2001 **SFH # 001225**
1201-50846

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

[Cite as: White v. White, 2002 NSSF 4]

BETWEEN: **CHRISTOPHER JAMES WHITE** **- PETITIONER/ APPLICANT**

- and -

SHIRLEY MARIE WHITE **-RESPONDENT**

DECISION
(oral)

HEARD BEFORE: The Honourable Justice Deborah Gass
Justice of the Supreme Court (Family Division)

PLACE HEARD: Supreme Court (Family Division)
P.O.Box 8988, Station "A"
3380 Devonshire Avenue
Halifax, NS B3K 5M6

HEARING DATE: September 6, 2001

DECISION (oral): September 19, 2001

WRITTEN RELEASE: January 18, 2002

COUNSEL: Karen Hudson, counsel for Shirley White

This is an application brought by Christopher James White to vary the amount of child support that he was ordered to pay, and in particular his initial application was to suspend maintenance for the children as at that time, that is in November, he was currently without income. At any rate, it is an application to vary the child support and as well in tandem with that to have the arrears of maintenance that have accumulated since November of 2000 forgiven.

The parties were married in 1982 and separated in 1992. There were three children of this marriage.

In 1992 the parties entered into an agreement with each other in which Mr. White agreed to pay the sum of $1,200.00 per month in child support. This would have been tax deductible and taxable in the hands of Ms. White. The rest of the agreement provided that she would remain in the matrimonial home with the children until they became independent and then the house would be sold and the proceeds would be divided. The agreement also provided that both parties would be responsible for the repairs and upkeep of the property and that Ms. White would continue to pay the mortgage. As well, the agreement provided that Ms. White would not partake of any pension benefits nor Mr. White partake in any of her pension benefits if she had any.

The parties divorced in 1996 and they incorporated this 1992 agreement into their divorce proceedings. The divorce was granted in December of 1996. It is of some significance to note that in the parties' agreement the only financial aspect of that agreement that is variable in law is the child support. The resolution of the matrimonial home and the pension are issues that are agreed for all time.

Shortly thereafter Mr. White fell into arrears within months of the divorce being

granted. Mrs. White and the children went on welfare. His income, according to the tax returns, are as follows:

1997 - $55,830.00;

1998 - $64,652.00;

1999 - $70,877.00.

In April of 1999 Mr. White received a voluntary “buy out” from the Halifax Herald limited after 21 years of working there. The evidence before me is that he was an exemplary employee. He was earning reasonable income with steady increases in each succeeding year. When he made this decision to leave the Herald, he approached his former wife, assuring her that his financial obligations would continue to be met. Mrs. White’s evidence was that she was very concerned about his decision and this was acknowledged in the evidence and she did not think it was a good idea. Her concern was about the stability of his income in the face of his children’s needs and his ongoing obligations for support. The Applicant, that is Mr. White, had made the decision to do so and was confident that he was going to be able to move forward and maintain his obligations. He had received a generous “buy out” package.

By September of 1999, he successfully obtained an order suspending enforcement of arrears and subsequently an order having arrears that accumulated to May of 2000 forgiven. It is interesting to note however, when one looks at the incomes that he was earning during this period of time, and I am referring to 1997 when he first went into arrears; then again when he approached his wife about the fact that he was going to be leaving his job; then when he got the order suspending enforcement; and subsequently the order to forgive the arrears - that according to the Child Support Guidelines for the year 1997 when he was earning $55,830.00 the table amount of child support, which is non taxable, was $984.00 a month. In 1998 on the basis of his income the amount that he would have been required to pay was $1,018.00 per month,

again non taxable. In 1999 based on his income, the amount that he would have been required to pay was $1,206.00 per month, again non taxable.

Mr. White assured Mrs. White in May of 2000 when the arrears were eliminated, that by starting with a clean slate she would get her money from then on.

By October of 2000 the money from his severance package ran out and the arrears began to accumulate again. It had been his understanding that he was going to qualify for Employment Insurance Benefits. It was also his belief that he would have moved forward with his private business.

As I have indicated, the only thing that was variable from the divorce is the child support and very shortly after the agreement was finally incorporated into the divorce proceedings Mr. White fell into arrears. It is interesting to note that up to and including September of 2000, based on the severance package that he received, that his monthly gross income was $5,547.00.

In looking at the facts and circumstances relating to his departure from his job in 1999, I make the following notations. The evidence is clear that he left his job with the Halifax Herald with no job elsewhere awaiting him. The evidence also disclosed that he was optimistic that he could do better in the “e-commerce” industry and although he has found that progress in this industry has been slower to catch on here in Canada, he is still optimistic that it is going to bring forth financial rewards, which would enable him to fulfil his obligations. The evidence is also clear that there was no medical reason for his retirement. His evidence was that he paid support for nine years in the amount of $129,000.00. It was clear from his evidence that Mr. White feels that he has done his duty with respect to the children and his position is that he was in an impossible situation from the outset supporting two households. His evidence as well

is that he has gained a lot of knowledge over the past two years and though it has not manifested itself in income, he is optimistic that the future is bright and that he will be in a better position financially in the near future.

In the meantime, the mother has been on occasion, and is currently on social assistance. Social assistance is supplementing her income, which she derives from working in a grocery store. She took that job when the oldest child was able to look after the youngest child, therefore eliminating the additional child care expense that would be involved. She has three teenage girls for whom she is providing and meeting all the needs and demands that three teenage girls have. She is under a terrible financial and emotional strain. In coming to the agreement that she did with her husband back in 1992, she agreed to give up any rights to his pension and she agreed to divide the equity in the home when it sold after the children became independent.

I conclude on the basis of the evidence that she is extremely financially and emotionally stressed. The evidence before me would indicate as well that Mr. White is suffering from extreme financial and emotional stress and has been for a number of years. It is however important to note that the court's primary concern is the best interests of the children and the impact of decisions that adults have made on the lives of these children.

Again it is clear from all of the evidence that Mrs. White entered into this agreement, that is the 1992 agreement that was incorporated into the divorce agreement, on the strength that the support would be paid. She again entered into an agreement whereby she wiped out a considerable amount of arrears, again on the strength that the maintenance would continue to be forthcoming.

It is interesting to note that in the past Mr. White tried some other business

ventures but when he did so he maintained his job at the Herald at the same time.

The evidence before me and the law supports the conclusion that Mr. White's application should be dismissed. The Nova Scotia Court of Appeal in ***Montgomery v. Montgomery*****,** (2000), 3 R.F.L. (5th) 126 upheld the decision of Kennedy, C.J. In rendering judgment on behalf of the Court, Pugsley, J. A. quoted Kennedy, C.J. at p. 133

> ...
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> Bottom line, very simply, this is a conscious, voluntary decision on the part of the applicant who is subject to a court order .... I do not consider the request for a variance, the request for a conscious voluntary change in the income situation to be a reasonable one and if that change is made, there will be income imputed to the applicant sufficient to satisfy and to continue to satisfy that order. ....

Further at page 135 there is reference to the state of the law as outlined in *Williams v. Williams,* (1997), 32 R.F.L. (4th) 23, (N.W.T.S.C.) which speaks of the issue of intentional actions on the part of the paying parent, but Pugsley, J. A. goes on to say:

> The appellant acknowledges that there has been an evolution in the law since *Williams v. Williams* as new fact situations arise. One such situation arose in *Hunt v. Smolis-Hunt* (1998), 39 R.F.L. (4th) 143 (Alta. Q.B.) when Justice Johnstone of the Alberta Court of Queen's Bench concluded that s. 19 (1)(a) of the Guidelines encompasses situations "where a payor recklessly disregards the needs of his children in furtherance of his own career aspirations". (p. 178)

and at p. 136:

> Section 19 does not establish any restriction on the Court to imputing income only in those situations where the applicant has intended to evade child support obligations or

> alternatively, recklessly disregard the needs of his children in furtherance of his own career aspirations.
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> The critical word, in my view, is the word “reasonable”. It is only the “reasonable” educational ... needs of the spouse which should be taken into account.
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> The issue of reasonableness, in my opinion, should not be confined to an examination of the circumstances surrounding the applicant alone, but of all the circumstances, including the financial circumstances of the children, in order to ensure that they receive a fair standard of support as set out in the objectives to the Guidelines.

At p. 137, reference is made to *Pishori v. Levy,* (N.S.Co. Ct.) [1990] N.S.J., No. 9:

> ... the respondent, a professional engineer, earning a gross annual salary of $32,500.00, decided to improve his career opportunities by enrolling in a two-year MBA program. At the time the decision was made, he was obliged to pay the sum of $250.00 per month for maintenance of a child which he fathered. The relevant statue in *Pichori v. Levy* was not the *Divorce Act*, but rather the *Family Maintenance Act,* S.N.S. 1980, c.6.
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> Section 8 of that Act required a parent to “provide reasonable needs for the child except where there is lawful excuse for not providing the same”.

He quoted the decision of Cacchione, C.C.J. (as he then was):

> The evidence disclosed that the respondent’s change in circumstance was self-induced. It was as a result of his wish to advance his career prospects. ... The situation the respondent found himself in was his own making and not unforeseen. In making plans for furthering his education the respondent should not have lost sight of his obligation to his son ... In allowing the application to vary the learned trial judge effectively made the appellant and her child

> underwriters for the respondent's career goals. He cast the appellant and her child in the role of short-term bankers for the respondent, in order to allow him to further his career plans. As such, the learned trial judge failed in his duty to ensure that the reasonable needs of the child were met.

While it is acknowledged that Mr. White indicated that he "saw the writing on the wall", it is clear that he was a senior person in the place where he was employed. He has also indicated that he was under a crushing financial burden and he was suffering emotionally from this. There was however no evidence that he was forced to leave his employment because of any medical, emotional or psychiatric difficulties. He testified as well that he expected he would be able to receive Employment Insurance Benefits and that did not materialize. However he took the "buy out" on the strength of the severance package and with the prospect of pursuing his other career goals. He did this in the face of his ongoing obligations to his three children.

It is clear from the evidence that Mr. White has the ability to earn income in the vicinity of at least $55,000.00 a year, which would have been the base amount of his income, not including bonuses and overtime or any other income that he might have received. It is important to note that the guideline table amount of maintenance exclusive of tax on an income of $55,000.00 is $984.00 a month. It is not dissimilar to the amount he agreed to pay some time ago, being $1,200.00 a month with tax implications.

In *Hanson v. Hanson*, (B.C.S.C.) [1999] B.C.J. No. 2532 [In Chambers] the court had held that the parent would intentionally be underemployed if that parent chooses to earn less than he or she is capable of earning. Again it is a situation where the parent in this case took a voluntary "buy out" to pursue his other options which were intended to perhaps in the short-term, bring in less remuneration, but which held the promise of bringing in greater remuneration over time.

Further reference to the use of the word “intentional” is found in the Northwest Territories Supreme Court decision of *Schick v. Schick,* [2000] N.W.T. J. No. 12. In referring to S. 19 of the Guidelines, the Court concluded that “intentional” must be distinguished from circumstances beyond the control of the respondent, such as where a respondent was laid off. That was not the case in this situation.

Therefore I am declining to grant the application to vary the order. That does create a very difficult and almost unresolvable situation here. It is clear from applying the law to the facts before me that no variation should be granted in this situation. The question the Court is left with then, is how to deal with this from a very practical point of view. First, the arrears that have accumulated, that is the arrears from November of 2000 to September of 2001 would be in the amount of $13,200.00, although there has been acknowledgment of some payments that have been made. I will leave it to the office of Maintenance Enforcement to determine what those payments have been. It is important to note that presently Mr. White’s share of the equity in the home would be somewhere in the vicinity of $7,500.00 if in fact the home could be sold for $65,000.00 and there is about $50,000.00 owing on the mortgage. What I would be prepared to suggest is that $10,000.00 of the arrears outstanding be satisfied by Mr. White transferring his interest in the matrimonial home to Mrs. White. That would leave outstanding a smaller enforceable balance of approximately $3,200.00 or less, but Maintenance Enforcement will have a record of payments made.

Further in terms of the ongoing obligation, it is clear that Mr. White does not have the present ability to pay $1,200.00 a month because his present income is $1,200.00 per month. However because I am imputing income to him based on the fact that I am not satisfied that the circumstances are such to warrant an actual variation of the order, I am prepared to suspend enforcement of all but $200.00 a month of the ongoing

maintenance for a period of six months at which time the matter will be reviewed. I have arrived at the figure of $200.00 a month based on Mr. White's calculation of his 2001 income of approximately $9,850.00 together with a calculation of his actual income right now of $1,200.00 a month, which would be an annual income of $14,400.00 per year. It seems to me that $200.00 a month is an enforceable collectable amount based on the actual circumstances in which he finds himself. The additional $1,000.00 a month will continue to accumulate in the form of arrears which will have to be addressed at some point in the future. This suspension of the enforcement of all but $200.00 per month will be something that will have to be reviewed periodically and the first review will be approximately six months hence.

Mr. White will continue his medical and dental coverage for the children.

It is regrettable that this situation has arisen but it is clear that the facts in this case fall squarely within the facts cited in numerous leading cases and squarely within the provisions of Section 19 of the Child Support Guidelines. It is clear from the evidence before me that Mr. White made this decision in the face of his ongoing child support obligations and therefore I am prepared to impute income to him and I am not satisfied that the maintenance order ought to be varied.

This is the manner in which the maintenance will be addressed and I would suggest that we adjourn for a review six months hence at which time Mr. White will be required to file with the Court an updated financial statement together with confirmation of his income for the intervening six months. Ms. Hudson, if you would be prepared to prepare that order I will sign it.

Deborah Gass, J.

DG/ng