

Date: 20010406
Docket No.: CA 166031

NOVA SCOTIA COURT OF APPEAL

[Cite as: Gaetz v. Gaetz, 2001 NSCA 57]

Glube, C.J.N.S.; Freeman and Saunders, J.J.A.

BETWEEN:

CLIFFORD PERRY GAETZ

Appellant

- and -

SHARON EVANGLINE GAETZ

Respondent

REASONS FOR JUDGMENT

Counsel: The appellant on his own behalf
Kay L. Rhodenizer, for the respondent

Appeal Heard: February 5, 2001

Judgment Delivered: April 6 , 2001

THE COURT: Appeal allowed without costs as per reasons for judgment of Freeman, J.A.; Glube, C.J.N.S. and Saunders, J.A. concurring.

FREEMAN, J.A.:

[1] The parties were divorced in 1995 after an 11 year marriage during which they had three sons born between 1984 and 1987, respecting whom they have joint custody. The boys have chosen to live with their father who is deeply involved in their hockey and golf activities but they maintain a close relationship with their mother as well.

[2] After the separation the appellant husband paid support while the wife tried to achieve self-sufficiency. The support payments began at \$1,200 a month blended spousal and child support. This was reduced by agreement to spousal support of \$900, then \$550.

[3] Both parents appear to have been motivated by a concern for the best interests of their sons. The flexible arrangement between them worked well until the husband accused the wife of entering his home and taking some records related to their proceedings. He stopped paying spousal support to force her to give back the papers. She turned to maintenance enforcement and obtained a garnishment order based on their original \$1,200 monthly obligation, which resulted in an overpayment for 1999.

[4] The husband brought an application for variation which was heard in the Supreme Court of Nova Scotia, Family Division on November 17, 1999, January 26, 2000 and February 14, 2000. The husband was self-represented on the appeal, but at the hearing both parties were represented by counsel.

[5] The husband sought an order effective January 1, 1999, terminating spousal support, terminating any obligation he might have to pay child support to the wife, and ordering the wife to pay the table amount of child support and her share of s.7 expenses under the **Child Support Guidelines**. The wife sought an order for spousal support for \$854 a month for 1999, an order for spousal support of \$550 per month effective January 1, 2000 and an order freeing her of responsibility for child support.

[6] The trial judge found the wife had an income of \$30,000 - \$31,000 from full-time and part-time employment, but with little job security. She lives in a home purchased with \$41,000 she received as her interest in the matrimonial assets. Her home is now assessed at \$85,000 and is mortgaged for \$54,000. She has few debts apart from a \$3,600 line of credit and owns RRSPs worth about \$50,000.

[7] Mr. Gaetz is an electronics salesman who was found to have an income package worth \$80,000, including a basic salary of \$40,000, commission income and a car allowance. He lives in the former matrimonial home which is valued at \$200,000 with a mortgage of \$51,000. He has debts totalling about \$70,000 including \$35,000 to Revenue Canada, a \$25,000 line of credit and a \$10,000 Visa overdraft. He has also borrowed \$55,000 from family members. His RRSPs are valued at \$135,000. During the period under review he had enjoyed high commission income but was pessimistic this could continue. He states he will soon need a new car.

[8] He claimed that the wife should share additional annual expenses, or add-ons, totalling \$18,634 under s. 7(1) of the **Guidelines**. This included \$6,571 for hockey and \$1,311 for golf, which might be classified as extraordinary extracurricular expenses under s. 7(1)(f); \$1,886 for school trips and enrollment (s. 7(1) (d) or (f); \$6,000 for registered educational savings plans which do not qualify as expenses under s. 7(1); and \$2,866 a year for orthodontic work, a health -related expense under s. 7(1)(c) which will total \$8,600 over three years. The trial judge considered the hockey claim “excessive, having regard to the parties’ income.” He found that \$3,500 of the hockey expenses, the golf expenses, and RESPs were not expenses Ms. Gaetz could be required to share under the **Guidelines**, reducing the total claimed for add-on expenses to \$7,752. He calculated Ms. Gaetz’s share to be \$166.09 a month.

[9] The table amount under the **Guidelines** for a parent earning \$30,000 a year with three children is \$576 per month or \$6,912 a year. The trial judge found that after taxes of \$5,918 and the table amount of child support Ms. Gaetz would be left with \$17,170 a year. If she were required to pay her share of the add-on expenses she would be left with \$15,177.

[10] The trial judge considered that of his \$80,000 annual income Mr. Gaetz would have \$53,704 after taxes and would receive \$6,912 in support from Ms. Gaetz if she paid only the table amount. He compared standards of living in the two households and had no difficulty determining that Ms. Gaetz’s standard of living would be considerably lower than Mr. Gaetz’s. He found that Ms. Gaetz would suffer undue hardship if she were required to pay the table amount of child support and her share of the add-on expenses. He reduced her obligation to pay child support to the token level of \$100 per month.

[11] The trial judge issued an order for joint custody of the three boys; primary residence to be with Clifford Gaetz with reasonable access to Sharon Gaetz. He varied the minutes of settlement to provide that Mr. Gaetz pay Ms. Gaetz \$900 per month spousal support for 1998 and \$550 per month for 1999. He found that Ms. Gaetz had received an overpayment of \$3,639 in 1999 and directed her to pay that back within six months. He suspended spousal support effective January 1, 2000. Ms. Gaetz was ordered to pay child support of \$100 per month commencing January 15, 2000. Following a separate hearing he ordered that Ms. Gaetz pay costs of \$2,250.

[12] Ms. Gaetz accepts this order and seeks to have it confirmed. Mr. Gaetz has raised numerous grounds of appeal, most of which relate to the trial judge's refusal to order Ms. Gaetz to pay child support pursuant to the **Child Support Guidelines**.

[13] The leading case on the **Guidelines** in Nova Scotia is **Raftus v. Raftus** (1998), 166 N.S.R. (2d) 179, in which this court comprehensively considered the scheme of the **Guidelines** and the rationale behind them before concluding, by a 2-1 majority, that in classifying extraordinary expenses under s. 7(1), the ability of a parent to pay is not a controlling factor. This is referred to as the objective approach; it would appear the subjective approach based on ability to pay advocated by the dissenting judge is more widely accepted in other provinces. Extraordinary expenses aside, the "table amount" established by the **Guidelines** is kept deliberately simple so the financial duties of separated parents to their children can be readily ascertained. It is a function of the payor parent's income, varied only by the number of children. Parents with incomes as low as \$7,000 a year are required to contribute financially to their children in accordance with the **Guidelines**.

[14] It is apparent from the trial judge's reasons that he is familiar with the **Guidelines** in their statutory context. He did not refer to **Raftus**. He did cite freely from a paper on undue hardship presented at the National Family Law Program held in St. John's, Newfoundland, in July, 2000, some six months after the hearings: *Rich Man, Poor Man: Undue Hardship and the Federal Child Support Guidelines: A Practitioner's Guide* - Doug Moe.

[15] The **Guidelines** authorize a court to depart from awarding child support as calculated in the tables only when the payor spouse or a child, on whose behalf a

request is made, would suffer undue hardship. This is determined by a two-step test. First, s. 10(2)(a) to (e) of the **Guidelines**, lists circumstances which must be considered: there must be a determination that the spouse has an unusually high level of debts incurred in the family context, high access expenses, or several instances of legal duties of support to a child or other person other than a child of the marriage. Only when circumstances capable of creating undue hardship are found does the second step become relevant - the comparison of the standards of living of the households of the payor spouse and the custodial spouse.

[16] The trial judge found that Ms. Gaetz's circumstances did not fit within any of those set out in subsections 10(2)(a) to (e). Mr. Moe's paper suggested a number of analogous circumstances, but there is no finding that any of these applied to Ms. Gaetz. The trial judge found undue hardship solely on the ground that Ms. Gaetz's standard of living was lower than that of Mr. Gaetz's household when the criteria set out in Schedule II of the **Guidelines** was applied. There was no basis for reaching that stage of the analysis.

[17] In my view the trial judge was in error. He imported irrelevant concepts that are alien to the whole legislative scheme of the **Child Support Guidelines**. If a parent whose circumstances do not reflect considerations set out in s. 10(2)(a) to (e), who has relatively minor debts, and who enjoys an income of \$30,000 - \$31,000 a year, can be relieved of most of her child support obligations on grounds of undue hardship, the whole purpose of the **Guidelines** would be undermined and their laudable objectives defeated. The appeal must be allowed and the trial judge's conclusions as to undue hardship set aside.

[18] In my view the s. 7(1) add-on expenses are still too high. I am not satisfied that the school trip expenses are necessary and the \$86 enrolment fee should be included in the table amount. The hockey program, for parents in the circumstances of these parties, should not be considered a necessary add-on. It is a luxury the father may choose to support from his own resources, but which the mother should not be required to share. The same is true of education funds, desirable as they may be. This leaves only orthodontic expenses of \$2,866 a year. Applying the .27 factor calculated by the trial judge, the wife's share would be \$773 or \$64.49 a month.

[19] I would therefore vary the trial judge's order to require that the respondent Sharon Evangeline Gaetz pay to the appellant Clifford Perry Gaetz child support of

\$576.00 per month plus add-on expenses of \$64.49 per month for orthodontic work, making a total of \$640.49 per month. I would exercise the discretion of the court to forgive arrears resulting from this variation and order that the increased payments commence April 1, 2001. In all other respects I would confirm the order of the trial judge. I would award no costs on the appeal.

Freeman, J.A.

Concurred in:

Glube, C.J. N.S.

Saunders, J.A.