

Date: 20010516
Docket: CA 167298

NOVA SCOTIA COURT OF APPEAL
[Cite as: Ross v. Mathieu (Ross) 2001 NSCA 85]

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

BETWEEN:

MARIO JOSEPH ALBERT ROSS

Appellant

- and -

MARIETTE ALICE MATHIEU (ROSS)

Respondent

REASONS FOR JUDGMENT

Counsel: Gregory D. Barro for the appellant
The respondent not appearing; submission in writing

Appeal Heard: May 16, 2001

Judgment Delivered: May 16, 2001

THE COURT: The order of the Chambers judge is varied to require Ms. Mathieu to pay \$325.00 per month commencing June 1, 2000. No costs on appeal are awarded, per oral reasons for judgment of Glube, C.J.N.S.; Freeman and Flinn, J.J.A. concurring.

GLUBE, C.J.N.S.: (Orally)

- [1] Justice Charles E. Haliburton granted an order dated October 31, 2000, which gave custody of the three children of the marriage to the appellant, Mario J. A. Ross. He ordered the respondent, Mariette Alice Mathieu (Ross), to pay \$175.00 per month in child support, effective June 1, 2000. Ms. Mathieu resides in Quebec and did not appear at the hearing, although she did provide information concerning her income, and other unverified information concerning access expenses.
- [2] At the hearing of this application to vary on October 19, 2000, and on the basis of the respondent's declared income of \$18,200.00, the appellant requested an order that the respondent pay the table amount of \$325.00 per month (Quebec table). Without giving reasons, the trial judge refused the appellant's request to grant the Table amount, and substituted an arbitrary amount of \$175.00 per month. While there are no written reasons for this in his decision, it is apparent from the transcript of the discussion between counsel for the appellant and the trial judge that the trial judge felt he could reduce the Table amount on the basis of a disparity of income between the parties, without first having to make a determination that undue hardship exists. Since the respondent did not appear, there is insufficient evidence upon which such a determination could be made.
- [3] The appellant appeals the trial judge's order. The respondent has not appeared on the hearing of this appeal but filed a written submission in support of the trial judge's order.
- [4] As stated by Freeman, J.A. recently in **Gaetz v. Gaetz** [2001] N.S.J. No. 131, the determination of undue hardship is a two-step test.

[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.

- [5] The Chambers judge was in error having made no finding under s. 10(2) of the **Guidelines** before examining the standard of living.
- [6] The order of the Chambers judge is varied to require Ms. Mathieu to pay \$325.00 per month commencing June 1, 2000. We award no costs on the appeal.

Glube, C.J.N.S.

Concurred in:

Freeman, J.A.

Flinn, J.A.