk should be granted such leave. For the reasons that follow, leave is denied and the application is dismissed.

HISTORY OF THE PROCEEDINGS

[3] These proceedings were commenced in 2012 by the mother of the children, Marie-Soleil Lacoursière, bringing an application pursuant to the *Children's Law Act*, S.N.W.T. 1997, c.14, seeking custody of the children. Between then and the trial of the action in 2015, there were 19 interim orders issued by the court dealing

with issues of custody and terms of access. Ms. Lacoursière was granted interim custody throughout.

[4] The matter came on for trial in 2015 before Schuler J. of this court. The trial took place over 11 days. Mr. Penk's testimony alone took up 5 days. Up to and throughout the trial Mr. Penk represented himself. Ms. Lacoursière was represented by counsel. The children, pursuant to an earlier order, were represented by counsel from the Office of the Children's Lawyer.

[5] Schuler J., on April 30, 2015, issued a lengthy order granting sole custody of the children to Ms Lacoursière and setting out detailed terms for the exercise of access by Mr. Penk (2015 NWTSC 19). She also ordered Mr. Penk to pay retroactive and ongoing child support as well as requiring Mr. Penk to provide annual income information. Finally, she ordered Mr. Penk to pay the costs of Ms. Lacoursière fixed in a lump sum of $25,000.00.

[6] Mr. Penk filed a Notice of Appeal of the judgment but the appeal was never argued. It was eventually struck from the list by the Court of Appeal in 2017.

[7] Ms. Lacoursière subsequently brought an application to vary the order of Schuler J. by terminating Mr. Penk's access rights. The matter was heard over 2 days and again Mr. Penk represented himself. On January 27, 2017, Shaner J. granted the application to terminate access (2017 NWTSC 8).

[8] In explaining why she found the necessary change in circumstances required for a variation of the previous access order, Shaner J. outlined what she described as the cumulative effect of Mr. Penk's conduct and statements "which raise new concerns about Mr. Penk's ability to control his anger and exercise rational judgment, and which manifest a flagrant disregard for the Court's authority and directions" (at para. 69).

[9] Shaner J. also described a disturbing pattern of conduct exhibited by Mr. Penk after the original trial in 2015 (at para. 70):

> Since the trial Mr. Penk has made a number of statements, described earlier, against an ever increasing number of people and organizations, including Mr. Collins, Ms. Lacoursière, Ms. Nightingale, Ms. Nightingale's husband, Mr. Hansen, Ms. McIlmoyle, a former Minister of Justice with the Government of the Northwest Territories, judges of this Court, the military the RCMP and the Canadian government. The statements are not restricted to criticism of Ms. Lacoursière's parenting, nor expressions of dislike and disapproval about Mr. Collins. They now include claims and accusations of fabricating evidence and Court documents,

> conspiracies, stalking and imminent harm to the children. Mr. Penk has made these statements in documents filed with this Court, the Court of Appeal, with the RCMP Complaints Commission and in numerous pieces of correspondence. His claims are baseless and, by any standard, completely irrational.

[10] The materials filed by Mr. Penk since Shaner J. issued her order have exhibited similar tendencies.

[11] Other circumstances justifying the termination of access were outlined by Shaner J. (at paras. 78-80):

> Mr. Penk has failed, without valid reason, to comply with the terms of the Final Order requiring financial disclosure and payment of child support. Mr. Penk indicated at the hearing that he has had his income tax return documents since the fall. Yet, he has taken no steps to provide those to Ms. Lacoursière as required by the Final Order.
>
> Nor has Mr. Penk made any effort to pay child support or the costs ordered against him. This is despite earning an income. Ms. Lacoursière has throughout been, continues to be, the sole financial provider for the children.
>
> It is well-established that access is not dependent on child support. The two are generally considered mutually exclusive. In this context, however, Mr. Penk's failure to pay support further demonstrates his disregard for this Court's authority, as well as a fundamental misunderstanding of his moral and financial obligations as a parent. Considered with the other circumstances, it is a factor which contributes to a finding that there has been a material change in circumstances.

[12] The application before Shaner J. also sought an order that Mr. Penk be required to seek leave from the court before filing any future applications. Shaner J. made that order as well. The reasons for making this order were not explicitly set out in the reasons for judgment but it is clear, from those reasons, that it was prompted by the evidence of Mr. Penk's disregard for previous orders and his aggressive litigation posture. As noted by Shaner J. (at para. 87), Mr. Penk's "court documents, correspondence and complaints are designed to harass Ms. Lacoursière and anyone he views as being on her side."

[13] Mr. Penk appealed this judgment as well to the Court of Appeal but it too never proceeded to a hearing. It was struck from the appeal list in December, 2017.

THE REQUIREMENT FOR LEAVE

[14] Although not expressly stated in her reasons, the order made by Shaner J. is analogous to a vexatious litigant order. There are statutory provisions in the *Judicature Act,* R.S.N.W.T. 1988, c.J-1, for such an order:

> 14.1. (1) If a judge of the Supreme Court is satisfied, on application, that a person has, in any court, persistently and without reasonable grounds commenced vexatious proceedings or conducted proceedings in a vexatious manner, the judge may order
>
> (a) that the person may not commence a proceeding in the Territorial Court or the Supreme Court without leave of a judge of the Supreme Court; or
>
> (b) that a proceeding previously commenced by the person in the Territorial Court or the Supreme Court may not be continued without leave of a judge of the Supreme Court
>
> (2) A person who is the subject of an order under subsection (1) may seek leave to commence or continue a proceeding by making an application to the Supreme Court.
>
> (3) Where an application for leave is made under subsection (2),
>
> (a) leave shall be granted only if the judge hearing the application is satisfied that the proceeding sought to be commenced or continued is not an abuse of process and that there are reasonable grounds for the proceeding;
>
> (b) the person making the application for leave may seek the rescission of the order made under subsection (1) but may not seek any other relief on the application;
>
> (c) the judge hearing the application may rescind the order made under subsection (1); and
>
> (d) no appeal lies from a refusal to grant relief to the applicant.
>
> (4) Nothing in this section limits the authority of a court to stay or dismiss a proceeding as an abuse of process or on any other ground.

[15] Even though the statute was not invoked in this case, there is still a residual common law jurisdiction to regulate vexatious conduct. A court has an inherent jurisdiction to manage its own process, including the inherent authority to require a litigant to obtain leave to bring new or further proceedings. This inherent authority is parallel to the statutory regime: see *Jonsson v Lymer*, 2020 ABCA 167 (at paras. 17-18, 23 & 29).

[16] The application before me is not for the purpose of reviewing Shaner J.'s decision to impose the leave requirement. It is simply to decide whether leave should be granted. In order to do that, the statute provides guidance as to the criteria for leave to be granted. Subsection 14.1(3)(a) states that leave shall be granted only if the proceeding sought to be continued is not an abuse of process and there are reasonable grounds for the proceeding.

[17] In many ways the stipulation that the application be both reasonable and not an abuse of process are self-defining.

[18] An application that is reasonable cannot be an abuse of process; an application that is abusive cannot by definition be reasonable. The Alberta Court of Appeal, in *Hutterian Brethren of Summerland v Vulcan*, 2017 ABCA 8, held much the same when it said that the two criteria were both satisfied if the case was arguable. An arguable case is one that has a reasonable chance of success. But this test is not merely whether the applicant has theoretically an arguable case. The applicant must put forward evidence and not mere allegations to support the proposition that there is an evidentiary basis for the relief claimed.

STEPS LEADING TO THE CURRENT APPLICATION

[19] There were various steps leading up to the current application for leave.

[20] In November, 2020, Mr. Penk communicated with the court seeking to bring an application for variation of the previous orders. In essence he sought sole custody of the children and termination of all support obligations past, present and future. He filed voluminous materials repeating many of the same accusations that were before Justices Schuler and Shaner. He included claims and demands respecting everybody that has ever been involved with these proceedings, including lawyers, government agencies, and court officers. He made allegations of bias on the part of the judges who had any part in these proceedings. As has been said on prior occasions, his filings display irrational opinions and extremely poor judgment.

[21] Nevertheless Mr. Penk's application for leave deserves a hearing. His access to justice is not to be denied. This is so particularly because this is a family law matter. The needs of children change over time; the circumstances of the parents change; and, financial obligations may change due to fluctuations in income. But the applicant must still satisfy the test for leave.

[22] The approach, when dealing with a vexatious litigant situation in the family law context, was clearly expressed years ago by Davidson J. of the Manitoba Court of King's Bench in *Winkler v Winkler*, [1991] 2 W.W.R. 369 (appeal dismissed by Court of Appeal at [1992] 1 W.W.R. 631) at pg. 375:

> Matters respecting children are rarely fixed with any finality, and as circumstances vis-à-vis parents change, or circumstances vis-à-vis children change, custody and access arrangements remain flexible. What is in the best interests of a child at one point in time may not be in the best interests of that child at another point in time. Domestic litigants must have access to the courts, and often on a frequent basis, to allow them to pursue valid variation claims.

> On the other hand, domestic litigants should not be able with impunity to harass the other party, or bring repetitive motions before the court with little or no prospect of success, merely because they are *domestic* litigants.

[23] In February 2021, I issued directions for the hearing of Mr. Penk's application for leave. He requested that the hearing proceed by way of written submissions only so I set deadlines for those submissions. For various reasons, Mr. Penk could not meet those deadlines and asked that the matter be put in abeyance.

[24] In October 2022, Mr. Penk filed a new Notice of Motion and affidavit seeking leave to vary the previous orders so as to grant him sole custody and to cancel all past, present and future support obligations. He again asked that the matter proceed by way of written submissions only. Again I issued directions. The application was to be restricted to the question as to whether leave should be granted for Mr. Penk to apply to vary the existing orders. I set deadlines for the submissions. Mr. Penk filed his submissions on December 29, 2022. Counsel for Ms. Lacoursière filed her submissions on January 27, 2023. The Office of the Children's Lawyer chose not to make submissions.

[25] On March 2, 2023, Mr. Penk contacted the Clerk of the Court requesting an opportunity to file a revised version of his submissions along with copies of other documents including a settlement proposal sent to Ms. Lacoursiere's counsel. I declined to consider these late submissions. The deadlines for submissions were set out in my earlier directions and both parties adhered to them. I recognize that a self-represented litigant deserves some flexibility when it comes to the court's procedural rules but that is no reason to allow further submissions in contravention of my clear directions. And there is no reason why the court should be implicated in settlement proposals which should be left up to the parties to resolve if they can.

[26] In my directions, I also stipulated that Mr. Penk's submissions must be accompanied by:

> (a) an itemized financial statement, sworn to its truth and accuracy by Mr. Penk, detailing his income from 2012 to 2022 inclusive, his assets and liabilities;
>
> (b) a detailed statement from Mr. Penk as to any amounts paid in satisfaction of the costs ordered to be paid pursuant to the order of April 30, 2015, and the reasons, if any, as to why such costs have not been paid; and
>
> (c) a certified report from the Office of Maintenance Enforcement providing a detailed accounting of all child support payments made to date and any accumulated arrears up to November, 2022.

[27] Items (a) and (b) above have not been satisfied. This alone might justify dismissing this application. In fact, Mr. Penk has never filed any documentation regarding his income and expenses in contravention of Justice Schuler's order that he provide income tax information annually. All he provides are blanket statements and estimates as to how much he earned or may earn. There is also no evidence that he has paid any part of the costs awarded against him.

[28] With respect to item (c), I have been provided with a "Debtor Financial Report" by the office of the Northwest Territories Maintenance Enforcement Program. That shows that, as of November 1, 2022, Mr. Penk owed $103,203.80 in child support. There is no evidence that he has ever made a payment on his child support obligations since 2014.

[29] The failure to provide financial information as directed by the court is not reasonable. The failure to pay costs as ordered by the court is not reasonable. And, most significantly, the failure to pay any child support is not reasonable.

MERITS OF THIS APPLICATION

[30] For there to be reasonable grounds for an application to vary the previous orders, there must at least be an arguable case for a change in circumstances. That is the prerequisite for a variation of any custody or support order.

[31] The *Children's Law Act* provides that an order for child custody or access will not be varied "unless there has been a material change in circumstances that affects, or is likely to affect, the best interests of the child": s. 22(1). To vary a support order, the court must be "satisfied that evidence not available on the previous hearing has become available or that a change of circumstances as provided for in the applicable guidelines has occurred since the making of an order of support": s. 61(2). A change in income of the payor parent would, under the applicable guidelines, justify a variation in support but for that a court must have verifiable evidence.

[32] With respect to variation of custody orders, the threshold test of a "material change in circumstances" has been described as follows by the Supreme Court of Canada in *Gordon v Goertz*, [1996] 2 S.C.R. 27 (at pg. 44):

> What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier:

> *MacCallum v MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place". J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.
>
> It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[33] In this case, Mr. Penk has failed to put forward any evidence of such a material change either in the needs of the children since the previous hearings or a change that could not have been reasonably anticipated at the previous hearings. The children are still in the care of Ms. Lacoursière. There is no evidence that their needs have changed to the extent that Ms. Lacoursière is unable to meet them. Mr. Penk's circumstances have not changed. He continues to travel between Canada and his home in Germany. And he continues to dabble in different jobs and endeavours.

[34] The only real change in circumstances that Mr. Penk can point to is the fact that the children are older and so their wishes should be fully accepted. But all the evidence throughout the course of this litigation demonstrates that the children have been caught up in a high-conflict parental situation. Two judges of this court, after an exhaustive review of all the evidence, held that it was in the best interests of the children to be in the care and custody of Ms. Lacoursière and that she is the parent best able to provide the care and guidance the children require. There has been nothing presented to call into question that conclusion.

[35] What Mr. Penk's argument comes down to is, simply put, that the previous court orders are "illegal". This is how he put it in his written submissions:

> The litigation Lacoursiere vs Penk and the discriminatory and abusive court orders constitute "a Conviction Based on Lies". Between 2012 and 2017 various female judges have accepted the systematic, untrue and defamatory statements of the Applicant, her lawyer and numerous other Canadian aggressors as true, when it was absolutely clear that the children and the Respondent have been victims of the Canadian aggressors, where the aggressors sought to commit, or facilitate and protect child theft and destruction of the Respondent in an organized criminal gang like fashion.

[36] This, in essence, has been the substance of Mr. Penk's filings with the court since the 2017 judgment terminating his access.

[37] With respect to child support, Justice Schuler in her 2015 decision imputed income to Mr. Penk based on an average of his income for the three previous years. As noted above, he has failed to provide the timely financial disclosure previously ordered or the financial information I directed that he file for this application.

[38] Mr. Penk, nevertheless, seeks to vary the support order by cancelling all past, present and future support obligations.

[39] The Supreme Court of Canada in *Colucci v Colucci,* 2021 SCC 24, held that a payor seeking a downward retroactive change in support must first show a past change in circumstances. The payor must have disclosed sufficient reliable evidence to determine when and how much their income changed, and to ascertain whether the change was significant, long lasting, and not one of choice. A decision to retroactively decrease support can only be made based on "reliable, accurate and complete information": at para. 62. A failure to do so is fatal to any attempt to cancel a child support obligation.

[40] Here, as Ms. Lacoursière's counsel submitted, Mr. Penk has failed to provide the documentary evidence required by the court and to provide full and frank disclosure of his personal and financial circumstances. All that Mr. Penk provides on this application are vague and undocumented statements as to how much he earned in some years as well as excuses for why he could not provide the documentation required by previous orders of this court or my directions. He says he returned to Europe recently and has no access to original documents. Yet he also says that he would have to apply at the responsible German state authority to obtain income records but he does not feel that his own statements need to be supported by documentation.

[41] Ms. Lacoursière's counsel submits that Mr. Penk's failure to abide by previous orders regarding payment of child support, the provision of financial documents, and the payment of costs, demonstrates bad faith on his part. I agree. His failure to do so demonstrates a lack of understanding of his responsibilities toward the children and a failure to act in their best interests. As the Supreme Court stated, in reference to the payor in the *Colucci* case, the failure to make the support payments and the lack of willingness to support the children, shows bad faith efforts to evade the court order.

[42] For these reasons, I have concluded that there are no reasonable grounds for this proceeding. Mr. Penk has failed to provide evidence of a material change of circumstances that would warrant an application to vary the existing court orders regarding custody, access and support. There is no arguable case.

COSTS

[43] Ms. Lacoursière seeks an order for solicitor-client costs for all steps since November 2020. That was when Mr. Penk filed his first application for leave to bring an application to vary the previous orders.

[44] Solicitor-client costs are generally reserved for exceptional cases "in special circumstances which justify a departure from the usual award": *Nemedy v King*, 2008 NWTSC 93 (at para. 20). They may be used to mark the court's disapproval of a party's conduct in the litigation. Here, Ms. Lacoursière's counsel submits that solicitor-client costs are warranted since this application is a continuation of a pattern of vexatious litigation with no bearing on the best interests of the children.

[45] In this application, and throughout these proceedings since November 2020, Mr. Penk has repeated the same claims and accusations of conspiracies, falsifying evidence and criminal conduct on the part of Ms. Lacoursière and others that he made in the previous court hearings, all of which were rejected as baseless and irrational. In my opinion, an order for solicitor-client costs is justified. However, I will not make the order covering all steps since November 2020. The application did not proceed at that time. It was only in June 2022 that Mr. Penk filed materials that led to this specific application.

[46] I order that Ms. Lacoursière shall be entitled to her solicitor-client costs since June 2022. Her counsel is to prepare a Bill of Costs to be taxed by the Clerk of the Court. Notice of the taxation shall be given to Mr. Penk by the Clerk by email. Ms. Lacoursière shall have judgment against Mr. Penk for the amount as taxed.

CONCLUSION

[47] The application for leave is dismissed with solicitor-client costs as ordered above. Ms. Lacoursière's counsel may prepare and file the formal order, subject to my approval, without the need for Mr. Penk's approval or signature.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, NT, this
8th day of March, 2023.

The Respondent (Applicant) represented himself.

Counsel for the Applicant (Respondent): Margo L. Nightingale

S-1-FM-2012000100

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Applicant

-and-

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES
