

1994

S.H. No. 1201-48230 (SFHD-10803)

**IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)**

BETWEEN:

BRUCE WAYNE WOLFE

PETITIONER/APPLICANT

- and -

SHELAGH BERNADETTE WOLFE

RESPONDENT

DECISION

CITE AS: Wolfe v. Wolfe, 2002-NSSF 18

HEARD: Before the Honourable Associate Chief Justice Robert F. Ferguson, at Halifax, Nova Scotia on February 18 & 19, 2002

DECISION: April 2, 2002

COUNSEL: Diana Musgrave, counsel for the Petitioner/Applicant

Shelagh Bernadette Wolfe, the Respondent, representing herself

FERGUSON, A.C.J.

Stephanie Wolfe, born [...], 1978; Andrew Wolfe, born [...], 1980; and Colleen Wolfe, born [...], 1985, are the children of Bruce and Shelagh Wolfe. A Corollary Relief Judgment dated November 16, 1994, ordered that Ms. Wolfe would have custody of the children with access to Mr. Wolfe. The Judgment also contained the following provisions:

“3. The Petitioner shall pay to the Respondent for the support and maintenance of the Respondent and the children of the marriage the sum of \$1,900.00 per month, payable at the rate of \$1,900.00 per month on the 15th day of each month, commencing the 15th day of August, A.D. 1994. Spousal support shall be reviewable based upon the principals (sic) contained in the Divorce Act Canada, upon application by either party.

4. Such other matters of corollary relief as set out in the Separation Agreement hereto annexed and incorporated herein and the Family Court Order hereto annexed and incorporated herein and which are approved insofar as the jurisdiction of this Honourable Court allows.”

The Separation Agreement annexed to the Judgment contained the following paragraphs:

“LIFE INSURANCE

7. The Husband covenants and agrees that he shall maintain life insurance coverage of a minimum amount of \$100,000.00 with the children named as beneficiaries, and that he shall provide proof of such coverage upon request by the Wife. The Wife covenants and agrees that any life insurance coverage which she obtains in the future will be for the benefit of the children with the Husband named as Trustee thereof, up to the amount of \$100,000.00 in coverage;

MEDICAL AND DENTAL COVERAGE

8. (a) The Husband shall maintain medical and dental coverage for the Wife and the children, as long as such coverage is available through his employment. The parties acknowledge that existing coverage is to the extent of 80% of the medical costs, and 90% of the dental costs, and the Husband covenants and agrees to sign all medical and dental forms as may be required to permit reimbursement to the Wife for the amounts paid by her. The Husband further covenants and agrees to immediately sign over to the Wife any reimbursement received in his name, with respect to medical and dental costs paid "up front" by the Wife. The Wife covenants and agrees to be responsible for the remaining percentage of the costs not covered by the Husband's employment plan, but in the event that the medical/dental expenses of the children exceed \$1,800.00 in any one year, then the parties shall be equally responsible for the costs above that amount, that do not fall within the percentage covered by the plan;"

By application dated March 28, 2001, Mr. Wolfe has applied to (a) terminate spousal support; (b) terminate child support for Stephanie effective June, 2002; and (c) vary support for Andrew and Colleen pursuant to the Federal Child Support Guidelines.

Ms. Wolfe acknowledges it is appropriate, having regard to the introduction of the Federal Child Support Guidelines, to vary the current maintenance order to one that differentiates as between child and spousal maintenance. She is opposed to a finding that she or any of the three children are no longer entitled to maintenance from Mr. Wolfe. Further, Ms. Wolfe is requesting (as stipulated in her affidavit sworn May 7, 2001) that Mr. Wolfe comply with paragraph 7 of the Separation Agreement by providing her proof that the insurance mentioned in that paragraph exists; and further, that paragraph 8 of the Separation Agreement be varied to provide that "medical/dental expenses for the children in excess of the amounts reimbursed by medical/dental plans be shared with the Applicant."

This application has been the subject of considerable interaction between the parties. Both were initially represented by counsel. However, at trial, Ms. Wolfe represented herself.

Variation of an Existing Order:

This application is made pursuant to s. 17 of the *Divorce Act*. The relevant portions of the *Divorce Act* are as follows:

“Order for variation, rescission or suspension

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses;

...

Factors for child support order

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

Factors for spousal support order

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.”

Incomes of the Parents:

Ms. Wolfe, in her Financial Statement, indicated her income, on a monthly basis, was as follows:

Gross Salary	\$2,462.42
Support Payment	\$1,900.00
Child Tax Benefit	\$46.90
Total Monthly	\$4,409.33

The above works out to a yearly total of \$52,908.00. She indicated she has recently received a raise from her employment and her yearly income from employment is currently \$35,000.00 per year.

Mr. Wolfe, in his Financial Statement sworn March 22, 2001, indicated his monthly income was comprised of the following:

Gross Salary	\$4,067.33
Overtime	\$1,086.84
Total Monthly	\$5,154.17

The above works out to a yearly total of \$61,850.04. Mr. Wolfe's income tax return reveals the following:

2000 (Total Income)	\$61,850.00
1999 (Total Income)	\$56,311.00
1998 (Total Income)	\$52,788.00

Mr. Wolfe also provided information establishing his income from gross salary and overtime for the year 2001 was \$71,236.41. He further testified that, due to a recent raise, his current gross salary is \$54,000.00 per year.

Mr. Wolfe testified his current occupation requires him to be on the road two weeks per month which accounts for the substantial overtime pay he accumulates during the year. He further stated that such travel is required of him and is not optional. Further, he states he will be required to continue in this occupational situation for at least one more year until a subordinate obtains sufficient expertise to undertake some of this travel.

I find Mr. Wolfe's income, for the purpose of establishing child or spousal support to be \$71,000.00 per year. I find Ms. Wolfe's income, for the purpose of establishing child support or spousal support, to be \$35,000.00 per year.

Eligibility of Children to be Considered as "Children of the Marriage" pursuant to s. 2 of the *Divorce Act*:

Section 2.(1) of the *Divorce Act* states:

“ ‘child of the marriage’ means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (d) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.”

Ms. Wolfe acknowledges that Stephanie and Andrew have part-time employment and she, insofar as they are concerned, is seeking an order requiring payment pursuant to the Guidelines. In the case of Colleen, Ms. Wolfe is seeking not only the Guideline amount but additional support for special or extraordinary expenses related to her education.

Stephanie

Stephanie is 23 years of age and has resided her entire life time with her parents or parent. She lived with her parents when they were a family unit and with her mother since the separation. She has not withdrawn from her parents’ “charge.” Since graduating from high school, she has continuously pursued a university education. It is obvious this pursuit has had limited success. She has been attending university for five years and will acquire a Bachelor’s degree this spring. She is employed on a part-time basis. Her income tax return for the year 2000 shows her total income as

being \$6,139.61 and the evidence indicates she will continue to earn in a similar capacity.

Mr. Wolfe submits any legal obligation to provide financial support to Stephanie should cease when she finishes her fifth year of university study this spring. In support of this conclusion, he notes her age, her limited success to date and the unreasonableness of her plan to be accepted in a B.ED. Program. Ms. Wolfe submits that Stephanie should remain legally eligible for parental support if she continues in her studies.

Andrew

Andrew is 21 years of age. He, like Stephanie, has lived his entire life with his parents, remaining with his mother upon separation. He is currently in his third year of university study. He intends to pursue a degree in Radiological Technology. Andrew did well academically in high school. Prior to entering university, he was involved in a bicycle accident. The evidence establishes this accident has had a serious impact on his physical and emotional health. Andrew has not had the same success academically in university as he had in high school. He has, however, remained enrolled in university since leaving high school. He is employed on a part-time basis and his income tax for the year 2000 indicates that his yearly income was \$6,029.70 and the indications are that he will continue to earn a similar amount.

Mr. Wolfe acknowledges Andrew's entitlement to parental financial support. He indicates a willingness to continue to support for an additional two academic years if Andrew continues in university. By then Mr. Wolfe will have supported Andrew through five years of university and concludes his obligation should then cease. Ms. Wolfe submits Andrew should remain eligible for support for an additional three years, as she estimates it will probably take him that long to secure his degree in Radiological Technology.

In **Yaschuk v. Logan** (1992) 110 N.S.R. (2d) 278, the then Nova Scotia Supreme Court - Appeal Division considered claims of support for children over 16 years of age and attending university. At p. 292, the Court stated:

"We were referred to a number of authorities dealing with 'a child of the marriage'. In each case involving a claim for support of a child over 16 who is other than ill or disabled, it is necessary to carefully examine the 'other cause' advanced as a reason for dependency. The court must be careful not to be carried away with claims on behalf of a would-be 'hanger on' in perpetuity. Most of such cases involve the perennial student, but it must be remembered that an education that will fit a child for a career can be properly regarded as a necessity. This is particularly so in a family, such as this, where the parents have in the upbringing of the children established an expectation that higher education would be provided. The means and circumstances of the parent must be carefully considered. The court must also consider the child's aptitude and general fitness to pursue higher education and to what extent. The judgment which must be exercised in each case is particularly within the province of the trial judge."

More recently in 1994, the Nova Scotia Court of Appeal, in **Martell v. Height** [1994] N.S.J. No. 120, dealt with the same subject and stated at paragraph 8:

“It is clear from the various authorities cited by counsel that courts recognize jurisdiction under s. 2(1) of the Divorce Act to hold parents responsible for children over sixteen during their period of dependency. How long that period continues is a question of fact for the trial judge in each case. There is no arbitrary cut-off point based either on age or scholastic attainment, although as these increase the onus of proving dependency grows heavier. As a general rule parents of a bona fide student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field. In making this determination the trial judge cannot be blind to prevailing social and economic conditions: a bachelor's degree no longer assures self-sufficiency.”

I conclude Stephanie continues to be a “child of the marriage” and would continue to be such beyond her graduation this spring if she is able to enrol in the B.ED. Program at Mount Saint Vincent or some equivalent post-graduate course of study. If, however, given her age, her income, the number of years she has spent at university with parental support, she decided to continue her studies in another unrelated field, she would, in my opinion, fall into the category of “hanger on” as mentioned in **Yaschuk v. Logan**, supra, and, accordingly, not be eligible for continued parental financial support.

I agree with both Mr. Wolfe and Ms. Wolfe that Andrew is currently a “child of the marriage.” I am, however, unable to comply with their request that I look two or three years down the road and make a decision as to his eligibility at that time. There are

simply too many undetermined factors required to be considered in coming to such a conclusion.

Colleen

Colleen is currently 16 years of age and attending grade ten and maintaining an “80 average.” Mr. Wolfe and Ms. Wolfe agree that she is a “child of the marriage.”

There is a dispute as to her entitlement to additional expenses related to her educational needs.

Section 7 of the Federal Child Support Guidelines is entitled “Special or extraordinary expenses.” It states, in part:

“7.(1) In a child support order the court may, on either spouse’s request, provide for an amount to cover the following expenses, or any portion of those expenses, taking into account the necessity of the expense in relation to the child’s best interests and the reasonableness of the expense, having regard to the means of the spouses and those of the child and to the family’s spending pattern prior to the separation:

...

(d) extraordinary expenses for primary or secondary school education or for any educational programs that meet the child’s particular needs;”

Mr. Wolfe submits it is premature to create a financial obligation for him to pay a portion of educational expenses for Colleen. He bases this submission on the fact that

she is currently maintaining an appropriate grade level and there is nothing by way of testing to establish a need for any special education. I agree that there is insufficient evidence to support a conclusion that a major and costly shift take place with regard to Colleen's academic pursuits. However, I find the child did start school a year later than normal because of a language related disability. I find her mother has been providing her with constant personal tutorial assistance since she entered school. I find that the child is currently in grade ten and that Ms. Wolfe questions her ability to provide appropriate tutorial help at this level. Ms. Wolfe requested in her filed Financial Statement an expense for tutorials for Colleen in the amount of \$160.00 per month. This would appear to be an appropriate and necessary request at this time.

I order, given their respective incomes, that Mr. Wolfe pay 66% of any monthly sum expended for private tutorial help for Colleen up to a total amount of \$105.00 per month which would be 66% of the \$160.00 requested. Ms. Wolfe will provide Mr. Wolfe with a receipt for such tutorial expenses on a monthly basis and Mr. Wolfe will reimburse her for 66% of that amount (not exceed \$105.00) within two weeks of receiving the notification from Ms. Wolfe.

Termination of Spousal Support:

Mr. Wolfe requests this court conclude Ms. Wolfe is no longer entitled to spousal support. Ms. Wolfe acknowledges she has made considerable strides to becoming self-sufficient. She acknowledges she has permanent employment with appropriate

benefits and a pension package. She submits it would be proper for her to remain eligible for support for two more years or until their youngest child graduates from high school. She bases this request on her past and current attention to the raising of the children of the marriage, particularly Colleen, and what she anticipates, even with tutorial help, will be a continued demand on her time and income until Colleen graduates from high school.

When questioned as to quantum, Ms. Wolfe acknowledged, if Mr. Wolfe were to pay the Guideline amount for the three children, her need for spousal support would be minimal. Her concern is that if either Stephanie or Andrew cease to be eligible for child support while Colleen is still in high school, that she would require support during that time.

Considering the factors set out in s. 17.(4.1) of the *Divorce Act*, I find it would be appropriate to continue Ms. Wolfe's eligibility to seek spousal support until July of 2004.

It is obvious that Colleen is a child that will require considerable support, including that of a financial nature, until she is through high school. Ms. Wolfe's concern about having sufficient funds to provide her portion of the financial support for the child during those times is legitimate. Further, Mr. Wolfe has the ability to provide limited spousal support in the event his child support obligation is lessened.

I conclude that it is appropriate to provide a minimal order for financial support at this time in the amount of \$1.00 per year.

Provision of Medical/Dental Coverage for the Children of the Marriage:

The responsibility of Mr. Wolfe and Ms. Wolfe to provide medical/dental service for the children is set out in paragraph 8 of the annexed Separation Agreement. Currently any costs not covered by Mr. Wolfe's plans are the responsibility of Ms. Wolfe up to an amount of \$1,800.00 per year. Amounts over \$1,800.00 per year are to be shared equally by the parents.

Ms. Wolfe requests this paragraph be amended to reflect that the sharing begin between the parents with the 1st - not the 1800th - dollar. Mr. Wolfe requests there be no variation in this paragraph. He submits he currently has no input into what medical/dental expenses the children might incur and, accordingly, could be exposed to expenses, the necessity for and costs thereof, being beyond his advice or control.

I believe it is appropriate that Mr. Wolfe share in the legitimate and required medical/dental expenses of his children while they remain "children of the marriage" in accordance with the *Divorce Act*. However, this requirement should be preceded by his opportunity to be involved in the decisions that such expenses are necessary. It should be noted such a conclusion provides Mr. Wolfe with an opportunity to be heard regarding his children's medical/dental treatment. It also presents him with an

obligation to participate in a responsible fashion as it pertains to his children's legitimate needs. Accordingly, I will order paragraph 8 of the annexed Separation Agreement be varied to require Mr. Wolfe and Ms. Wolfe to share equally any medical/dental costs that have been approved by the parents that are over and above the coverage of Mr. Wolfe's plans. In the unfortunate event that Mr. Wolfe and Ms. Wolfe are unable to agree (which in most cases would mean the non-acceptance of a medical/dental opinion), it would be open to Ms. Wolfe as the custodial parent to seek redress through the court. In any event, the stipulation requiring Mr. Wolfe to share equally such expenses over \$1,800.00 per year would remain in effect.

Summary:

1. The Corollary Relief Judgment will be varied. The varied order will contain the paragraph indicating that the annual income of Ms. Wolfe is \$35,000.00 per year and that the annual income of Mr. Wolfe is \$71,000.00 per year;
2. Paragraph 3 of the Corollary Relief Judgment requiring Mr. Wolfe's payment of \$1,900.00 per month for the support of Ms. Wolfe and the children will be deleted and replaced by a paragraph indicating that Mr. Wolfe will pay support for the three children of the marriage, Stephanie, Andrew and Colleen, in compliance with the Federal Child Support Guidelines, the sum of \$1,209.00 per month. This variation will take place in the month of April, 2002, requiring payments of \$604.50 on the 1st and 15th day of each month;

3. That Ms. Wolfe shall remain eligible for spousal support until July 1, 2004, with a current payment of \$1.00 per year;
4. That Mr. Wolfe will reimburse Ms. Wolfe for 60% of the cost of providing private tutoring for Colleen up to a maximum of \$105.00 per month;
5. That Mr. Wolfe will share equally with Ms. Wolfe any medical or dental costs of the children of the marriage that have been approved by him.

I request counsel for the Applicant to prepare the order.

J.