**C.A. No. 110044**

# NOVA SCOTIA COURT OF APPEAL

**Hallett, Chipman and Pugsley, JJ.A.**
**Cite as: Wight v. Wight, 1995 NSCA 162**

**BETWEEN:**

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| **KIMBERLY LORRAINE WIGHT**<br>Appellant<br>- and -<br>**KEVIN ELLIOTT WIGHT**<br>Respondent | Brian Vardigans<br>for the Appellant<br><br>W. Bruce Gillis, Q.C.<br>for the Respondent<br><br>Appeal Heard:<br>October 2, 1995<br><br>Judgment Delivered:<br>October 23, 1995 |

**THE COURT**: Appeal allowed with costs to the appellant in the amount of $750 plus disbursements per reasons for judgment of Pugsley, J.A., Hallett and Chipman, JJ.A. concurring

**PUGSLEY, J.A.:**

Kimberly Wight appeals from a corollary relief judgment issued October 25, 1994, ordering her former husband, Kevin Wight, to pay to her $550 monthly for the support of their two children, aged 8 and 5, respectively.

Mr. Wight was also ordered to pay $100 a month into a "Children's Education Fund" initiated with his mother, some years earlier, which fund, at the time of divorce, aggregated approximately $4,400.

The grounds of appeal may be summarized as follows:

1. the trial judge failed to require Mr. Wight to pay his share of the cost of raising the children (estimated at $1,150 monthly) in view of his income of $4,126 per month and Ms. Wight's present unemployment;
2. the trial judge placed undue reliance on Mr. Wight's desire to pay off his debts of approximately $20,000;
3. the trial judge placed undue reliance on a verbal agreement between the parties, negotiated at the time of breakup, in October, 1993.

**Background**

The parties were married in December, 1985, and ceased cohabiting in October, 1993, at a time when both were approximately 31 years of age.

They agreed on joint custody of their two boys, with day-to-day care assumed by Ms. Wight.

Mr. Wight is a captain in the armed forces. He was employed as a pilot at CFB Greenwood, Nova Scotia. In October, 1994, he signed up with the military for a further twenty years and was transferred to CFB Comox, British Columbia, as a shift

supervisor at a desk operation centre.

Ms. Wight has a grade 7 education and worked, prior to the marriage, as a waitress, short order cook, and as an assistant service station manager. She has not worked since the marriage. She made no claim for spousal support.

On the day the parties separated, in October, 1993, they entered into an arrangement whereby Mr. Wight would pay to Ms. Wight $495 per month (including $95 for nursery fees) for support for the two children, and would also contribute $100 monthly for the education fund.

After providing for payment of matrimonial debts aggregating $16,000, by Mr. Wight, the parties agreed on a division of assets, leaving each with a net of approximately $14,500. Mr. Wight temporarily reduced the debt to approximately $3,000, by disposing of assets, including a jeep retained by him, before increasing his obligations to $20,000 in order to purchase a motorcycle, a second-hand car, and furniture and appliances.

At the time of trial, he forecast his monthly deficit at approximately $400 after payment of support.

He will be sharing accommodation in British Columbia with a female friend who will be drawing unemployment insurance until she obtains a job. He testified she will be self-supporting.

Ms. Wight is in receipt of mothers' allowance of $675 and family allowance of $186 monthly, in addition to the support payments of $400. At the time of trial, the youngest child had entered the public school system, hence the nursery school payments ceased. She estimated her monthly expenses for the children to aggregate approximately $1,150 and her own expenses to aggregate $1,137.

She testified that any increase in Mr. Wight's support payments, or any employment income earned by her, would result in a dollar-for-dollar decrease in the

amount of her mothers' allowance.

**Analysis**

The obligation to support children is a duty owed to the children, not to the parents (**Richardson v. Richardson**, [1987] 1 S.C.R. 857 at 870).

Section 15(8)(a) of the **Divorce Act**, R.S.C. (1985), c. 3 requires the Court to apportion the joint financial obligation of maintaining the child on both spouses "according to their relative abilities to contribute".

The trial judge correctly did not take into account the money available to Ms. Wight from social assistance when determining the level of Mr. Wight's obligation to pay support (see the comments of Lacourcière, J.A. on behalf of the Court in **Fabian v. Fabian** (1983), 34 R.F.L. (3d) 313 at 316 (Ont. C.A.) as well as Carr, J. in **Gray v. Gray** (1986), 3 R.F.L. (3d) 457, (Man. Q.B.)).

While Ms. Wight acknowledged she could obtain a job as a waitress, paying minimum wage, she pointed out that it would be shift work, requiring her to pay a baby sitter, and "as long as I'm on social assistance, they deduct penny-for-penny... If I could get off social assistance, I could go get a part-time job plus I could still go to school, maybe possibly get ahead".

This attitude "did not inspire any sympathy" in the trial judge. That reaction should have been tempered, in my opinion, when one considers Ms. Wight's lack of education and work experience, the importance of looking after the children, as well as her evidence that prior to the hearing she made an application to social assistance to upgrade her education to facilitate employment.

The financial obligation imposed on Ms. Wight by s. 15(8)(a) *supra* has been directly met by her contribution of the Family Allowance cheque each month and indirectly met by the value of her work within the home, performed every day. These

hidden costs include an estimate of the value of the "housekeeping, shopping, child rearing and nurturing tasks" undertaken by her as well as the "opportunity costs incurred as a result of these responsibilities" (**Willick v. Willick**, [1994] 3 S.C.R. 670 at 720).

The trial judge determined that "need is not a real question. The only real question is the ability of Mr. Wight to pay... I'm not persuaded on the basis of the evidence that he has the capacity to pay any more than something in the range of what he has been paying in the past".

In order to assess Mr. Wight's ability to pay support, it is instructive to review his list of monthly expenses. In addition to a number of discretionary items (telephone $75, savings $200, alcohol and tobacco $100) as well as an item no longer incurred (nursery school $95) the list also included debt retirement of $826 per month.

The vast majority of Mr. Wight's debt obligations were incurred after separation. The trial judge found that he has "substantial debts which, frankly, he need not have incurred to the extent that he has incurred them..."

The evidence concerning the purchase of the motorcycle, the second-hand motor vehicle, and the excessive amount spent on furniture and appliances, fully support this conclusion.

Child support is a parent's first obligation and takes precedence over car payments, entertainment, tobacco, alcohol, and debts (**Murray v. Murray** (1991), 35 R.F.L. (3d) 449).

The voluntary decision to make discretionary expenditures cannot be used by Mr. Wight as a shield to fend off legitimate claims for support of the children (**Edwards v. Edwards** (1995), 133 N.S.R. (2d) 5 at 19, N.S.C.A.).

While the income earned by Mr. Wight's female companion cannot be considered to be used directly to support his children, it is appropriate to take into

account that he will receive assistance in looking after his household expenses in Comox.

Mr. Wight's forecast of a monthly deficit of $400 did not factor in the income tax relief he will receive resulting from the payment of support. The trial judge noted that he would enjoy a "significant income tax benefit once an order is in place and he is obligated to pay child maintenance". Yet, as a result of the decision, the total support obligation of Mr. Wight was increased by only $55 a month, to $650. Such a modest increase does not recognize the substantial tax benefit to which Mr. Wight is entitled, let alone materially assist in meeting the needs of the children.

Section 15(5)(c) of the **Divorce Act** (*supra*) directs the Court to take into consideration "any order, agreement, or arrangement relating to the support" of the children.

While the trial judge recognized that support for children is not determined by any agreement between the parents, and is always subject to review by the Court (see **Richardson v. Richardson** (*supra*)), he apparently placed some reliance on the arrangement discussed on the day of separation.

The trial judge commented:

> "It was nonetheless an agreement. I am satisfied the agreement was made for whatever reasons... He has established a pattern, they did have an agreement".

The arrangement was not only clearly inadequate in the light of the needs of the children, but it also ignores Ms. Wight's evidence that her husband "wrote out what he felt was appropriate and wanted me to sign it, and I said no, because at that point in time, I couldn't even think, let alone make a decision on what's right and what's wrong... At that point I was just willing to do anything just to go."

This comment is consistent with the trial judge's finding that Mr. Wight was the "dominant force at the time of the agreement" characterizing his evidence as

"indicating a somewhat military approach to what was decided, what was needed, what was required, and what will be done".

While an agreement may, in some circumstances, afford strong evidence that it made "adequate provision for the needs of the children at the date the agreement was made" (**Willick** (*supra*) per Sopinka, J. at 687, adopting the comments of Anderson, J.A., in **Dickson v. Dickson** (1987), 11 R.F.L. (3d) 337 (B.C.C.A.)), these comments are not applicable to this case. The arrangement was not reduced to writing, Ms. Wight did not benefit from the advice of counsel, and she was emotionally upset at the time of the separation.

Counsel for Ms. Wight has suggested that this Court has an independent discretion to vary the support determined by the trial judge. The authorities, however, make it clear that our ability to vary the award is not so extensive.

In **Moge v. Moge**, [1992] 3 S.R.C. 813, the Court approved the following comments of Morden, J.A. in **Harrington v. Harrington** (1981), 22 R.F.L. (2d) 40 (Ont. C.A.):

> "As far as the applicable standard of appellate review is concerned I am of the view that we should not interfere with the trial Judge's decision unless we are persuaded that his reasons disclose material error, and this would include a significant misapprehension of the evidence, of course, and to use familiar language, the trial Judge's having 'gone wrong in principle or (his) final award (being) otherwise clearly wrong': **Attwood v. Attwood**, [1968] (p. 591 at 596)."

I am, however, with respect, of the opinion that a determination that Mr. Wight is obliged only to pay $550 per month, out of a gross salary of $4,100, for the support of two young children, in the circumstances of this case, is clearly wrong.

The October, 1993 arrangement between the parties should have had little influence when one considers the needs of the children, and the ability of Mr. Wight to pay.

Ms. Wight estimated she will require $1,150 per month to support the

children. This estimate was prepared prior to Mr. Wight's transfer to British Columbia. It is appropriate to consider that she will be required to bear, in addition, those unexpected expenses that inevitably arise that will increase the cost of the day-to-day care of two young boys, particularly when access by Mr. Wight will be limited. (**Pasterfield v. Pasterfield** (1993), 45 R.F.L. (3d) 332 (Sask. C.A.)).

The trial judge, in my respectful opinion, erred in a material way by placing undue reliance on Mr. Wight's desire to pay off his debts, by failing to sufficiently take into account the substantial tax benefits he would obtain, and in examining his budget, underestimating his ability to pay support.

I would affirm the order of the trial judge requiring Mr. Wight to continue to pay $100 monthly to the children's education fund, but I would allow the appeal by increasing the sum to be paid to Ms. Wight, as support for the children, to $1,100 per month. I would also award costs of the appeal to Ms. Wight in the amount of $750 plus disbursements.

J.A.

Concurred in:

Hallett, J.A.

Chipman, J.A.

C.A. No. 110044

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Appellant

- and -

**KEVIN ELLIOTT WIGHT**

Respondent

REASONS FOR JUDGMENT BY: PUGSLEY, J.A.