NOVA SCOTIA COURT OF APPEAL
Citation: *Hill v. Davis*, 2005 NSCA 104

Date: 20050630
Docket: CA 238220
Registry: Halifax

Between:

Gilbert Roland Hill

Appellant

v.

Pamela Davis

Respondent

Judge(s):	Roscoe, Bateman & Cromwell, JJ.A.
Appeal Heard:	May 19, 2005, in Halifax, Nova Scotia
Held:	Appeal dismissed, with costs payable by Mr. Hill to Ms. Davis in the amount of $2,000.00 together with disbursements as taxed or agreed, as per reasons for judgment of Bateman, J.A.; Roscoe and Cromwell, JJ.A. concurring
Counsel:	Deborah E. Gillis, Q.C., for the Appellant Susanne M. Litke & Sharon Avery, Student at Law, for the Respondent

Reasons for judgment:

[1] This is an appeal from an order made pursuant to the **Maintenance and Custody Act,** S.N.S. 1989, c. 160 as amended, requiring the appellant father, Gilbert Roland Hill to pay maintenance for his son James Anthony Davis. The respondent, Pamela Davis, is James' mother.

BACKGROUND

[2] Roland Hill and Pamela Davis, had a brief relationship in 1981 when Ms. Davis was 16 years old. Their child, James Davis, was born on June 2nd, 1982.

[3] Ms. Davis says she told Mr. Hill of James birth early on. Mr. Hill maintains he was unaware of Ms. Davis' pregnancy until 1996, when Ms. Davis brought an application for child maintenance for James under the **Family Maintenance Act** (now the **Maintenance and Custody Act**). He was ordered to pay maintenance of $500 monthly, commencing June 5th, 1996. James had some contact with his father after that time but continued to reside with his mother.

[4] In June 2000 James completed grade 12 at Millwood High School. In January 2001, after working in temporary positions for 6 months, James re-enrolled in Grade 12 in order to improve his marks for university entrance.

[5] In early 2001 Mr. Hill filed an application to terminate the support for James. Mr. Hill either did not know or did not believe James had re-enrolled in school in January. On April 9, 2001, the parties appeared in court on Mr. Hill's application to terminate support. By that time, James was living with his father, having moved in with him on April 4. The support was therefore terminated by agreement, the consent order providing that James would be in his father's custody, with reasonable access by his mother.

[6] James abandoned his upgrading attempt and sought employment. He was abusing drugs and alcohol which behaviour was of concern to both parents. On June 2nd, 2001 James Davis turned 19 years old. He returned to live with his mother in late June when his father told him to move out. Tragically, on August 12, 2001, James sustained a severe brain injury when, intoxicated, he fell from the

4th storey of a parking garage onto the concrete floor below. He was admitted to hospital, where he stayed until October 9th, 2001. He was subsequently transferred to the Nova Scotia Rehabilitation Centre. Extensive rehabilitation was required for him to re-learn to speak and walk. He has made great strides but has not and will not regain his pre-accident physical and intellectual capacity.

[7] Following his discharge from the Nova Scotia Rehabilitation Centre in December 2001, James returned to live with his mother. She had taken a leave from her job at the time of the accident. Upon discharge from the Centre he continued to suffer from his injuries, required close supervision and was unable to work or further his education. Ms. Davis remained off work. When her employment benefits ran out she applied for provincial income assistance. She was not able to return to work until March of 2002, and then only on a part time basis. Since December 20, 2001, James had been in receipt of income assistance.

[8] On December 18, 2001, Ms. Davis applied to vary the April, 2001 order to require that Mr. Hill pay maintenance for James. The application did not come before the court for hearing until November, 2003.

[9] In September 2002, James enrolled in an educational program at the City Church Bible Institute (CCBI). During that academic year he attended classes on Wednesday evenings. He completed several courses with excellent grades.

[10] In February 2003, on the recommendation of his rehabilitation physician, James began consultations with Brian Tapper, a vocational counsellor. Mr. Tapper helped him develop an educational plan. From September 2003 to the time of the maintenance hearing in November, James attended the Flexible Education Learning Centre (FLEC) of the Halifax Regional School Board, to upgrade his high school marks.

[11] At the time of the hearing, although he continued to suffer the effects of the brain injury, James was involved in a regular exercise routine, was abstaining from alcohol and drugs and was highly motivated to pursue an education. It was James' hope to take a paralegal course at the Nova Scotia Community College, commencing in September, 2004. Mr. Tapper thought that was an attainable goal, although James was yet to be admitted to the program.

[12] The maintenance application was heard before Justice Tidman who delivered an oral decision at its conclusion. He directed that Mr. Hill pay child support in the amount required by the **Child Maintenance Guidelines**, O.I.C. 1998-386 (August 5, 1998), N.S. Reg. 53/98 as amended. This consisted of basic support of $774 monthly together with a proportionate share (80%) of extraordinary expenses and a contingent lump sum as retroactive support. It is this order which is on appeal.

Issues

[13] Mr. Hill frames the following grounds of appeal:

> 1. Did the Learned Trial Judge err in law and in fact in finding that James Davis was a dependent child pursuant to s. 2 of the *Maintenance and Custody Act* and in ordering maintenance payable for him by the Appellant? Did the Learned Trial Judge err in law in varying the Consent Order dated April 26, 2001, effective April 1, 2001, which ordered by consent that there was to be no child support maintenance payable for James Davis, which Order was not varied upon James Davis attaining the age of nineteen years or prior to August 12, 2001?
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> 2. Did the Learned Trial Judge err in law and in fact in varying the Consent Order dated April 26, 2001 and in finding that James Davis, at the time of attaining the age of nineteen (June 2, 2001), had not withdrawn and was unable to withdraw from the charge of his parents because it was his intention at that time and continued to be his intention to further his education at a post-secondary institution? Did the Learned Trial Judge err in law and in fact in determining that James Davis was a dependent child because it was his intention on attaining his nineteenth birthday to further his education at a post-secondary educational institution?
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> 3. Did the Learned Trial Judge err in law in finding that James Davis was a dependent child by virtue of his educational plans without evidence that the plans were concrete and without evidence that the proposed plans were likely to provide him with marketable skills or evidence that the suggested studies would realistically ready James Davis for gainful employment?
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> 4. Did the Learned Trial Judge err in fact when he found that at the time of the trial, James Davis had made arrangements to take a paralegal course at the Nova Scotia Community College?

> 5. Did the Learned Trial Judge err in law and not exercise his discretion judicially in ordering support payable pursuant to s.3(2)(a) of the Guidelines without having due or adequate regard to s.3(2)(b) and an inquiry into the condition, means and circumstances of James Davis and the parties, including regard to whether James Davis had any obligation to pursue an action against third parties for compensation.
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> 6. Did the Learned Trial Judge err in law in failing to exercise his discretion to put conditions on support payable by the Appellant including a termination date?

[14] As I will discuss below, the wording of certain of the grounds of appeal presume an interpretation of the Judge's decision which is not supported on a careful reading of the judgment.

Standard of Review

[15] As to the applicable standard of review, L'Heureux-Dubé J. wrote for the Court in **Hickey v. Hickey**, [1999] 2 S.C.R. 518, at ¶ 10 and 12:

> . . . [Trial judges] must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
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> . . .
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> There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a

> support order simply because it would have made a different decision or balanced the factors differently.
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> (Emphasis added)

Analysis

[16] Section 9 of the **Maintenance and Custody Act**, supra, provides:

> Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child. 1997 (2nd Sess.), c. 3, s. 4.

[17] "Dependent child" is defined in s. 2:

> (c) "dependent child" means a child who is under the age of majority or, although over the age of majority, unable, by reason of illness, disability or other cause, to withdraw from the charge of the parents or provide himself with reasonable needs but does not include a child twenty-four years of age or older who is attending a post-secondary educational institution;
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> (Emphasis added)

[18] As the case was presented to Justice Tidman, the focus was James' status immediately preceding the accident. It was Mr. Hill's position that, at the time of the accident in August 2001, James having attained the age of majority and not continuing with his studies or having firm plans to do so, was no longer a "dependent child" under the **Act**. Mr. Hill says he, therefore, did not have an ongoing obligation to provide support.

[19] There was evidence about James' plans for further education in the period after graduation from high school and before the accident. Upon graduation he made inquires about the requirements for entry into Saint Mary's and Mount Saint Vincent Universities. He learned that he needed to better his marks for acceptance. That is why he returned to high school in January 2001. Although he abandoned that upgrading attempt in the months leading up to the accident, he had interviewed for and was accepted into an e-commerce program at CompuCollege commencing in September 2001. During that time he was working at two part time jobs and saving a little bit of money for his education as well as contributing

to his mother's household expenses. He had admittedly not committed to attend CompuCollege or any university, nor did he have the finances necessary to do so at that time.

[20] Mr. Hill says the support order is premised on a finding by the judge that prior to the accident James had a clear intention to pursue a particular course of post-secondary study and, therefore, remained a dependent child. "Other cause" for the inability to withdraw from the charge of the parents, within the definition of "dependent child" (¶ 17 above) is commonly held to include a reasonable period of post-secondary education undertaken after the "child" turns 19 years old.

[21] Mr. Hill's submission in this regard is in error. The judge's key finding, which is supported on the record, is that James was not intending to work permanently, but was taking a hiatus before continuing his education. The judge said:

> . . . The child may wish to work in order to save for the cost of post-secondary education and to have an educational break and decide on a future course of training.
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> In my opinion and in my view, this is exactly the situation with James. In this case, although James was working, I am satisfied that it was not his intention to work permanently at those jobs. He was, in fact, living with his father at the time he made application to CompuCollege in September of 2001 in an e-commerce program. He had graduated from grade 12 in June of 2000. However, in order to qualify for university, James wished to upgrade his marks. . . .
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> On the basis of the outlined circumstances, I find that James, at the time he attained the age of 19 years, had not withdrawn and was unable to withdraw from the charge of his parents, since it was his intention at that time, and still is his intention, to further his education at a post-secondary educational institution.

[22] Section 2(c) of the **Act** provides that a child may remain a dependent child even where over the age of majority, if ". . . unable, by reason of illness, disability or other cause, to withdraw from the charge of the parents or provide himself with reasonable needs . . . ." The case law is replete with examples where children remain dependents for maintenance purposes, even though not actually attending an educational institution. The issue of how long a child's period of dependency continues is one of fact (**Martell v. Height** (1994), 130 N.S.R. (2d) 318 (C.A.) per

Freeman, J.A. at ¶ 8.; **MacLennan v. MacLennan** ([2003] N.S.J. No. 15 (N.S.C.A.) (Q.L.) per Cromwell, J.A. at ¶ 40). As such it is subject to a high level of deference, requiring palpable and overriding error to justify appellate intervention.

[23] It was Mr. Hill's submission that at the time James moved back to live with his mother, because he was over 19 years of age and not engaged in any educational program, he was no longer a "dependent child" under s. 2(c) of the **Act** and had forever lost that status. He says the fact that Ms. Davis did not immediately make an application for the resumption of the maintenance after James came to live with her again in June 2001 confirms that he was not a dependent for whom maintenance is payable. The disablement caused by the injury, says Mr. Hill, cannot revive that status (citing **Nowe v. Nowe**, [1986] N.S.J. 78 (Q.L.)).

[24] The evidence supports the judge's finding that, at the time of the accident on August 12, 2001, James remained a dependent child:

- He had graduated from school in June of 2000, but returned to upgrade his marks in January of 2001. Although James did not apply himself to that endeavour and quit the program in April 2001, the fact that he returned to school to improve his marks is confirmation that he intended to further his education;

- In the period immediately preceding the accident, James was working at two part time jobs and attempting to put some money aside for future schooling;

- James' mother had a very modest income and was not in a position to assist him financially in furthering his studies. Mr. Hill was not supportive of James furthering his education and had made no offer of contribution. James needed to work if he planned to self-finance his education;

- James had made application and had been accepted into the CompuCollege program, although he had not clearly decided to attend and did not have the immediate finances to do so;

- The period of time between his reaching the age of majority and the accident was a short one;

- It was James' evidence that he intended to further his education.

[25] The judge clearly understood James had not made firm plans on a course of study but reasonably concluded that it was his intention to further his education.

[26] The **Act** does not require that the dependent child who is over the age of majority be pursuing further education. It simply states that the dependency continues if the child is "unable, by reason of illness, disability or other cause, to withdraw from the charge of the parents or provide himself with reasonable needs." I am not persuaded that the judge erred in concluding James had not withdrawn and was unable to withdraw from his parent's charge at the time of the accident.

[27] This is not to suggest that a parent has an indefinite responsibility to support a child who is capable of becoming independent. A parent does, however, have an obligation to assist a child through a reasonable transition period **(Gamache v. Gamache** [1999] A.J. No. 474 (Q.B.) (Q.L.) per Trussler, J. at ¶ 8 and 9).

[28] Although the focus of Mr. Hill's opposition to the maintenance application was James' pre-accident status, he questioned, as well, the viability of James' plan to pursue paralegal training at the Nova Scotia Community College. It was Mr. Hill's position that James' plan was unrealistic in light of his limitations arising from the brain injury. According to the evidence, although James did suffer lasting effects from the injury, he had performed extremely well in his recent upgrading courses and was said by his doctor and vocational counsellor to be highly motivated to succeed. If admitted to the paralegal program he would need some accommodation from the Community College - most likely an extension of the time within which he would need to complete the program.

[29] It was Mr. Hill's submission that James should abandon his educational plans and immediately find minimum wage employment. There was no evidence, however, that he was equipped for any employment. He had lasting balance problems, could not undertake work in which he would risk re-injury, was prone

to distraction and tended to be impulsive. Even if he were fit to work, he would need a highly structured work environment and substantial accommodation from any employer willing to provide a job, even at minimum wage.

[30] There was no serious suggestion from Mr. Hill that James, at the time of the hearing, was able to provide for himself or remove himself from parental charge. Accordingly, Mr. Hill's attack on James' plan for further education was not relevant to the question before the judge - which was James' pre-accident status. I would find the judge did not err in concluding James was not independent at the time of the accident. As James had not ceased to be a dependent child prior to the accident, unlike the situation in **Nowe v. Nowe**, supra, there was no issue here about regaining the dependent status.

[31] In the alternative, Mr. Hill says the judge erred in ordering support in the **Guideline** amount. The onus of establishing the **Guideline** amount is inappropriate rests with the party seeking a different order (**MacLennan v. MacLennan**, supra, ¶ 8).

[32] Quantum of support is governed by the **Child Maintenance Guidelines** made under s. 55 of the **Maintenance and Custody Act**, supra. The **Guidelines** provide:

> 3(2) Unless otherwise provided under these Guidelines, where a child to whom a child maintenance order relates is the age of majority or over, the amount of the child maintenance order is
>
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
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> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each parent to contribute to the maintenance of the child.

[33] Mr. Hill says James' income should have been taken into account so as to reduce the support payable. James' only source of income was Provincial Income Assistance in the monthly amount of $667. Section 30 of the **Act** prohibits consideration of that income when fixing child support:

> 30 An order may be made under this Act whether or not the single woman, spouse or common-law partner, dependent child or dependent parent is receiving aid from any government or from any city, town or municipality or from any public, local or private body, organization or institution, or is being cared for in any sanatorium, hospital, home or other charitable or public institution and such aid shall not be considered in making the order. R.S., c. 160, s. 30; revision corrected 1999; 2000, c. 29, s. 8.

[34] Mr. Hill further says the judge should have time-limited the payment of support - tying it to a specific time within which James should complete his education. I have concluded the order for support was not premised on James' continuing dependency as a result of his pursuit of post-secondary studies. James' future ability to "withdraw from parental charge" is unknown. It is not an appropriate case for a time-limited order.

[35] In summary, I am not persuaded there was any evidentiary basis upon which the judge could conclude that the **Guideline** amount was "inappropriate" and therefore depart from it. He did not err.

DISPOSITION

[36] I would dismiss the appeal with costs payable by Mr. Hill to Ms. Davis in the amount of $2,000.00 together with disbursements as taxed or agreed.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

Cromwell, J.A.