In the Court of Appeal of Alberta

Citation: Henry v. Henry, 2005 ABCA 5

Date: 20050107
Docket: 0301-0273-AC
Registry: Calgary

Between:

Daryl Ross Henry

Appellant (Petitioner)

- and -

Celeste Rosanne Henry

Respondent (Respondent)

Corrected judgment: A corrigendum was filed on January 7, 2005; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Anne Russell
The Honourable Madam Justice Constance Hunt
The Honourable Madam Justice Marina Paperny

Reasons for Judgment Reserved of The Honourable Madam Justice Marina Paperny
Concurred in by The Honourable Madam Justice Anne Russell
Dissenting Reasons for Judgment of The Honourable Madam Justice Constance Hunt

Appeal from the Judgment by
The Honourable Madam Justice P. A. Rowbotham
Dated the 19th day of August, 2003
Filed on the 19th day of August, 2003
(2003 ABQB 717, Docket: 4801-073280)

Reasons for Judgment Reserved
of the Honourable Madam Justice Paperny

Introduction

[1] Mr. Henry appeals an order requiring him to pay retroactive child support. Mr. Henry paid child support pursuant to a divorce judgment granted in 1991. His income increased steadily thereafter. His child support payments did not. By the time the Federal Child Support Guidelines (Guidelines), SOR/97-175, came into force in May 1997, Mr. Henry's income had increased significantly. His child support payments remained the same.

[2] Shortly after their divorce and periodically from 1991 to 2002, Ms. Henry requested additional child support. Mr. Henry denied these requests on the basis that his income was insufficient to pay more. In November 2002, Ms. Henry commenced court proceedings seeking increased support. In August 2003, the chambers judge ordered Mr. Henry to pay increased support retroactive to July 1997.

Standard of Review

[3] The Supreme Court of Canada has emphasized that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong: ***Pelech v. Pelech***, [1987] 1 S.C.R. 801; ***Moge v. Moge***, [1992] 3 S.C.R. 813; ***Willick v. Willick***, [1994] 3 S.C.R. 670 and ***Hickey v. Hickey***, [1999] 2 S.C.R. 518.

Issue

[4] This appeal invites the court to articulate what factors should guide the judicial discretion to award retroactive child support. This is the same issue that was raised in and determined in ***D.B.S. v. S.R.G.***, 2005 ABCA 2 ("***D.B.S.***") and ***L.J.W. v. T.A.R.***, 2005 ABCA 3 ("***L.J.W.***"). The lead judgment, ***D.B.S.*** is being released concurrently and the principles set forth in that decision govern the disposition of this appeal.

Background Facts of this Appeal

[5] The background facts are set out in detail in the reasons of the chambers judge: ***Henry v. Henry*** (2003), 344 A.R. 377. The parties married in 1984 and had two children. They separated in 1990 and a divorce judgment was granted in July 1991. The children resided at all times with the mother. By the time of the divorce, Ms. Henry and the children had moved to Saskatoon. Her income at that time was $1,500.00 per month. Mr. Henry's income was $6,125.00 per month.

[6] When the parties first separated, Mr. Henry paid $1,200.00 per month support for the two

children. However, the divorce judgment reduced the amount to $350.00 per month per child.

[7] Ms. Henry deposed that she was shocked to discover the divorce judgment reduced child support to $700.00 per month as she thought there was an agreement to pay $1,200.00 per month. She was unable to obtain legal help to address this and claimed Mr. Henry told her that if she tried to vary the judgment, he would fight her in court and seek custody of the two children. She describes these communications as acrimonious.

[8] Ms. Henry stated that throughout the years, she sought additional support from Mr. Henry. Until 2000, Mr. Henry persistently refused to increase the amount of support. On occasion he paid money toward travel expenses associated with access, paid a portion of one child's braces in 1996, and bought gifts for the children. Ms. Henry repeatedly, orally and in writing, asked for an increase in child support. However, she did not retain legal counsel because of Mr. Henry's threat to fight her every step of the way, because she could not afford a lawyer and was too busy between work and child care to pursue the issue.

[9] Mr. Henry's income increased greatly after the couples' divorce. He did not disclose his income in the period from 1991 to the date of the application. In 1996, Ms. Henry moved back to Alberta, but because Mr. Henry was in Calgary, she did not have an opportunity to observe how his standard of living had increased. She claims he misled her about his income. Mr. Henry's income by 2000 was over $200,000; in 2002 it was $231,900.

[10] In February 2000, Ms. Henry wrote again to Mr. Henry requesting an increase in child support and informing him of the Federal Child Support Guidelines, which came into force in 1997. Mr. Henry voluntarily raised the child support payments to $1,050.00 in February 2000; in March 2003, he increased the amount to $1,186.00. During a three month summer visit in 2000 by one of the children, however, Mr. Henry requested that Ms. Henry financially contribute to child care, which she did.

[11] Ms. Henry served Mr. Henry with a notice to disclose/notice of motion in November 2002.

[12] Both parents have remarried and Mr. Henry has two children of his new marriage. There was no evidence of the income of the respective new spouses.

[13] As of February 2003, there was only one "child of the marriage". The eldest child is 19, continues to reside with Ms. Henry, and has completed a post-secondary course.

Decision of the Chambers Judge

[14] The chambers judge held that the coming into force of the Guidelines and Mr. Henry's increased income constituted a change in circumstances. Mr. Henry was ordered to pay $1,800 per

month in child support, based on his 2002 income of $231,900. The chambers judge also held that Mr. Henry was responsible for providing for the children of the marriage, was aware from Ms. Henry's communications that there was ongoing financial need and that Ms. Henry was struggling to raise the two children. Despite this knowledge and his increased income, Mr. Henry refused to increase support. The chambers judge concluded that the children had not enjoyed a lifestyle commensurate with Mr. Henry's income. For those reasons, a retroactive support order was appropriate. She concluded Mr. Henry should have been aware of the Guidelines in 1997. The award was made retroactive to July 1997, two months after the Guidelines came into force.

Retroactive Support

[15] A trilogy of cases, ***D.B.S.***, ***L. J. W.*** and this appeal raised the same issue. The main judgment of this court is found in ***D.B.S.***, released concurrently. The within appeal is governed by the principles enunciated therein and applies both its analysis and conclusions. In ***D.B.S.***, this Court reviewed the fundamental principles of child support, and the factors once considered germane to determining whether there should be a retroactive award in light of the fundamental shift brought about by the Guidelines. The Court concluded that the factors had to be re examined to ensure they were consonant with the stated goals and objectives of the Guidelines.

[16] The Court recognized that any basis for the exercise of discretion must reflect and be applied to achieve those goals. In undertaking this examination, the Court held that certain factors which promoted the joint obligation of both parents now figured more prominently and others, for example the proposition that it is only in extraordinary circumstances that such an award could be made, no longer remained valid: ***D.B.S.***.

[17] With the stated goals and the objectives at the forefront of the analysis, the Court reformulated the relevant factors to be considered in determining when retroactive child support should be awarded. As a result, a revised list of the factors to be used in exercising the discretion to award retroactive child support were delineated.

[18] In exercising the discretion to award retroactive child support, the following considerations were confirmed as relevant:

1. A child is entitled to child support. Need is presumed.

2. The Guidelines presume an ability to pay on the part of the payor in accordance with his or her income as determined in accordance with s. 16 of the Guidelines.

3. Blameworthy conduct on the part of the payor is not required.

4. The payee does not need to demonstrate an encroachment on capital.

5. Notice of an intention to pursue child support is not a prerequisite to a retroactive award.

6. Whether there is an unreasonable burden placed on the payor must be established, is not assumed and available payment options should be considered to alleviate any unreasonable burden. Any burden placed on the payor must be balanced against the corresponding deprivation to the payee and the child.

7. A lump sum payment is not precluded merely because it "redistributes capital".

8. The date of the increased income as defined by the Guidelines is the presumptive date for the commencement of a retroactive award unless the payor has satisfied the additional financial obligation in some other manner, has taken all reasonable steps to fulfill the obligation, has a previous arrangement for child support that contemplates the provisions of the Guidelines or the payee fails to act diligently without reasonable excuse: ***D.B.S.***.

[19] The exercise of judicial discretion in awarding child support must be consistent with and shaped by the fundamental principles of child support and the stated goals and objectives of the Guidelines, and any such exercise should be measured against them.

[20] The court's power to grant retroactive support comes from the variation provision in s. 17 of the *Divorce Act* and is premised on a change of circumstance. Under s. 14 of the Guidelines, one such change is an increase in income that would change the table amount of support. Thus, a change of income changes the amount of the base support obligation. For this reason, as elaborated upon and discussed at length in ***D.B.S.,*** this Court determined that in principle, the date the obligation arose should be used as the presumptive date for the commencement of a retroactive order.

[21] Parliament has seen fit to legislate a payor income model of child support. In an effort to establish a fair standard of support and to ensure children benefit on an ongoing basis from the financial means of both parents, Parliament has adopted a table that is designed to promote ongoing, negotiated changes to that support, rather than resorting to the courts. It does so by providing for annual disclosure and a readily ascertainable amount. To reduce conflict, the calculation of support is objective and relatively simple. The goal of Parliament was not to make child support orders "final" regardless of a change of circumstances and in particular, in income. It was to make support orders objective and fair on an ongoing basis.

[22] As discussed in ***D.B.S.***, the obligation for increased support does not originate or stem from a "duty to disclose", although such a duty exists as part of the obligation to support children. It arises by virtue of being divorcing or divorced parents and having an income that warrants a corresponding increase in support. The disclosure provided in s. 25 of the Guidelines is a judicial mechanism which

payees can employ to ensure regular financial disclosure. However, the disclosure provisions themselves are not the source of the support obligation.

[23] Requiring notice by the payee as a prerequisite to a court's ordering a retroactive award overlooks the fundamental basis for the support obligation. Requiring notice also undermines several of the objectives of the Guidelines, overlooks the nature of the financial obligations imposed under them, shifts responsibility to the parent without information and often with less resources, and delays fulfilment of a parent's obligation to the intended beneficiary, the child. In other words, when there is an increase in income on the part of the payor, requiring notice by the payee that he or she believes more support might be payable before retroactive support is awarded, undercuts the articulated goals and imposes additional obligations on those without information and rewards those who seek to avoid or at the very least, defer their obligations: ***D.B.S.***.

[24] Also as discussed in ***D.B.S.***, concerns with fairness cannot focus on fairness to the payor alone or even fairness solely between the payor and payee. The Guideline objectives and the Supreme Court of Canada in ***Francis v. Baker***, [1999] 3 S.C.R. 250, made clear that the Guidelines require a child-centred approach. The first question to be asked in a consideration of fairness is this: Is it fair that the child should have been deprived of the benefit of a higher standard of living? Requiring notice reinforces the misguided notion that a payor does not need to be aware of the law or the financial requirements of his or her children. Such a policy does not promote mutual responsibility. It ignores the legal reality of parenthood, that children are dependent on both their parents, and fails to recognize the "fiduciary relation" described by Weiler J.A. in ***Horner v. Horner***, [2004] O.J. No. 4268 (C.A.), which requires that a child's interests come before a parent's self-interests.

[25] Compensation is properly part of the consideration of fairness. As discussed in ***D.B.S.***, the need to consider compensation arises out of the principle that child support is a joint obligation of both parents. Where one parent has borne a disproportionate share of support for a child, fairness dictates that compensation be considered to redress the imbalance between the parents' respective obligations. Compensation also promotes the objective of mutual parental responsibility.

[26] As discussed at length in ***D.B.S.***, this Court has historically recognized the fundamental principles of child support including that the joint obligations of parents to provide financial support arise prior to the start of an action or an application for support, support is the child's right, a child-centred approach is to be taken to support, and the processes of the court must be consistent with and not minimize or avoid the objectives of child support. Both ***Hunt v. Smolis-Hunt*** (2001), 205 D.L.R. (4th) 712 (C.A.) and particularly, ***MacMinn v. MacMinn*** (1995), 17 R.F.L. (4th) 88 (C.A.), have been widely cited in this and other jurisdictions for these broad principles. There is no legitimate basis to narrow or limit the principles enunciated in either, or their application to the within cases.

Application to this Appeal

[27] Mr. Henry submits the chambers judge made two errors when she ordered retroactive support:

a) she failed to find the exceptional circumstances requirement in ***Ennis***; and
b) she determined he had a positive duty to disclose his income.

[28] Exceptional circumstances are not required for the exercise of judicial discretion in determining whether to award retroactive support: ***D.B.S.***. The analysis commences with a determination of when the obligation arose and is supported by a presumption that where the amount of support is readily ascertainable, it should be presumed to be owing from the date the payor's income increased.

[29] The obligation for increased support arises when there has been a change in circumstances. In this case, the obligation arguably arose well before 1997 by virtue of the substantial increases in Mr. Henry's income up to that time. However, retroactive support is not sought for that time. But by May 1997, it is clear that there was an obligation for increased support.

[30] The chambers judge found that Mr. Henry's income increased greatly from the time of the divorce in 1991. According to the divorce petition, Mr. Henry's income at the time of divorce was $73,500.00 a year. The chambers judge found that his income in 1997 was $197,455.00. The year before the application, 2002, his income was $231,900. The chambers judge concluded that the coming into force of the Guidelines, being themselves a change of circumstance, triggered entitlement to a variation. She concluded that at the latest, Mr. Henry's obligation to increase support was incurred on May 1, 1997.

[31] The chambers judge found, that not only did Mr. Henry fail to disclose his increase in income to Ms. Henry, he, in fact, hid the increase and denied it over a period of many years by repeatedly making statements to Ms. Henry which suggested he could not afford to increase the amount of child support. Ms. Henry was living in a different city from Mr. Henry and could not observe his improved lifestyle or readily obtain information which would have made her aware that his income had increased. In the absence of information about Mr. Henry's income, as described in the reasons of the chambers judge, Ms. Henry pursued him for increased support as best she could.

[32] The chambers judge determined that in accordance with the Guidelines, Mr. Henry's support obligation increased when the Guidelines came into force. In accordance with the criteria outlined in ***D.B.S.***, the chambers judge was obliged to consider additional factors. Did the payor satisfy the additional financial obligation in some other manner? Had he taken all reasonable steps to fulfill the obligation? Was there a previous arrangement for child support that contemplated the Guidelines or whether Ms. Henry failed to act diligently?

[33] In this case, the chambers judge found that Mr. Henry failed to satisfy his support obligations . Rather, he attempted to thwart or avoid it. Her conclusion is supported by the facts.

[34] Did the parties have a previous arrangement for child support that contemplates the Guidelines? The chambers judge found that the support did not provide adequately for the children and that Ms. Henry claimed it was inadequate and contrary to an earlier agreement they had from the time of the divorce decree.

[35] The court concluded that there was no unreasonable delay by Ms. Henry in seeking an increase in support. At the time of the divorce, Ms. Henry's evidence was that the amount was less than she believed they had agreed upon but she had neither the time nor the financial resources to seek an increase and was intimidated by Mr. Henry's threats of changing custody. Her financial situation and Mr. Henry's threats of litigation also prevented her from seeking a variation over the years. Moreover, she did not pursue an increase earlier because Mr. Henry misled her about his income to the point where, on one occasion, Ms. Henry paid the travel expenses and subsidized one of the children's costs while the child had access with Mr. Henry. The chambers judge considered these facts and did not find that the delay caused a prejudice to Mr. Henry.

[36] In considering whether a retroactive award would create an unreasonable burden on the payor, the chambers judge observed that the amount for the retroactive support payments would be in excess of $100,000.00, approximately half of Mr. Henry's yearly income and he had a new family to support. However, she balanced this against the hardship endured by Ms. Henry to provide a home and maintain the two children over the years.

[37] In essence, the chambers judge concluded that Ms. Henry was entitled to retroactive support to compensate for the many years when the support paid fell well short of the amount which was properly owing. She appreciated that as at the date of the application one child was no longer a child of the marriage, but for the reasons stated above, this did not alter the need for compensation for the deprivation of support over the years. This is a reasonable exercise of discretion.

[38] The support was made retroactive to July 1, 1997. The coming into force of the Guidelines in May 1997 constitutes a change of circumstances. However, the chambers judge commented that the parties lacked awareness of the Guidelines as of May 1997 and also lacked of legal counsel at that time. While ignorance of the law affords no excuse and support could have been ordered from May 1997, it appears the chambers judge exercised her discretion to consider the lack of actual knowledge and awarded support from a later date. Whatever the chambers judge's reasons, in the result, her decision is to Mr. Henry's benefit. More significantly, Ms. Henry has not cross-appealed seeking the order to be made retroactive from May 1997.

Conclusion

[39] I find no error in the decision of the chambers judge which would warrant interference by this Court. As a result, the appeal is dismissed.

Appeal heard on June 15, 2004

Reasons filed at Calgary, Alberta
this 7th day of January, 2005

Paperny J.A.

I concur:

Russell .J.A.

Dissenting Reasons for Judgment of
The Honourable Madam Justice Hunt

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[40] This case is about retroactively increasing an existing child support order that the payor has been following. The central issue is how far back in time the retroactive increase should go in light of the *Divorce Act*, R.S.C. 1985, (2nd Supp.), c. 3 ("*Divorce Act*") and the *Federal Child Support Guidelines*, S.O.R./97-175 ("*Guidelines*").

[41] I disagree with the majority decision on one key point, namely, the starting date of a retroactive child support order. So long as the payor has been complying with an existing, non-interim pre-*Guidelines* order, and has not acted in a blameworthy fashion, a retroactive increase to that order should not relate to a time before the payee notifies the payor in writing that he or she claims increased payments under the *Guidelines*.

[42] Three main reasons support this conclusion: Parliament's intention, fairness, and respect for the legal system. My discussion of these matters is followed by a brief analysis of post-*Guidelines* decisions of this Court on retroactivity and a consideration of how I apply the notice principle in this case.

Parliamentary Intention

[43] Section 17(1) of the *Divorce Act* authorizes courts to make retroactive orders, but neither the *Divorce Act* nor the *Guidelines* elucidates the principles applicable to retroactivity. In particular, they are silent about the start date of the period to which a retroactive increase should relate when a payor has been paying child support pursuant to a pre-*Guidelines* order or agreement. Since they offer no guidance on how transition between the old and new regimes ought to be handled, the question is left to judicial discretion.

[44] This discretion must be exercised judicially: ***T.(E.) v. T. (K.H.)*** (1996), 25 R.F.L. (4th) 98 at 104 (B.C.C.A.). In my view, the exercise of this discretion should be guided both by what Parliament has, and has not, said.

[45] While the *Guidelines* made fundamental changes to the child support regime, they did not change everything. They did not, for example, alter s. 17(1) of the *Divorce Act*, which contemplates an application by a spouse to vary a support order retroactively.

[46] Under the *Guidelines*, payors and payees still have both rights and obligations. For example, pursuant to s. 25(1) of the *Guidelines*, the payee has the right to request disclosure of the payor's income and related information once a year. The payor has an obligation under s. 25(3) and (5) to reply to such a request within a short time. Section 25(7) provides sanctions against a spouse who fails to comply with a disclosure request.

[47] Although they could have done so, the *Guidelines* did not mandate an automatic increase in support payments when the payor's income increases. As observed by Laskin, J.A.:

> Parliament could have made the policy choice to require parties to exchange financial information annually or at some other regular interval and to vary child support in accordance with the Guidelines. Indeed, I see valid grounds for such a policy choice. The right to child support is that of the child, not the custodial parent. The payor's failure to give effect to this right voluntarily and the custodial parent's failure to enforce this right should not deprive the child of the support he or she is entitled to. When child support is not automatically varied in accordance with the Guidelines as the payor's income increases, the child effectively subsidizes the payor's improved standard of living. Moreover, failing to vary child support with undisclosed increases in income rewards conduct that seems inconsistent with the Guidelines. But Parliament has not made this policy choice. (Emphasis added.)
>
> ***Walsh v. Walsh*** (2004), 69 O.R. (3d) 577 at para. 25

[48] When the *Guidelines* came into effect, Parliament added s. 25.1 to the *Divorce Act*. Section 25.1 contemplates agreements between the Government of Canada and a province, authorizing a provincial child support agency to "recalculate, at regular intervals...the amount of child support orders on the basis of updated income information." The recalculated child support amount takes effect 31 days after the spouses are notified, unless one of the spouses launches a s. 17(1) application in the interim (s. 25.1(3) and (4)). Section 26 of the *Guidelines* enables a spouse to appoint a provincial child support service to act on his or her behalf for the purpose of requesting and receiving income information under s. 25 of the *Guidelines*. This mechanism anticipates automatic recalculations based on income changes.

[49] But since there is no such agreement in Alberta, there exists no mechanism for recalculating the amount of support automatically at regular intervals. Parties still have to apply under s. 17(1) of the *Divorce Act* if they are unable to agree on a variation. Section 25.1 is a further indication that Parliament did not contemplate an automatic adjustment based on increased income, absent a federal-provincial agreement.

[50] The history leading up to the *Guidelines* supports this view. In 1991, a Committee considered systems in other countries where child support orders are automatically recalculated (The

Federal/Provincial/Territorial Family Law Committee, *Child Support: Public Discussion Paper* (Ottawa: Department of Justice, 1991) at 36). Four years later, a report by the same Committee considered the possibility of having ongoing reassessments by an administrative agency or an annual obligation to share financial information even without a request (*Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support* (Ottawa: Department of Justice, 1995) at 42-43). Ultimately, the Committee recommended a system whereby a custodial parent could ask for income information once a year, a recommendation that became s. 25 of the *Guidelines*. Parliament chose automatic recalculation of an existing child support order only when there is a federal-provincial arrangement.

[51] Nothing precludes parties from agreeing that an increase in payor income automatically increases support payments. Nor are courts precluded from ordering such a regime. Absent those situations, judicial discretion in making retroactive orders ought to be exercised so as to reflect the system Parliament has selected. Unless there is a federal-provincial arrangement or an order or agreement requiring otherwise, that system obliges the payee to take steps to obtain a variation.

[52] In short, ss. 17(1) and 25.1 of the *Divorce Act*, s. 25 of the *Guidelines* and the history of the *Guidelines* demonstrate that Parliament did not intend there to be automatic increases in child support triggered simply by increased payor income. This background is critical to my view about how the courts ought to exercise their discretion concerning retroactivity.

Fairness

[53] As discussed below and in the judgment of Paperny, J.A., there have been varied judicial views about the period to which a retroactive order should relate. Courts have attempted to strike a balance between the interests of payors and payees in the transitional phase between pre- and post-*Guidelines* orders. Concerned with fairness, they often focussed on the date of the payee's application which gave notice of a claim. I think that choosing the point of notice, whether or not by application, strikes the right balance.

[54] Although there was considerable publicity around the *Guidelines*, not all payors were necessarily aware of them, or, more importantly, aware of the nature of the changes they imposed. Even with knowledge of the existence of the *Guidelines* a payor could hardly have been expected to know that he or she had an automatic obligation to increase support payments, since the *Guidelines* neither say so nor indicate how judicial discretion ought to be exercised in that regard.

[55] Because the *Guidelines* are not designed for automatic increases, fairness militates against requiring a payor who has complied with his or her legal obligations to make payments retroactive to a time before the payor was put on notice that the payee wanted an increase. Once notified, the payor can take appropriate action (such as consulting a lawyer or community advisory agency, obtaining a copy of the *Guidelines*, voluntarily increasing support, etc.). From the point of notice,

the payor can claim neither surprise about the prospect of increased obligations nor unfairness. The payor can organize his or her affairs accordingly.

[56] It is not a heavy burden on a payee, who has detailed knowledge of the children's situation, to notify the payor of a claim for an increase. Normally such notice should be in writing to alleviate difficulties of proof. Giving notice will not necessarily require the use of a lawyer or lead to litigation. A simple letter will suffice.

[57] Making an order retroactive to a point before notice was given upsets settled expectations and the ability of a payor to plan his or her affairs (which may include new family obligations). The payor may have thought or assumed that the payee did not want or need additional funds. A payor who has complied with his or her existing child support obligations arising under a pre-*Guidelines* agreement or order and has met his or her s. 25(1) disclosure obligations might understandably have assumed, until informed otherwise, that he or she was meeting the necessary legal requirements.

[58] There may be cases where it would not be unfair to impose a retroactive order that predates notice of a claim. One example would be a payor who has not met his or her disclosure obligations. See ***Horner v. Horner***, [2004] O.J. No. 4268 (C.A.); ***Marinangeli v. Marinangeli*** (2003), 66 O.R. (3d) 40 (C.A.). Another possible situation would be a payor who has been blameworthy by not faithfully meeting the terms of the pre-*Guidelines* order or agreement.

[59] Choosing notice as the key date does not necessarily undermine the objectives in s. 1 of the *Guidelines*. Those objectives do not mention the retroactive compensation of a payee (let alone a payee who fails to ask for increased support). The requirement for notice may help "reduce conflict and tension between spouses" (s.1(b)) more than a retroactive court order that pre-dates notice. Requiring notice may also encourage settlement (s. 1(c)), because the payor is less likely to feel he or she is being treated unfairly. The objective of ensuring consistent treatment of spouses and children in similar circumstances (s. 1(d)) is served equally well by a retroactive order relating to the period starting either when notice is given or when the payor's income increases.

[60] I acknowledge that, in some cases, a retroactive order for a period pre-dating notice will establish a fair standard of support for a child (s. 1(a)). But that will not necessarily be the result when a delayed claim means that a child is already an adult by the time the order is made. In such cases, the payee will be compensated which, I reiterate, is not a *Guidelines* objective.

[61] The unfairness of imposing the *Guidelines* regime retroactively absent notice and in the face of compliance with an existing order or agreement is illustrated by the situation where the payor's income decreases. If the key triggering event is a change in payor's income, one might logically argue that an order should be decreased retroactively even absent notice by the payor that his or her financial situation has changed. Few would consider that result fair because the payee will have already organized his or her life relying on the receipt of payments based on a higher payor income.

The payor has unique knowledge of his or her own financial circumstances and could apply to reduce child support immediately upon a decrease in income.

[62] This case does not involve a decrease in income and the point was not argued. Other considerations may apply to such cases. Nevertheless, the example illustrates how the converse situation would appear to a payee without notice and underscores the unfairness of a retroactive order in the transitional phase between pre- and post-*Guidelines* situations.

[63] In other words, there are two sides to fairness. On one hand, a retroactive order compensates the payee and may improve the day-to-day situation of dependent children. On the other, without notice, it is unfair to the payor. Even more importantly, when a payor has complied with a pre-*Guidelines* order, retroactivity before notice may reduce respect for the legal system.

Respect for the Legal System

[64] There is a clear policy interest in ensuring that existing court orders are respected: ***L.S. v. E.P.*** (1999), 50 R.F.L. (4th) 302, 1999 BCCA 393 at para. 50. "A previous court judgment is assumed to be correct and should be respected unless it is reversed on appeal or varied." (*Ibid*. at para. 48.) A previous order will not be departed from lightly and its correctness must not be reviewed during a variation proceeding: ***Willick v. Willick***, [1994] 3 S.C.R. 670 at 687-688 (dealing with a maintenance order).

[65] The above authorities underscore the obvious. When there has been compliance with an existing order, making an order retroactive to a date before notice will undermine respect for the legal system. It suggests that the payor's compliance with a pre-*Guidelines* order or agreement and with express disclosure responsibilities counts for nothing and that a court order does not mean what it says. This is an enormous price to pay. If Parliament had intended to so radically alter past rights and obligations from the very moment the *Guidelines* took effect, it should have said so.

[66] It is telling that this Court has never before made an order retroactive to a point pre-dating notice in the face of an existing order, save in the case of blameworthiness or an interim order based on limited facts.

Post-*Guidelines* Decisions on Retroactivity of the Alberta Court of Appeal

[67] Since the *Guidelines* took effect, the issue of retroactive child support has been argued before this Court on numerous occasions. The variety of results reflects many different fact situations and the challenge of developing principles that deal fairly with the interests of all concerned. The following analysis does not mention every case, but outlines my interpretation of the main decisions.

[68] Some of these cases understandably refer to the pre-*Guidelines* decision of ***MacMinn v. MacMinn*** (1995), 174 A.R. 261 (C.A.) ("***MacMinn***"). Although it contains many useful observations about the purpose of child support, a close examination reveals that ***MacMinn's*** retroactivity issue was whether, following a trial in December 1993, the judge ought to have adjusted retroactively an interim order made in July 1992.

[69] There were two important facts in ***MacMinn***, *supra*. First, the trial evidence revealed that the father's income in 1992 was considerably higher than had been understood at the time the interim order was made. Second, the mother's application for an interim increase in May 1993 had been refused on the ground that the trial date was quickly approaching.

[70] The Court of Appeal held that, in these circumstances, it was appropriate to adjust child support back to the date of the interim order. The resulting retroactive order did not pre-date the application. The Court's conclusions about retroactivity in the following passages emphasize delay in the pre-trial period following an interim order and underscore the fact that an application notifies the payor of the claim:

> Certainly, from the time an action has commenced, the custodial parent has evinced an intention to pursue his or her claim against the non-custodial parent. The fact that it may take one or two years to bring an action to trial in no way diminishes the obligation of the non-custodial parent for the support of his or her child.
>
> ...
>
> when the matter proceeds to trial... it is perfectly proper...for the trial judge to consider and compensate for shortfalls in a parent's contribution to support arising because of an inadequate interim award.
>
> ...
>
> Indeed, if a non-custodial parent could avoid the full import of his or her financial obligations during the pre-trial period by simply arguing that by trial, it is too late to make an award with retroactive effect, the consequences of endorsing this approach would be punitive for children and the custodial parent.
>
> ***MacMinn*** at paras. 15, 17, 18

[71] In the early post-*Guidelines* period, Court of Appeal decisions accepted that retroactive orders normally should relate to the period starting on the date of the application. See, for example: ***Wesolowski v. Wesolowski***, 1999 ABCA 66 at para. 13. In this case, the divorce order had been silent on child support but the father had faithfully made support payments pursuant to a provincial

court order for some 10 years. Also see ***Degagne v. Sargeant*** (1999), 232 A.R. 355, 1999 ABCA 145 at para. 8; ***Ennis v. Ennis*** (2000), 281 A.R. 161, 2000 ABCA 33 at para. 30 ("***Ennis***"); and ***Koenen v. Koenen*** (2001), 277 A.R. 265, 2001 ABCA 46 at para. 6 ("***Koenen***").

[72] Some of these decisions acknowledged that there might be circumstances where a date earlier than the application would be appropriate, notably, payor blameworthiness or prior notice. For example, in ***Koenen***, *supra* the mother had attempted to obtain financial information from the father, who avoided service. The father's conduct was blameworthy, while the mother had not delayed. In ***Wishlow v. Bingham*** (2000), 261 A.R. 299, 2000 ABCA 198, a decision that the panel emphasized at para. 4 was "fact-driven", a variation order was made retroactive to the date of the *Guidelines*. The father had been consistently unresponsive to disclosure requests. Several months before the *Guidelines* came into effect, the mother had written him a letter seeking *Guidelines*-based support as of May 1, 1997.

[73] ***Ennis***, *supra*, relying upon ***MacMinn***, discussed the rationale behind using the date of the application as the "norm" at para. 29. It acknowledged fairness to the payor, stating at para. 30 that "[o]nce notice of the intention to seek maintenance in accordance with the *Guidelines* is made known in this concrete fashion [through the filing of an application], there is no unfairness to the non-custodial parent."

[74] At para. 31, it suggested that "exceptional circumstances" were required when a retroactive order pre-dating the application was sought. It noted payor blameworthiness and payee diligence as relevant considerations, adding that "there is a presumption that a previous court order is to be respected." Different considerations would apply if a payor falsified income or the payee "sat for years and took no action." Because there were no "extraordinary circumstances" in ***Ennis***, the Court limited retroactivity to the date of the application.

[75] The respondent argues that the "extraordinary circumstances" rule no longer applies, in light of this Court's decisions in ***Hunt v. Smolis-Hunt*** (2001), 286 A.R. 248, 2001 ABCA 229 (***"Smolis-Hunt***") and ***Whitton v. Shippelt*** (2001), 293 A.R. 317, 2001 ABCA 307 ("***Whitton***"). I think that result is far from clear.

[76] Like ***MacMinn***, ***Smolis-Hunt***, *supra*, contains many broad statements about retroactivity. Like ***MacMinn***, its context is crucial. In ***Smolis-Hunt*** there was no existing court order or agreement on child support. This is plain from the way the majority stated the issue that is relevant to this case at para. 2:

> The issue is whether a trial judge has jurisdiction to award child support from the date of separation until the date of the filing of the petition for divorce in the context of this case. Put another way, can federal legislation and the common law be relied

> upon to establish a general duty to maintain children prior to the commencement of divorce proceedings in which enforcement of that duty is sought? (Emphasis added.)

[77] The majority's review of the jurisprudence included a discussion of ***Andries v. Andries*** (1998), 159 D.L.R. (4th) 665 ("***Andries***"), in which the Manitoba Court of Appeal stated that lump sum awards intended to compensate for inadequate interim awards were the exception rather than the rule. The majority quoted the following passage from ***Andries***:

> ...A payor should not ordinarily be required to pay support for a period during which none was sought or for a period during which the amount was fixed by interim order or agreement. Generally speaking, a payor structures his or her financial affairs on the basis of known obligations. In the usual course of things, it would be quite unfair to impose an additional obligation retroactively. (Emphasis added.)
>
> ***Smolis-Hunt*** at para. 30

[78] At para. 31, the majority quoted exceptions to the above rule, being "all cases in which the payor was at fault either by failing to recognize his obvious obligation or by trying to avoid it." (para. 49 in ***Andries***, *supra*).

[79] At para. 32, the majority observed:

> It seems to us that the exceptions, as a matter of fundamental fairness, are equally engaged when a parent fails for the stated reasons [that is, when the payor was at fault] to discharge his or her child support obligations in the period of time preceding the issuance of a petition for divorce. We see, with respect, no principled reason, nor any statutory impediment, to fail to exercise the statutory or inherent jurisdiction of the court to compel payment of child support in the recited exceptional circumstances...If the actions of a parent warrant a retroactive order for the period following the initiation of divorce proceedings, such behaviour prior in time ought not to be insulated from jurisdictional scrutiny and court ordered remedies on the basis of procedural impediment...An order for retroactive child support pre-dating the issuance for a petition for divorce is...a necessary incident to the dissolution of a marriage... (Emphasis added.)

[80] The above passages of ***Smolis-Hunt*** focussed on the rationale for ordering child support before the commencement of divorce proceedings. The majority spoke of extending "the exceptions" (i.e. blameworthy conduct of the payor) to the pre-divorce petition stage. The possible impact of an existing order that was being honoured was never considered because there was not one in ***Smolis-Hunt***.

[81] The relevant ratio of ***Smolis-Hunt*** was that "trial judges are vested with a discretion, in appropriate circumstances, to order retroactive child support for a period of time preceding the commencement of proceedings under the Divorce Act." (Para. 34; emphasis added.) The term "appropriate circumstances" was used in the context of the majority's discussion in paras. 30-32 of "exceptions" to the norm and "exceptional circumstances". In para. 34, the majority specifically suggested that such an order should not be made "if the only purpose of such an award is to redistribute capital between the parties."

[82] Having found jurisdiction to make a retroactive order pre-dating proceedings, at para. 35 the majority underscored the importance of notice to the payor:

> A trial judge, before exercising his or her discretion, should take pains to ensure that the parent paying support is not treated unfairly by a sudden demand to pay support for a period which, applying an objective test, a reasonable parent would think had passed. On the other hand, where the payee has made it clear by her actions that she intended to pursue child support, the passage of time can in no way diminish the obligation of the non-custodial parent. (Emphasis added.)

[83] In ***Smolis-Hunt*** the majority found no error in an order retroactive to the date of separation, which pre-dated the commencement of divorce proceedings by more than a year. The justification for the retroactive award was not blameworthy conduct on the part of the payor. Rather, the majority accepted that the payee's failure to make an earlier claim was justified because "there would have been no point in endeavouring to secure an order of the court for interim maintenance as the Petitioner was in his own words, 'paying as much as he could'." (***Smolis-Hunt***, at para. 36.) His law practice was not lucrative and he refused to abandon it for a salaried position that he had held prior to his legal studies.

[84] ***Smolis-Hunt*** was relied upon by another panel in ***Whitton***, *supra*, to conclude, at para. 19, that "the test does not rely on 'exceptional circumstances' but 'appropriate circumstances'." This conclusion was drawn by referring to para. 34 in ***Smolis-Hunt*** (where the term "appropriate" was used) but not to the portions of paras. 30-32 and para. 35 discussed above. In other words, ***Whitton*** did not examine the context for the use of "appropriate" in ***Smolis-Hunt***.

[85] In ***Whitton***, the panel added at para. 19:

> Some of the appropriate circumstances cited in [*Smolis-Hunt*] include but are not limited to situations where:
>
> > a) the payor was at fault by failing to recognize or trying to avoid the obvious need for support,

> b) a payor makes it impossible to assess the proper amount of support,
>
> c) the payor wilfully causes the payees [sic] income to cease,
>
> d) the payor knew of an obligation which did not become the subject of an order due to ongoing negotiations, and
>
> e) the payor fails to disclose a greatly increased income.

[86] The first three of these circumstances involve blameworthiness. The fourth is one where the payor knows of the claim. Authority for the fifth appears to be ***Dahl v. Dahl*** (1995), 178 A.R. 119 (C.A.), where the award was made retroactive only to the date of the application.

[87] In ***Whitton*** itself, a chambers judge had ordered child support in the amount of $4000 for a period pre-dating the payee's application, which order was upheld by this Court. At para. 20, the Court observed: "We note that in this case the Divorce Judgment made no Order for payment upon which the father could be said to rely pending variation. He was under no "obligation by Order" until the interim Order of Sirrs J. in April of 2000 (upon which he has paid nothing)." (Emphasis added.) In other words, even the retroactive order upheld in ***Whitton*** did not conflict with an existing (non-interim) order that had been honoured by the payor.

[88] To summarize, I am doubtful that ***Smolis-Hunt*** in fact altered the "norm" of not awarding support before the date of an application save in exceptional circumstances (payor blameworthiness, prior notice, or a justified delay in seeking a support order). Morever, many of this Court's prior decisions have emphasized the need for notice to ensure that retroactive orders are not unfair to payors. Finally, there is no case where this Court has made a non-interim order retroactive to a period before an application when there was compliance with an existing order combined with no blameworthiness and no prior notice.

Application of Principles to this Appeal

[89] The evidence before the chambers judge took the form of affidavits. There remains considerable acrimony between the parties despite their long separation and the fact that each has remarried and had other children. While there is little point in analyzing the many discrepancies between their respective affidavits or perspectives on events of the distant past, passages in the chambers judge's reasons (such as paras. 23 and 32) demonstrate the existence of such evidentiary conflicts.

[90] The appellant complied with the pre-*Guidelines* divorce order of 1991 which required him to pay $700 per month. He enjoyed a very significant increase in income over the years, eventually earning a great deal more than the respondent. The respondent struggled financially to raise their two

daughters. From time to time she sought extra financial assistance from the appellant for certain items. Sometimes he contributed; other times he refused (for example, in regard to a bed-wetting machine which his correspondence suggests he thought was a sham).

[91] What is less clear from the evidence is precisely when, and in what terms, the respondent asked for increased child support. The chambers judge specifically references the request for help with the bed-wetting machine in 1993 and a request of October 1995. In regard to the latter, the only documentary evidence is the appellant's reply, which refers to the bed-wetting machine but is otherwise unclear as to what assistance was sought by the respondent.

[92] The respondent's February 2000 letter, on the other hand, clearly signalled an intent to seek increased support pursuant to the *Guidelines*. The chambers judge so found at para. 37. This date also accords with the respondent's second affidavit, para. 25, where she says, "Since 2000, I have repeatedly asked...that the Petitioner increase the child support that he is paying according to the...*Guidelines*." Shortly after receiving this letter, the appellant increased his payments by $350 per month. A notice to disclose was later served on him and eventually these proceedings resulted.

[93] The appellant deposes that he did not see the *Guidelines* until November 2002. Even so, the respondent's February 2000 letter mentioned "income and maintenance charts that they follow now." This was enough to trigger the appellant's liability thereafter for support payments pursuant to the *Guidelines*. It should have indicated to him that the legal framework had changed and that he should seek advice. There was nothing in the respondent's behaviour after this date to disentitle her to retroactive payments.

[94] The chambers judge did not explicitly find blameworthiness on the appellant's part so as to justify a pre-notice award. The closest she came to such a finding is in para. 39:

> Mr. Henry knew that there was financial need. Raising two teenage girls was a struggle and the evidence supports this. Mr. Henry paid the court ordered amount for nine years and increased it only after Ms. Henry's letter of February 9, 2000. He did not deliberately conceal his increased income. He just never bothered to disclose it and viewed it as Ms. Henry's obligation to ask for it. When additional money was requested for certain items, he contributed but with a reminder that money was not readily available and a suggestion that Ms. Henry should better manage her money. (Emphasis added.)

[95] This finding is far different than previous cases where payor behaviour has justified a retroactive award pre-dating notice. It is apparent from the chamber judge's reasons in para. 41, moreover, that the retroactive award pre-dating notice was not based on a finding of blameworthy conduct but was for the express purpose of compensating the respondent who had "endured the hardship of maintaining a home and providing for" the children. By the date of the decision, one

child was no longer a child of the marriage and the chambers judge noted that the second would turn eighteen in a few years and then might no longer be a child of the marriage. In such circumstances, the failure of the payee to ask clearly for increased support is a factor that weighs even more heavily in favour of the payor, since retroactive compensation to the payee is not an objective of the *Guidelines*.

[96] Therefore, I would have varied the judge's order by making the payments retroactive to February 2000.

Appeal heard on June 15, 2004

Reasons filed at Calgary, Alberta
this 7th day of January, 2005

Hunt J.A.

Appearances:

D. G. Moe
for the Appellant

D. Colborne
M.L. Matkovic
for the Respondent

Corrigendum of the Reasons for Judgment Reserved of The Honourable Madam Justice Marina Paperny

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“M.L. Matkovic” has been added as counsel for the respondent.