

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Jakeman v. Gaetz*, 2004 NSSF 5

Date: 20040120
Docket: 1201-48479
Registry: Halifax

Between:

Sharon Evangeline Jakeman

Petitioner/
Respondent

v.

Clifford Perry Gaetz

Respondent/
Applicant

Judge:

The Honourable Justice Deborah Gass

Heard:

March 25, May 14, November 18, November 19 and
December 10, 2002, in Halifax, Nova Scotia

Counsel:

Kay Rhodenizer, counsel for Petitioner/Respondent
Clifford Gaetz, unrepresented

By the Court:

[1] This is a matter between Clifford Gaetz, Respondent/Applicant and Sharon Gaetz (now Jakeman), Petitioner/Respondent.

[2] This decision is the result of an application brought by Clifford Gaetz to vary a Supreme Court order dated August 18, 2000 as varied on appeal by the Nova Scotia Court of Appeal on April 6, 2001. The specifics of the application to vary are:

1) To terminate the requirement to pay any future spousal support payments.

2) To retroactively vary child support payments to October, 1999 on the basis of the applicant's belief that the respondent failed to disclose her total income and misled the court on other key issues.

3) In the alternative, to retroactively vary child support to October 2000 on the basis of a change in the applicant's circumstances due to loss of employment.

[3] At a pre-trial conference on November 2, 2001, a pre-trial memorandum issued which has the force and effect of an order pursuant to **Civil Procedure Rule 26.01 (2)**. At that time, the applicant was advised that the scope of the application was limited to any changes in circumstances occurring since the decision of Justice Williams of August 28, 2000 as amended as a result of Mr. Gaetz' successful appeal on April 6, 2001. The pre-trial memorandum directed

both parties to file certain documentation and the matter was set over for a continuation of the pre-trial conference to December 14, 2001.

[4] A subsequent pre-trial conference was held on February 13, 2002 at which time the parameters of the application to vary were further specified. Further disclosure was ordered and the matter was adjourned for hearing to commence March 25, 2002 for one day.

[5] The hearing began on March 25, 2002. Notwithstanding the court's directions in previous pre-trial conferences, the applicant sought to expand the scope of the inquiry beyond the changes in circumstances since the last decision.

[6] The court did indicate at previous pre-trials that it would consider changes in circumstances since the hearing itself which concluded on February 14, 2000 resulting in the order of August 2000. The court further emphasized that the issues of non disclosure and misrepresentation put forth by Mr. Gaetz with regard to the previous hearing would not be entertained within the purview of this application to vary. It was clear that the matter was not able to be concluded in the one day that had been set and it was adjourned for continuation to March 14, 2002. Again the

matter was not able to be completed and it was further adjourned to May 14, 2002 for a full day continuation of the trial.

[7] On May 14, 2002 further disclosure was directed to be provided by both parties. Mr. Gaetz was to provide his 1999 and his 2001 tax returns and information regarding the child tax benefit for the year 2000 and Ms. Jakeman was to provide financial information regarding Mr. Jakeman's employment at Nova Scotia Power.

[8] At the conclusion of the May 14, 2002 appearance, which did not complete the hearing, counsel on behalf of the Respondent, Sharon Jakeman, sought an interim reduction in the table amount payable by Ms. Jakeman. The court concluded that it was inappropriate to make an interim decision without hearing all of the evidence and dismissed the application for an interim variation pending the continuation of the full hearing of the matter. The matter was again set over for completion to November 18, 2002.

[9] On November 18, 2002 again because of the difficulty in confining the evidence and submissions to the parameters of the application, the hearing was not

able to be concluded in the day that was set and it was adjourned to continue on the following day, November 19, 2002. A total of 55 exhibits were entered. The matter was subsequently adjourned to December 10, 2002 for summations.

[10] Throughout the entire proceedings between court appearances, there was a considerable exchange of correspondence and letters written directly to the court, much of which touched on the applicant's efforts to have the court address issues which had already been determined by the court to be inappropriate for the application to vary and the scope of a hearing at this level.

[11] In summary then, this decision is with respect to an application to vary child support since the last hearing concluded in February of 2000 and an application to terminate spousal support which had previously been suspended.

BACKGROUND:

[12] The parties were married on June 19, 1982. There are three children of the marriage: Christopher Perry Gaetz, born [...], 1984, Brian Clifford Gaetz, born [...], 1985 and Jeffrey Richard Gaetz, born [...], 1987. The parties separated July 31,

1993 and were divorced January 23, 1995. Their Minutes of Settlement provided for, among other things, joint custody of the children of the marriage and maintenance payable to Ms. Jakeman in the sum of \$1,200.00 a month, as combined spousal and child maintenance.

[13] It appears that in 1999 both parties filed applications to vary the Corollary Relief Judgment. The parties agreed that while maintaining the joint custody provisions, the children's primary residence would be changed to that of Clifford Gaetz and the spousal support payable by Clifford Gaetz to Sharon Jakeman would be in the amount of \$900.00 per month effective January 1, 1998.

[14] At the time of this application to vary before Justice Williams, Mr. Gaetz was seeking an order effective January 1, 1999 terminating spousal support, terminating any requirement for child support and seeking the table amount of child support from Ms. Jakeman together with her share of the Section 7 expenses.

[15] At the time of this hearing, Ms. Jakeman was seeking an order of spousal support of \$854.00 for the year 1999, spousal support of \$550.00 effective January

1, 2000 and no order of child support payable by her to Mr. Gaetz for the three children.

[16] Justice Williams rendered his decision in July of 2000, which resulted in an order taken out in August of 2000. That order provided for spousal support to be suspended effective January 1, 2000, and for Ms. Jakeman to pay child support in the amount of \$100.00 per month commencing January 15, 2000. Justice Williams concluded that a requirement to pay the table amount of child support would cause her undue hardship.

[17] Mr. Gaetz appealed this decision. The decision of the Court of Appeal rendered April 6, 2001 allowed Mr. Gaetz' appeal and ordered Ms. Jakeman to pay child support in the table amount of \$576.00 per month plus Section 7 expenses of \$64.49 being a total of \$640.49 per month effective the 1st of April, 2001.

[18] Mr. Gaetz then brought this application to vary the order of Justice Williams as appealed. In support of his application to vary, he alleges that both courts, that is the trial court and the appeal court, based their decisions on facts which were misrepresented.

[19] This court maintained that its jurisdiction in this application is limited to changes in circumstances since the last order and the facts upon which it was based. Therefore, notwithstanding the considerable written and oral representations in that regard, this court is confining itself to any changes in circumstances.

[20] The hearing of this matter was unduly prolonged by the insistence of the applicant to refer both orally and in writing to allegations of misrepresentation and inadequate disclosure at the time of the original hearing by Ms. Jakeman; inappropriate conduct and misrepresentation on the part of her counsel, and inappropriate considerations of the presiding justice at the original hearing.

[21] This decision extricates from all of the material filed in this matter and all of the evidence given in court, facts pertinent to the issue of changes in circumstances as between the parties that has a bearing on any variation of child support and or termination of spousal support.

ISSUE ONE - VARIATION OF CHILD SUPPORT:

[22] The applicant seeks a variation of child support retroactive to October of 2000 on the basis of a change in the applicant's circumstances due to loss of employment.

[23] As stated by Freeman, J.A. on behalf of the court in rendering the decision on appeal,

.....Extraordinary expenses aside, the "table amount" established by the **Guidelines** is kept deliberately simple so the financial duties of separated parents to their children can be readily ascertained. It is a function of the payor parent's income, varied only by the number of children. Parents with incomes as low as \$7,000 a year are required to contribute financially to their children in accordance with the **Guidelines**. (Emphasis added)

[24] In rendering its decision, the Appeal Court rejected the trial court's finding of undue hardship. Only in determining an undue hardship application is the recipient/parent's income taken into consideration. Therefore a change in Mr. Gaetz' employment circumstances would have no bearing on the table amount of child support payable by Ms. Jakeman. The Court of Appeal required Ms. Jakeman to pay the table amount of child support of \$576.00 per month effective April 1, 2001.

[25] At paragraph 19 Justice Freeman states:

I would therefore vary the trial judge's order to require that the respondent Sharon Evangeline Gaetz pay to the appellant Clifford Perry Gaetz child support of \$576.00 per month plus add-on expenses of \$64.49 per month for orthodontic work, making a total of \$640.49 per month. I would exercise the discretion of the

court to forgive arrears resulting from this variation and order that the increased payments commence April 1, 2001. In all other respects I would confirm the order of the trial judge. I would award no costs on the appeal.

[26] The only payment that would be affected by any change in the recipient/parent's income would be the apportionment of the contribution towards Section 7 expenses. The Appeal Court rejected the claim for school trips and the hockey program leaving only the orthodontic expenses as valid Section 7 expenses requiring a contribution. The mother's contribution was determined to be \$64.49 per month. Therefore, the only alteration that would be expected as a result of Mr. Gaetz' loss of employment would be an alteration of the apportionment of the orthodontic expense. In terms of retroactivity, the Court of Appeal already exercised its discretion in determining that there would be no arrears of support either guideline or table amount, and that the order would be effective April 1, 2001. Therefore, where this has already been determined, then any change in the quantum of section 7 expenses would be confined to April 1, 2001.

[27] The apportionment of the orthodontic expense was based on a determination of Mr. Gaetz' income of \$80,000.00 a year and Ms. Jakeman's income of \$30,000.00 a year. She was be required to pay 27 percent of the orthodontic expense, which the Court of Appeal found to be \$2,866.00 per year . In applying

her 27 percent obligation, her payment was \$64.49 per month or \$773.00 per year.

The question then is whether or not there has been a change in circumstances since February 14, 2000 which would vary the s.7 contribution. In this respect, the loss of employment of the recipient parent is relevant.

DETERMINING INCOME AND IMPUTING INCOME:

[28] The court is urged by Mr. Gaetz to impute income to Ms. Jakeman pursuant to the provisions of s. 19(1)(a) of the **Federal Child Support Guidelines** which states:

19.(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed, other than where the under-employed or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse.

[29] At the time of the hearing in February 2000 Mr. Gaetz was employed with Sharpe Electronics. He lost his job in October of 2000. In 2001 he received Employment Insurance benefits of \$6,608.00 (T4E, ex. 11). He also received \$73,150.00 retirement allowance in 2001 (T4A, ex. 11). His statement of financial information sworn March 24, 2002 indicates no income except for the child tax benefit. He shows expenses of \$4,000.00 per month.

[30] Ms. Jakeman left her part-time work at Regional Residential Services in August 2001, after three years of looking after challenged adults. Medical reasons were cited. I accept her evidence, and that of her physician in this regard. She had been working at two jobs: one as a teaching assistant full time, followed by this part-time job in a small options group home.

[31] I cannot conclude that she voluntarily left her job in the face of ongoing legal obligations to avoid those obligations. I accept the evidence that it was stressful, hard work holding down two jobs, both which are physically, mentally and emotionally challenging.

[32] Ms. Jakeman continues her job with Halifax Regional Municipality School Board as a teaching assistant with a salary of \$21,099.32. Her previous 100 percent position was declared redundant and replaced with an 80 percent position.

[33] I conclude that Ms. Jakeman's total income for 2001 is \$35,351.99 and for 2002, her income is \$21,009.00.

EFFECTIVE DATE OF ORDER:

[34] The facts as at February 2000 on which the decision of Williams, J. was based were that Ms. Jakeman's income was \$30,000.00 per year. An order issued August 18, 2000 reflecting his decision of July 2000.

[35] The Court of Appeal addressed the question of undue hardship and rejected it.

[36] Based on the findings of income by the trial judge, the Court of Appeal ordered the table amount of maintenance of \$576.00 plus 27 percent of orthodontic expenses of \$64.49, a total of \$640.49 per month.

[37] The Court of Appeal specifically addressed the question of retroactivity and determined that any arrears which may have accumulated were forgiven and the order was effective April 1, 2001. I therefore conclude that the issue of retroactivity beyond April 2001 is res judicata. Therefore any varied order cannot predate the effective date ordered on appeal.

[38] Therefore, commencing April 1, 2001, based on a finding of income for 2001 of \$35,351.99 the table amount would be \$675.00 per month. It would appear that the ratio for 2001 for orthodontic expenses, based on the parties' incomes would be 31% and 69%. Ms. Jakeman would be responsible for \$888.00 per year or \$74.00 per month. Therefore Ms. Jakeman is ordered to pay a total of \$749.00 per month from April 1, 2001 to December 31, 2001.

[39] In 2002, her income dropped to \$21,009.00 per year. The table amount for three children is \$400.00 per month.

SPECIAL or EXTRAORDINARY EXPENSES (S. 7 EXPENSES):

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

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100.00 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist, or any

other person physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
(e) expenses for post-secondary education; and
(f) extraordinary expenses for extracurricular activities.

[40] Mr. Gaetz seeks a contribution to other Section 7 expenses as follows:

- A total of \$8,710.00 for orthodontic work from 1999 - 2001
- Golf: \$1,173.00 2000 Family Membership
\$1,173.00 2001 Family Membership
- Hockey: \$2,714.77 2000 costs plus travel and equipment
\$1,653.00 2001 costs plus travel and equipment
- University tuition plus books for Chris

[41] The golf and hockey expenses were addressed by the Court of Appeal. They were found to be unaffordable for this family.

[42] These same expenses are being claimed in this application to vary. The boys were extensively involved in these activities. Nothing has changed in this regard. They were unaffordable then and are less affordable as of the date of this hearing. Mr. Gaetz is unemployed now and Ms. Jakeman's income is significantly lower.

[43] A university expense is reasonable. However the father's goal to have Chris complete university without a student loan is not reasonable, given the parents' financial circumstances. There are no particulars as to actual costs or contributions through part-time work, scholarships or bursaries.

[44] There is no ability on the part of Ms. Jakeman to pay towards university in addition to the table amount of support being paid for the three boys.

[45] The Court of Appeal ordered a 27 percent share of orthodontics to be paid by Ms. Jakeman. The proportion required of Ms. Jakeman with no income from Mr. Jakeman would be 100 percent.

[46] I conclude that with Ms. Jakeman's income of \$21,009.00 for 2002 and the table amount of \$400.00 there is no ability to pay towards Section 7 expenses as of January 1, 2002. The mother will continue to keep the boys on her medical/dental plan for so long as they are eligible.

ISSUE TWO - SPOUSAL SUPPORT:

[47] The **Divorce Act, 1985**, governs variation of spousal support at s. 17:

17(7) A variation order varying a spousal support order should

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) insofar as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

SPOUSAL SUPPORT:

[48] Spousal support has been suspended since January 2001. Mr. Gaetz seeks a termination of spousal support.

[49] What has changed since William, J.'s decision?

- 1) Mr. Gaetz lost his job;
- 2) Ms. Jakeman left her part-time job thereby reducing her income for 2002 to \$21,009.00;
- 3) In August, 2001, Ms. Jakeman moved in with Mr. Jakeman as she found she could not afford to maintain her home;
- 4) Ms. Jakeman married in 2002. Her spouse earned \$57,000.00 per year in 2001.

[50] The change in circumstances warrants a review of maintenance in its entirety. Mr. Gaetz' ability to pay is significantly changed, and Ms. Jakeman's needs have changed.

[51] The parties were married for 11 years. Ms. Jakeman was 36 at the time of the divorce in 1995.

[52] It is my conclusion that, considering the length of the marriage, the respective responsibilities for the children and the current circumstances of the parties, that any obligation for spousal support shall be terminated.

CONCLUSION:

[53] There have been changes in circumstances for each of the parties.

[54] Child support is varied to \$749.00 per month from April 1, 2001 to December 31, 2001, and to \$400.00 per month commencing January 1, 2002.

[55] The parties shall exchange their tax returns and notices of assessment and reassessment annually on or before June 1 of each year.

[56] Spousal support is terminated effective January 1, 2003.

Deborah Gass, J.