Docket No.: CA 163652
Date: 20001003

NOVA SCOTIA COURT OF APPEAL

[Cite as: Wedsworth v. Wedsworth, 2000 NSCA 108]

Glube, C.J.N.S.; Flinn and Oland, JJ.A.

BETWEEN:

DEBORAH LOUISE WEDSWORTH

Appellant

\- and -

JOHN JAMES MACLEOD WEDSWORTH

Respondent

REASONS FOR JUDGMENT

Counsel: Susanne Litke, for the appellant
respondent in person

Appeal Heard: September 19, 2000

Judgment Delivered: October 3rd, 2000

THE COURT: Appeal allowed in part per reasons for judgment of Flinn, J.A.; Glube, C.J.N.S. and Oland, J.A. concurring.

FLINN, J.A.:

[1] This is an appeal from a decision and order of Justice Campbell of the Supreme Court of Nova Scotia (Family Division).

[2] The main issue in this appeal arises in the following circumstances: The respondent had been paying child care expenses, under s. 7(1)(a) of the Child Support Guidelines (Guidelines), of $433.00 per month as his contribution towards day care expenses for the three children of the appellant and the respondent. The contribution was based on total day care expenses of $600.00 per month, with the respondent's proportionate share being set at 72%. The appellant applied, *inter alia*, to vary the respondent's contribution for day care expenses because those monthly expenses had increased from $600.00 to $918.00. The respondent opposed the increase, but did not oppose the existing monthly payment of $433.00, nor did he request that the payment of $433.00 be reduced. The trial judge not only refused the appellant's application for the increase, he varied the existing order by removing, completely, all obligation of the respondent to contribute to those day care expenses.

[3] The appellant appeals that decision.

[4] I will now review the background facts which give rise to this appeal.

[5] The appellant and the respondent were married on August 30, 1991, separated on April 16, 1997, and were divorced on December 31, 1998. There are

three children of the marriage; namely, twin boys four years of age as of January this year and a son eight years of age as of April this year.

[6] In the corollary relief judgment the appellant was granted sole care, custody and control of the three children. The respondent was granted specific access.

[7] The respondent was ordered to pay to the appellant spousal support of $500.00 per month for a period of two years commencing January 15, 1999. The respondent was also ordered to pay child support of $1,253.00 per month, made up as follows: On the basis of the respondent's income of $44,760.00, he was ordered to pay $810.00 per month in accordance with the applicable table set out in the Guidelines. He was further ordered to pay $433.00 per month as his portion (72%) of the monthly day care expenses of $600.00 pursuant to s. 7(1)(a) of the Guidelines.

[8] In March 1999 the respondent ceased paying his monthly contribution towards day care expenses when he learned that the appellant was no longer employed, and the children were no longer in day care. In May 1999 he made an application to vary the corollary relief judgment accordingly. Included in the application was an application to vary the access provisions. This application was countered by an application of the appellant, dated August 19, 1999, seeking to vary child support (both the table amount and the s. 7(1)(a) expenses). The appellant also requested that the access provisions be varied and that certain provisions of the corollary relief judgment with respect to life insurance be reviewed.

[9] The matter came before Justice Stewart, on an interim basis, and an order was issued on August 31, 1999. The order provided that the respondent's obligation, under the applicable table of the Guidelines, be increased to $860.00 per month on the basis of his increased annual income of $48,138.00. The respondent was also ordered to pay his proportionate share of the s. 7(1)(a) expenses, in the amount of $433.00 per month, but those payments were not to commence until October 1, 1999. The appellant had enrolled in a course of study leading to a certification in the information technology field, and the children were back in day care as of August 1999; however, the monthly payments were delayed for two months to make up for the two months of payment which the appellant had made in January and February 1999 when the children were not in day care. The order also made interim provisions with respect to access. The access provisions are not relevant for the purposes of this appeal, nor is the matter of life insurance.

[10] The matter came on for final determination before Justice Campbell in December 1999 and February 2000.

[11] There were two main issues in dispute before the trial judge:

1. Whether the respondent's income should be adjusted upwards so as to support a larger Guideline table amount for child support; and

2. Whether increased day care costs were reasonable and necessary, and

whether the respondent's contribution to those costs should be increased over the amount of $433.00 per month which the respondent was then paying.

[12] There was another issue dealing with arrears of mortgage payments. I will say more about those arrears later in these reasons.

[13] It is important to note that the respondent was not applying to <u>reduce</u> the amounts that he was already paying for child support. The respondent's position on this application was:

1. He took issue with the appellant's position that his income should be adjusted upwards; and
2. He submitted that the increased day care costs were unreasonable and unnecessary; and in any event, he could not afford to pay <u>any more</u> than he was presently paying; i.e., $1,793.00 per month, comprising $500.00 (spousal support), $860.00 (child support according to the table) and $433.00 (his contribution towards the day care expenses).

[14] The first issue which the trial judge dealt with was to determine the respondent's income, for the purpose of the Guidelines.

[15] The trial judge rejected the submissions of the appellant that the respondent's income should be adjusted upwards because the respondent was not disclosing the full amount of his income from a second job, namely delivering pizzas; or, alternatively,

that additional income be "imputed" to the appellant under the provisions of the Guidelines. The trial judge accepted the respondent's position (as it was found to be by Justice Stewart at the interim hearing) that his annual income, as an aircraft technician with the military, was $44,533.00 per annum, and that his secondary income, from delivering pizza, was $3,600.00 per annum. Based on the respondent's total income of $48,133.00, applying the appropriate table, and the respondent having made it clear to the trial judge that he was not claiming undue hardship, the trial judge fixed the monthly payment for child support at $860.00. This is the same amount which the respondent had been paying since the interim order of Justice Stewart in August 1999.

[16] The determination of income, for the purpose of the Guidelines, is essentially a factual matter. This court has repeatedly stated that the finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal. In coming to his conclusion, as to the respondent's income, the trial judge made no manifest error, he did not ignore relevant evidence, nor did he misunderstand the evidence or draw erroneous conclusions from it.

[17] Further, the trial judge made no error in rejecting the submission of counsel for the appellant that income should be imputed to the respondent because he voluntarily cut back his time spent on his second job of delivering pizzas. The case of **Montgomery v. Montgomery**, [2000] NSJ No. 1 (QL) (C.A.) has no application here. The circumstances of Mr. Montgomery which caused the court to impute income to him bear little or no resemblance to the circumstances of the respondent.

[18] For these reasons this court will not interfere with the trial judge's conclusions as to the appellant's income for the purpose of the Guidelines, nor with his fixing the table amount for child support at $860.00 per month.

[19] As to the appellant's request for an increase in the respondent's proportionate share of the increased day care expenses, the trial judge determined that those increased expenses (from $600.00 per month to $900.00 per month) were both necessary and reasonable, in the sense that less expensive day care facilities were not available. Those findings of the trial judge are not an issue in this appeal.

[20] Following his analysis of the respective incomes and expenses of the appellant and the respondent, the trial judge, not only refused the application of the appellant for an increase in the respondent's contribution to the day care expenses, he made the following determination:

> With the greatest of reluctance and with deference to my conclusion that Ms. Wedsworth needs the money, I find myself forced to conclude that Mr. Wedsworth has no ability to pay for day care and that, accordingly under section 7(1) of the Child Support Guidelines, having regard to the means of the spouses, there will be no order for contribution to day care.

[21] The trial judge, therefore, varied the existing order to delete any reference to day care expenses.

[22] Under the circumstances of this case, I would have found no error on the part of the trial judge had he simply refused the appellant's application for an increase in the

respondent's contribution to the day care costs.

[23] There is no question, here, that the respondent has reached the limit of his ability to pay. In the list of income and expenses which the respondent filed with the trial judge, he showed net income per month of $3,018.75 and total monthly expenses of $3,189.15. Those expenses included support payments of $l,793.00 made up of spousal support ($500.00), child support ($860.00) and day care expenses ($433.00).

[24] Fortunately, the respondent's common-law spouse had some income from employment as a waitress, and the two shared expenses. While his spouse was on maternity leave, she was receiving unemployment insurance benefits. The respondent has advised the court that, as of June this year, his spouse has returned to the work force. That produces more income, however much of that additional income is offset by their own child care expenses.

[25] Therefore, since the respondent was, in the words of the trial judge, "at or close to the limit of his ability to pay," it is not surprising that the trial judge would have refused the appellant's application for an increase in the respondent's contribution to day care costs.

[26] However, in my opinion, the trial judge erred in reducing the respondent's share of those day care costs to zero. The following are the factors which lead me to this conclusion:

(a) It was the corollary relief judgment, dated December 31, 1998, which initially called for the respondent to pay $433.00 per month as his contribution to child care expenses. That order was issued by consent. The respondent agreed to that arrangement. That arrangement is presumed to have been appropriate, and the trial judge has no power to change such an arrangement except where there is a change in circumstances.

(b) Except for the short period of time in 1999, when the children were not in day care, the respondent has met his obligation, and paid his share of day care expenses up to the date of the order of the trial judge.

(c) On the hearing of this application before the trial judge, the respondent did not ask for any reduction in the $433.00 per month that he was contributing to child care expenses. He objected to paying any increase in those expenses, and he took the position that the increased expenses were unreasonable. However, he did not plead any change in circumstance whereby the amount that he had been paying ($433.00 per month) should be reduced. The respondent clearly told the trial judge, which he confirmed to this court, that he would not "shirk his financial responsibilities" but that he could not afford to pay <u>any more</u> than he was presently paying for child care expenses.

[27] The appellant's requirement for day care expenses at the present time arises

because she wishes to complete the course (in which she had been enrolled) leading to a certification in the information technology field. That certification will lead to future employment, and some measure of self-sufficiency. The appellant had stopped taking the course after the trial judge's order relieving the respondent of his obligation to pay child care costs. On the basis of representations made to this Court by counsel for the appellant, after consultation with the appellant, there is a real probability that there is only need for the present level of contribution to day care expenses for a brief period. The court has been advised by appellant's counsel that in four months the appellant could complete the necessary requirements for her course, and then seek paid employment. It is in the interests of both parties, within reason, that this be permitted to occur.

[28] The respondent is concerned, understandably, that his cash resources are stretched to the limit and if his present level of support for his wife and children were to go on indefinitely, it would tax his resources beyond that which is reasonable.

[29] This is an unusual case, with unusual circumstances, and it is not in the interests of either party to remit this matter for a re-hearing. This Court has the authority to make any order which the trial judge could have made; and, in my opinion, this Court should deal with the matter so that the parties know where they stand, and can get on with their lives.

[30] During the hearing of this appeal the court explored the possibility of restoring

the provisions of the corollary relief judgment with respect to the respondent's $433.00 per month contribution for child care expenses. There is, however, no point in ordering the respondent to pay $433.00 per month as his contribution to day care costs if the appellant cannot make arrangements for the difference between that amount and the actual cost. The court was assured by counsel for the appellant that a way would be found to make up the difference so that the children could be placed in day care and the appellant could complete her course.

[31] If the appellant can complete her course and thus find gainful employment, then the respondent will undoubtedly be relieved of some of his obligation for day care. I note, also that in approximately four months, on January 15, 2001, the respondent's obligation for spousal support ($500.00 per month) comes to an end.

[32] In the unusual circumstances of this case I would propose an order, with respect to child care expenses, to cover the period of the next six months, following which the matter should be reviewed by a judge of the Supreme Court of Nova Scotia (Family Division).

[33] Firstly, I would set aside the order of the trial judge to the extent, only, that it makes provision:

1. that the respondent is relieved of his obligation, under the corollary relief judgment, to pay the monthly amount of $433.00 as his share of the day care expenses for the children; and

2. for the payment of the arrears in mortgage payments.

[34] As I have indicated previously, I will deal with the matter of mortgage arrears later in these reasons.

[35] Secondly, I would order, with respect to day care expenses, that the provisions of the corollary relief judgment be restored. I would order that when the appellant has re-enrolled in her course, and when the children have been placed in day care the respondent will pay to the appellant the sum of $433.00 per month as his contribution towards those day care expenses for a period of six months, following which this matter will be reviewed by a judge of the Supreme Court of Nova Scotia (Family Division). As I have indicated, this will provide the appellant with the opportunity to complete her course and become gainfully employed following which time the respondent's obligation for child care expenses should be somewhat relieved. In addition, by that time his obligation for spousal support will have ended.

[36] I will now deal with the issue of mortgage arrears.

[37] At the time of separation the appellant and the respondent owned their own home. That home is now registered in the name of the appellant. She and the children reside there. She makes the payments for mortgage, taxes and household expenses.

[38] At the time of the corollary relief judgment mortgage arrears had accrued. The

respondent agreed, as part of the corollary relief judgment, to pay those arrears forthwith. They were not paid. Foreclosure proceedings ensued. Part of the arrears were paid to stop the foreclosure. The mortgage was restructured to cover the balance of the arrears and costs. This restructuring has caused the mortgage payment to increase by approximately $50.00 per month.

[39] The trial judge, having decided that the respondent did not have the means to pay any contribution to child care expenses, ordered the respondent to pay these mortgage arrears to the appellant by one payment of $57.86 on March 1, 2000, to be followed by 36 monthly payments of $100.00 each commencing April 1, 2000.

[40] The amount of the obligation $3,657.86 is not in dispute, nor is the respondent's obligation to repay that money.

[41] The appellant submits that if payment of the mortgage arrears, by the respondent, has a negative impact on the respondent's ability to pay child care expenses, then child care expenses should be paid in priority. Further, the appellant submits, that if the respondent cannot afford to pay both child care expenses and payment of the mortgage arrears, the child care expenses should be paid and the mortgage arrears deferred until such time as the respondent is relieved of his obligation to pay spousal support. I agree with that submission.

[42] I am proposing, in these reasons, that the respondent pay $433.00 per month

for child care expenses, in addition to child support and spousal support. However, he has not the resources to pay the total of his support obligations ($1,793.00) and, at the same time, make the mortgage arrears payment.

[43] Therefore, I would order that the respondent continue making the $100.00 payments on the mortgage arrears until such time as he commences the $433.00 monthly payments for child care expenses. At that time any further $100.00 monthly payments on the mortgage arrears will be deferred until such time as the respondent is relieved of his obligation to pay spousal support. When he is relieved of his obligation for spousal support, the $100.00 monthly payments for mortgage arrears will be resumed, and continue until the total of the 36 payments has been made.

[44] In closing, I note that there would be nothing to prevent either party making an application to vary the corollary relief judgment (as varied by the order which I propose), if within the six month period for which I have ordered child care expenses to be paid there is a change in circumstances sufficient to warrant a variance. Likewise, there would be nothing to prevent the parties from reaching an agreement, at any time, to vary the terms of the corollary relief judgment, as varied.

[45] Because of the financial circumstances of both parties the trial judge made no order as to costs. I would propose the same thing with respect to this appeal.

Flinn, J.A.

Concurred in:

Glube, C.J.N.S.

Oland, J.A.