Docket: C.A. 138256

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Pugsley and Flinn, JJ.A.

Cite as: Hughes v. Hughes, 1997 NSCA 185

BETWEEN:

HOWARD BRYN HUGHES	)	The Appellant in person
	)	
Appellant	)	
	)	
- and -	)	
	)	
	)	
MARY ELIZABETH HUGHES	)	Pamela M. Stewart
	)	for the Respondent
Respondent	)	
	)	Appeal Heard:
	)	October 15, 1997
	)	
	)	Judgment Delivered:
	)	November 12, 1997
	)	
	)	
	)	
	)	

THE COURT: Appeal allowed varying an amount for child support, per reasons for judgment of Clarke, C.J.N.S.; Pugsley and Flinn, JJ.A. concurring.

CLARKE, C.J.N.S.:

On April 22, 1997, after granting the divorce of the parties, Justice Carver decided the appellant (father) should pay the respondent (mother) $850.00 per month for the support of Elizabeth, the only child of the marriage.

The order based thereon provided, in part, that,

> 3. The petitioner shall pay to the respondent for the support of the said child the sum of $850.00 per month, payable at the rate of $425.00 on the 15th and the 30th of each and every month, commencing on the 15th day of May, 1997. This amount shall be paid to the respondent on the basis of tax deduction to the petitioner and income inclusion to the respondent as long as Elizabeth is a dependent child of the marriage.

The appellant appeals from the decision and order of the trial judge.

At the time of the application, Elizabeth was 19 years old and in grade 12. Her plan was to move from Kentville, where she was living with her mother, to Bridgewater to take a two years course in Hospitality at the Nova Scotia Community College. Arrangements were in place for her to begin her studies in September, 1997.

Under the terms of the settlement agreement made by the parties in 1995, the father agreed to pay the mother $850.00 per month for the support of Elizabeth. They also agreed that if the father retired from the Canadian Armed Forces within three years, such would be considered a change of circumstance that would permit him to make an application to vary the amount of child support.

The appellant took his release in April 1996. His annual income in 1995 was $45,000.00. In retirement his annual income is $25,971.00, being $2,164.25 per month. At the time of his release he received additional amounts of money by way of severance pay, special leave entitlement and other benefits totalling in the range of $70,000.00.

The principal thrust of Mr. Hughes' case at trial was that the Federal Child Support Guidelines should determine child support in a range of approximately $250.00 per month on a tax excluded basis; that Elizabeth should be expected to draw upon an education fund established by her parents in excess of $6,000.00; that she should apply for a student loan, and that she should contribute her earnings from

summer employment. Financial projections of her future educational costs and earning power potential were discussed in some detail.

Justice Carver stated that being approximately seven days away from the effective date of the guidelines, he must take those guidelines into effect as any award may be subject to variation after the new guidelines are in place in Nova Scotia. (See **Briand v. Briand** (1996), 153 N.S.R. (2d) 157 at 160). He referred to and considered the **Divorce Act**, s. 15(2) and Federal Child Support Guideline 3.

In his decision, Justice Carver reviewed the circumstances of the appellant, the respondent and Elizabeth. He applauded the efforts being made by all three to improve their self-sufficiency. He focused on the needs of Elizabeth over the next four years during which he appeared to accept that she would be pursuing post secondary education at Mount Saint Vincent University following her time at the Nova Scotia Community College. It is implicit from his decision that her failure to do so would change the circumstances on which the award was based.

In reviewing the current situation of the appellant, Justice Carver wrote:

> The petitioner has enrolled in the Community College in Middleton to take a Human Services Program. The tuition is approximately $1000.00 and his books cost approximately $675.00. At present, he is also taking two correspondence courses the cost which has been $675.00. He is entitled to two $2500.00 interest-free loans from the Services spread over two years to pursue training, but each must be repaid. The first loan of $2500.00 must be paid before the second loan will be advanced. If the petitioner successfully completes his studies, he will be reimbursed by the Services 50 percent for at least his tuition expenses.

Considering his pension income and the amounts he received upon his release, Justice Carver concluded that during the next four years the appellant "will have an income not too different than what he had in 1995 when the Separation Agreement was entered into."

Of the respondent, Justice Carver said:

> Mrs. Hughes is a nurse. She worked fairly steadily on a casual basis at the King's Rehabilitation Centre. At present she is receiving Employment Insurance which will terminate on May 23, 1997. Her work at the Rehab is no longer dependable as at least some of her prior work as a nurse can now be done by C.N.A.'s. At present she is upgrading her skills in tourism. This year she hopes to combine both areas of employment.
>
> . . .
>
> The respondent I take still has much the same assets

> now as at the time of the Separation Agreement, but her income picture is worse now than then. It is hard to project what her income will be over the next four years. If it is substantial, then any award of today can be varied by agreement or by court order.

Justice Carver continued:

> Taking the new guidelines into effect where Elizabeth is over the age of majority, when I consider her circumstances and the extra cost of attending the Nova Scotia Community College, I find to pay her the amount provided for by the guidelines for a child under majority is inappropriate for her.
>
> Considering the law presently in effect and reviewing the law in the new guidelines to become effective May 1, 1997, I find the petitioner should continue the payments of $850.00 to the respondent on the basis of tax deduction to the petitioner and income inclusion by the respondent as long as Elizabeth is a child of the marriage. I award this amount taking into consideration the other party's position as well as the $6,000.00 available to Elizabeth for educational purposes. She has this amount to use, but it must be remembered her expenses for books, tuition, room and board and extra clothing are all now extra than when the Separation Agreement was entered into. Spread over four years there will be no more than needed to take care of expenses over and above the child support.
>
> Some mention was made to Elizabeth she seek a student loan. She may have to do that, but where parents are financially able to provide for a child's education, they must do so rather than shackling a child with a loan that may be difficult to pay upon graduation.

In his appeal Mr. Hughes contends that Justice Carver should

have followed the Guidelines Table which would have made the award in the range of $222.00-$224.00 per month. He also argues that Justice Carver misapprehended the evidence of his income; that of the respondent, the mother; and that of Elizabeth, the child.

It is not the function of this Court to retry the case. It is our function to determine if Justice Carver was clearly wrong in law or whether he substantially misapprehended the evidence before him. So long as there is evidence upon which his findings of fact can be supported, it is not for us to disturb them or set them aside.

The standard of review at the appellate level is settled. In **MacIsaac v. MacIsaac** (1996), 150 N.S.R. (2d) 321, Bateman, J.A., of this Court, wrote at pp. 324-5:

> In ***Moge v. Moge*** (1992), 145 N.R. 1; 81 Man.R. (2d) 161; 30 W.A.C. 161; 43 R.F.L. (3d) 345 (S.C.C.), L'Heureux-Dube, J., at p. 359, accepted the following statement of Morden, J.A., in ***Harrington v. Harrington*** (1981), 33 O.R. (2d) 150 (C.A.) at p. 154:
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> > 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 p. 596. In other words, in the absence of material error, I do not think that this Court has an 'independent discretion' to decide afresh the question of maintenance and I say this with due respect for decisions to the contrary . . .

Chipman, J. A., wrote, for the court, in ***Edwards v. Edwards*** (1995), 133 N.S.R. (2d) 8; 380 A.P.R. 8 (C.A.), at p. 20:

> Having regard to all the evidence and particularly the respective incomes of the parties, I cannot say that the trial judge erred in his assessment. This court is not a fact finding tribunal. That is the role of the trial judge. Ours, as has been said many times, is a more limited role. We are charged with the duty of reviewing the reasons of the trier of fact with a view of correcting errors of law and manifest errors of fact. The degree of deference accorded to the trial judge with respect to factual findings is probably no higher anywhere than it is in matters relating to family law. Hart, J.A., put it well when he said on behalf of this court in ***Corkum v. Corkum*** (1989), 20 R.F.L. (3d) 197, at 198:
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> > In domestic matters the trial judge always has a great advantage over an appellate court. He sees and hears the witnesses and can assess the emotional aspects of their testimony in a way that is denied to us. Unless there has been a glaring misconception of the facts before him or some manifest error in the application of the law, we would be unwise to interfere.

Underlying the decision of the trial judge is his assumption that Elizabeth will be undertaking four years of post secondary education and during all of those four years she will continue to be a

child of the marriage. In addition to the references already made, Justice Carver stated:

> It appears Elizabeth will need child support for approximately four years until she has her degree at Mount Saint Vincent. If she pursues this course, she will be considered a child of the marriage until she completes her course through her genuine effort.

That Elizabeth will be pursuing a degree at Mount Saint Vincent University extending in total a span of four years is, with respect, a misconception of the evidence which materially affects the reasoning and resulting order of the trial judge.

Elizabeth did not give evidence. As a result neither Justice Carver nor this Court know what are her personal goals and ambitions. The reference to further post secondary study leading to the grant of a degree at Mount Saint Vincent University comes from the evidence of the respondent (mother) who said:

> Then if she wants to use those credits after that she could go to Mount Saint Vincent and take her degree ..., rather than taking a four year degree she could use the credits from the Community College and take it in less time.

This evidence concerning further study at Mount Saint Vincent University, at best, is highly speculative. The evidence is not capable of drawing a reasonable inference that Elizabeth is committed or even working toward a university degree. The most that can taken from the evidence is that she will be engaged in a two years course in Hospitality at the Lunenburg Campus of the Nova Scotia Community College. The evidence reveals that the costs of tuition and away from home expenses at the Lunenburg Campus are substantially less than those that result from study and attendance in the university setting. In my respectful opinion, the evidence reflects a time frame of two years and not four years as the trial judge perceived it.

Justice Carver recognized the existence of the education fund. This is a fund to which both parents contributed from their earnings. It was, and is, dedicated to assist in the cost of educating Elizabeth beyond high school. The present balance in the fund is not clear from the evidence but it is in excess of $6,000.00. This is a fund controlled by the respondent. Justice Carver was inclined to leave it to cover extra expenses that Elizabeth may have, spread over four years. In fact, the

evidence indicates a span of two years.

The circumstances of all three - father, mother and Elizabeth - have changed since the separation agreement was signed on September 24, 1995. Justice Carver was well aware of that, as his decision reveals. Unfortunately there is now less money available to meet the needs and obligations of all three persons.

The proposed budget for Elizabeth while at Community College is $960.50 per month. The parties agree that it should be reduced by $40.00 for dental insurance which is paid and will continue to be paid by the appellant. That makes the budget $920.50. This includes her tuition, pro-rated, room and board, school supplies, clothing, recreation, entertainment and all her projected needs.

It is clear from the evidence that Elizabeth will have personal earning power when the Community College is not in session. Justice Carver noted this by observing:

> The course at the community college extends from September 1997 to May 1998. The following year it will run from October 1998 to May 1999. During the summers, while she is in the

> program, she will be working in her field in the public or private sector. How much she earns will depend upon where and for whom she works and how much she will have remaining after living expenses.

In 1996 while Elizabeth was attending high school, she earned $1,419.47 from part time jobs. Her energy and drive to earn extra income is to be applauded. The evidence reveals that while attending the course at the Community College, the opportunity to have gainful employment during the summer months is much enhanced. It appears that under the Co-op Program for students in her category, gainful summer employment is virtually guaranteed. Evidence concerning the amount, nature and location was not available to the trial judge but the fact that it would exist and would be gainful was. One can assume that the minimum wage rate would apply. It is also reasonable to assume that in these circumstances her earnings from summer employment should exceed, by a significant margin, that which she earned under less favourable employment opportunities in 1996. It follows that Elizabeth is well positioned during the months that the Community College is not in session to earn considerably more than is required to meet her proposed monthly deficit of $70.50 which by extension is

$846.00 for a calendar year.

The result is that the principal in the education fund is not required, as Justice Carver concluded, to meet the expenses which are already included in Elizabeth's budget. In these circumstances, it is reasonable to direct that $250.00 per month should be withdrawn from the fund to assist Elizabeth with her educational expenses with the result that the child support paid by the appellant should be reduced to $600 per month.

Since the evidence, with respect, does not support the material findings of fact upon which the trial judge arrived at his award of child support, it is consistent with the established principles of review for this Court to vary the award.

The Federal Child Support Guidelines have no impact upon this decision because the variation resulting from this appeal is to an order issued before the Guidelines became effective on May 1, 1997.

The appellant gave notice to produce, by way of fresh evidence, the following:

1. The Respondent's Income Tax returns for the years 1994, 1995, and 1996;

2. Copies of every notice of tax assessment or reassessment for the respondent for the years 1994, 1995, and 1996, and;

3. The most recent statement of earnings, or, where such a statement is not available, a letter from the respondent's current employer setting out the respondent's current rate of salary, and the remuneration from the date of her last tax return to the date of the hearing of the appeal.

In **Edwards v. Edwards** (1994), 133 N.S.R. (2d) 8, a case involving in part a dispute between a divorced husband and wife over maintenance, an application was made to the Court of Appeal to introduce financial statements. Chipman, J.A., referred to the principles governing the admission of fresh evidence before an Appeal Court by writing at pp. 14-15:

1. The evidence should generally not be admitted if by due diligence it could have been adduced at trial.

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue at the trial.

3. The evidence must be credible in the sense that it was reasonably capable of belief.

4. The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Applying those tests to this case, I am persuaded the application should be refused for the following reasons.

1. If the 1994 and 1995 tax returns were available, no request was made for them at the time of trial. That is when they should have been requested - not now. Even if they were available, they would not have spoken to the respondent's current income as at the time of trial.

2. It appears the 1996 income tax return was not available at the time of the trial. The respondent did, however, testify that her gross income for 1996 was $12,495.00. The record reveals that given that evidence, counsel for the appellant did not cross examine the respondent about the nature of her earnings. Justice Carver considered the financial status of the respondent at the time of trial

and said this:

> The respondent I take still has much the same assets now as at the time of the Separation Agreement, but her income picture is worse now than then. It is hard to project what her income will be over the next four years. If it is substantial, then any award of today can be varied by agreement or by court order.

3. Even if more detailed financial information were available, it is unlikely that it would have affected the result of the trial.

Disposition

For the reasons given, I would order that:

(a) The application of the appellant to adduce fresh evidence should be dismissed.

(b) The appeal should be allowed and the award of child support of $850.00 per month should be set aside.

(c) Paragraph 3 of the order for corollary relief issued by Justice Carver should be varied to provide as follows:

> 3. The petitioner shall pay to the respondent for the support of the said child the sum of $600.00 per

month, payable at the rate of $300.00 on the 15th and 30th of each and every month, commencing on the 15th day of May, 1997. This amount shall be paid to the respondent on the basis of tax deduction to the petitioner and income inclusion to the respondent as long as Elizabeth is a dependent child of the marriage.

(d) The order of $300.00 costs in favour of the respondent at trial should be set aside.

(e) The appellant should be awarded costs at trial and on this appeal of $300.00, in total, including his disbursements.

Clarke, C.J.N.S.

Concurred in:

Pugsley, J.A.

Flinn, J.A.