Date: 20010830
Docket: CA 169790

NOVA SCOTIA COURT OF APPEAL
[Cite as: MacKay v. Bucher, 2001 NSCA 120]

Bateman, Saunders and Oland, JJ.A.

BETWEEN:

SHAWNA KATHLEEN MacKAY

Appellant

- and -

CHRISTIAN WERNER BUCHER

Respondent

REASONS FOR JUDGMENT

Counsel: Deborah E. Gillis for the appellant
Milton J. Veniot, Q.C. for the respondent

Appeal Heard: June 1, 2001

Judgment Delivered: August 30, 2001

THE COURT: Appeal allowed per reasons for judgment of Bateman, J.A.; Saunders and Oland, JJ.A. concurring.

BATEMAN, J.A.:

[1] This is an appeal from a decision of Judge James Wilson of the Family Court. He declined to confirm a provisional order arising from the appellant's application to the Provincial Court of British Columbia requesting a variation of child support to conform to the child support guidelines.

Background:

[2] The child in question, Zachary Edward MacKay, was born on January 4, 1990. He is the son of the appellant, Shawna Kathleen MacKay and the respondent, Christian Werner Bucher. Ms. MacKay and Mr. Bucher had a romantic relationship from the summer of 1988 to January of 1989. She was single and a student at Mount Allison University in Sackville, New Brunswick. Mr. Bucher, who was not married, was employed as a computer programmer with Scott Paper earning about $40,000 annually.

[3] The parties negotiated a child support agreement which was incorporated into a Consent Order pursuant to the **Family Maintenance Act**, R.S.N.S. 1989, c. 160 (the "**FMA**"), (as of June 4, 2001 known as the **Maintenance and Custody Act**, same citation). That Order provided that the mother was to have sole custody without access by the father. He was to pay child support totalling $15,000 payable by a lump sum of $10,000 and monthly instalments of $400 until the further $5000 was discharged. Those payments have been made.

[4] According to the affidavit filed by Ms. MacKay with the B.C. court, the child was conceived during the relationship with Mr. Bucher. In the early stages of her pregnancy she says that he threatened and harassed her, accusing her of being unfit to mother a child. Mr. Bucher pressured her to accept lump sum child support. Implicit in Ms. MacKay's affidavit is the suggestion that she settled for the lump sum because she feared losing custody of the child. She was represented by Nova Scotia Legal Aid but says that her legal representation was inadequate. In particular she suggests that she did not understand, when agreeing to the settlement, how regular monthly support would compare to a lump sum amount.

[5] Zachary, who is now eleven years old, has been diagnosed with attention deficit hyperactivity disorder, the treatment for which has placed considerable strain on Ms. MacKay's financial resources. In addition Zachary requires an unusual amount of attention and supervision from his mother which has limited her career opportunities. Ms. MacKay is currently

a special education teacher in British Columbia earning about $52,000 annually.

[6] On March 30, 2000 the B.C. Provincial Court provisionally ordered support in accordance with the child support guidelines in force in that province. The support was comprised of the basic table amount of $343 monthly, based upon a payor's income of $40,000, and $550 monthly for special expenses.

[7] The Order was sent to Nova Scotia for confirmation under the procedure outlined in the **Maintenance Orders Enforcement Act**, R.S.N.S. 1989, c. 268. Ms. MacKay, who was vacationing in Nova Scotia at the time, attended for the first appearance on the confirmation application on July 19, 2000. Mr. Bucher gave notice that he intended to oppose confirmation of the order. Ms. MacKay advised that she would not participate in the proceeding in Nova Scotia. She was not represented at the subsequent confirmation hearing which was held on October 20 and December 14.

[8] At the hearing Mr. Bucher testified as did his wife, Janice Charlene Bucher; Shawn Brown, who was Ms. MacKay's lawyer at the time of the settlement of child support; and Nancy Lynn Caldwell, who had been a friend of Ms. MacKay at the relevant time. Their testimony was not subjected to cross-examination, Ms. MacKay having elected not to participate in the hearing. The import of the evidence was that Zachary was conceived some months after Ms. MacKay and Mr. Bucher had terminated their relationship. Ms. MacKay had arrived at his apartment, asked to spend the night and assured him that there was no risk of pregnancy as she was on birth control. They had sexual relations. He later learned that she was pregnant. He denies pressuring her, harassing her or threatening to claim custody of the child. Mr. Bucher testified that it was Ms. MacKay's preference to receive lump sum child support provided he agree not to exercise access with Zachary. The settlement terms, according to Mr. Bucher, were essentially those dictated by Ms. MacKay.

[9] Mr. Bucher is now employed as a network supervisor. His statement of financial information dated October 17, 2000 discloses an annual income from all sources of $69,612. His wife is a chemical engineer earning about $70,000 annually. They have a five year old son.

[10] At the hearing Mr. Bucher received leave of the court to examine Shawn Brown who had been Ms. MacKay's solicitor at the time of negotiation of the agreement. The judge ruled that by claiming inadequate legal representation Ms. MacKay had waived solicitor-client privilege. Ms.

Brown's evidence did not support Ms. MacKay's claim that she was ineffectively represented nor that the distinction between periodic and lump sum support was not made clear to her by her counsel. The judge found that the notes produced from Ms. MacKay's legal file "indicate a thorough understanding of the financial implications of her case."

[11] The judge concluded that Ms. MacKay's credibility on most issues related to the case was seriously challenged by Mr. Bucher and his witnesses. He determined that the "application of the guidelines would be inequitable because other provisions in the form of a lump sum order have already been made for the child" (s.10(3)(b) **FMA**, infra.). Accepting Mr. Bucher's argument that the claim for a variation of lump sum child support must be based upon a material, unforeseen change in circumstances, the judge concluded that there was no such change here. He left open the question of Zachary's special needs, if any, constituting an unforseen change warranting an order for special expenses pursuant to s.7 of the **Guidelines**. Although declining to confirm the provisional order in respect of the basic table amount of support, the judge remitted the matter to the Provincial Court of British Columbia "... to obtain further evidence with respect to special expenses."

Issues:

[12] The appellant states the following issues:

> Did the learned trial judge err in determining that the application of Guideline Table amounts would be inequitable and that appropriate amounts had already been paid by the Respondent for the child of the marriage because other provisions, namely a $15,000 maintenance payment, had already been made in 1990?
>
> Did the learned judge err in his interpretation and application of the *Provincial Child Support Guidelines* and the *Family Maintenance Act* in failing to properly apply the *Family Maintenance Act* and *Guidelines* and the variation principles outlined therein and in failing to consider the needs of the child and the best interests of the child, as the paramount considerations in an application to vary?
>
> Did the learned trial judge err in hearing and considering evidence surrounding the conception of the child, when such evidence was irrelevant to the needs of the child and the provisions of the *Child Support Guidelines* and the *Family Maintenance Act*?

[13] As to the standard of review, Chipman, J.A. wrote in **Edwards v. Edwards** (1994), 133 N.S.R. (2d) 8; N.S.J. No. 361 (Q.L.) (N.S.C.A.) at p. 20 (N.S.R.):

> [53] . . . This court is not a fact finding tribunal. That is the role of the trial judge. Ours, as has been said many times, is a more limited role. We are charged with the duty of reviewing the reasons of the trier of fact with a view of correcting errors of law and manifest errors of fact.

Analysis:

[14] It has long been established that the court is not bound by child support agreements made by their parents. In **Pelech v. Pelech**, [1987] 1 S.C.R. 801; S.C.J. No. 31(Q.L.), one of the "trilogy" of cases (**Pelech, supra**, **Richardson v. Richardson**, [1987] 1 S.C.R. 857; S.C.J. No. 30 (Q.L.) and **Caron v. Caron**, [1987] 1 S.C.R. 892; S.C.J. No. 32 (Q.L.)) the Court examined the circumstances in which a court may interfere with a comprehensive, final settlement agreement negotiated in contemplation of divorce. Wilson, J., writing for the majority, affirmed that the principles guiding the court's variation of agreements regarding spousal support do not apply to child support arrangements. At p. 845 (S.C.R.):

> The second category mentioned by Blair J.A. in *Webb* is made up of cases in which the terms of a valid and binding agreement adversely affect the well-being of children in the custody of the dependent ex-spouse. <u>While it is fairly clear that a parent cannot barter away his or her child's entitlement to parental support, and thus the courts may always intervene to change agreed terms relating to child support</u>, the more difficult question is whether the courts should acknowledge the reality that the nurture of children is inextricably intertwined with the well being of the nurturing parent. Thus, in some circumstances a denial of spousal maintenance will result in the deprivation of the children of the marriage. (Emphasis added)

[15] This principle was affirmed more recently by the Supreme Court of Canada in **Willick v. Willick**, [1994] 3 S.C.R. 670; S.C.J. No. 94 (Q.L.) where Sopinka, J. wrote for the majority at p. 686 (S.C.R.):

> <u>The reasoning which supports the restrictions with respect to interspousal support does not apply to child support</u>. In *Richardson v. Richardson*, [1987] 1 S.C.R. 857, at pp. 869-70, Wilson J. explained the different nature of the two rights:

> This inter-relationship [between spousal maintenance and child support] should not, however, lead us to exaggerate its extent or forget the different legal bases of the support rights. The legal basis of child maintenance is the parents' mutual obligation to support their children according to their need. That obligation should be borne by the parents in proportion to their respective incomes and ability to *pay*: *Paras v. Paras, supra*.... Child maintenance, like access, is the right of the *child*: *Re Cartlidge and Cartlidge*, [1973] 3 O.R. 801 (Fam. Ct.). For this reason, a spouse cannot barter away his or her child's right to support in a settlement agreement. The court is always free to intervene and determine the appropriate level of support for the child.... Further, because it is the child's right, the fact that child support will indirectly benefit the spouse cannot decrease the quantum awarded to the child.

(Emphasis added)

[16] While Mr. Bucher may have hoped that his payment of the lump sum child support ended his exposure to further claims, the law was clear then as it is now, that a child has a right to parental support which right cannot be bargained away.

[17] In support of his assertion that the child support should not be varied Mr. Bucher has cited **Gillis v. Soulis** (1990), 101 N.S.R. (2d) 91; N.S.J. No. 388 (Q.L.) (N.S.C.A.). Historically, agreements under the **Children of Unmarried Parents Act**, R.S.N.S. 1967, c. 32 (the "**CUP Act**") were considered final and not subject to variation. That thinking has now given way to a child centered approach.

[18] In **Gillis v. Soulis** a parent applied, pursuant to the **Family Maintenance Act, supra**, to vary a lump sum child support agreement negotiated under the **CUP Act**. Freeman, J.A. framed the question before the court as follows, at p. 92 (N.S.R.):

> [2] The issue is whether an order for a lump sum payment under the **Children of Unmarried Parents Act**, R.S.N.S. 1967, c. 32, made shortly after the boy's birth is subject to variation. It reflects the conflict between concerns of an expanding social conscience and the traditional concern of the law to preserve order in human affairs.

[19] There, the putative father had elected to pay a lump sum of $1000 which was within the $100 to $1,500 range of lump sums permitted by the **CUP Act**. Freeman, J.A. explained the history of the legislation, commencing at p. 92 (N.S.R.):

[6] The **Children of Unmarried Parents Act**, which imposed a statutory duty of support on fathers of children born out of wedlock, was enacted in Nova Scotia in 1951 (S.N.S. 1951, c. 3), replacing the **Illegitimate Children's Act,** S.N.S. 1900, c. 14 which replaced the **Maintenance of Bastard Children Act**, R.S.N.S. 1884, c. 37. That earlier **Act** appeared by that name in the Revised Statues of Nova Scotia in 1851. The first legislation on the subject in Nova Scotia was **An Act to provide for the Support of Bastard Children and the Punishment of the Mother and reputed Father**, S.N.S. 1758, c. 19, which replaced the English Statute 18 Eliz. c. 3.7. At common law the plight of such children was similar to that in Ontario described in Wilson, **Children and the Law**, Jeffery Wilson and Mary Tomlinson, (Butterworths: Toronto, 1986) at p. 202:

> "At common law, a child born outside marriage was regarded as filius nullius, 'a son of nobody'. He was deemed 'illegitimate,' a status which rendered him a child without rights or obligations in relation to his parents. He could not expect to inherit or receive support from his father or mother and neither parent had a right to custody or guardianship of the illegitimate child. Gradually, the harshness of the law was alleviated by a piecemeal approach to reform. Affiliation proceedings, first enacted as the **Children of Unmarried Parents Act**, and then incorporated as Part III of the 1970 **Child Welfare Act**, allowed the court to order that a putative father, once shown to be the father of the child, pay the expenses of the child's birth and maintenance for his support to the age of 18 years."

[7] The Nova Scotia **Children of Unmarried Parents Act** was repealed by s. 53(1) of the **Family Maintenance Act** (S.N.S. 1980, c. 6) which came into force October 1, 1980. Section 56 of the new **Act** states:

> "56. An order for the payment of maintenance or expenses made under the former Children of Unmarried Parents Act shall continue in force according to its terms, and may be enforced, varied, rescinded or suspended in the same manner as an order made pursuant to this Act."

. . .

[11] The scheme of the **Children of Unmarried Parents Act** is markedly different from that of the **Family Maintenance Act**, . . .
(Emphasis added)

And at p. 94 (N.S.R.):

> [18] ... The problem in the present case is that the order in question is a unique creation of the old **Children of Unmarried Parents Act**. It is governed by the principles of that Act, which are outside the legislative scheme of the **Family Maintenance Act**. Rights of parties established under the **Children of Unmarried Parents Act** are not to be abrogated without clear and specific statements of legislative intention which s. 56 does not provide.

And at p. 97 (N.S.R.):

> [41] The dearth of cases is readily explained. There is no power in the courts of Nova Scotia to vary such orders. They are unique creations of a particular statute, and the statute must govern. It is possible to arrive at this conclusion merely by considering the scheme of the **Children of Unmarried Parents Act**. However any lingering doubt is removed by s. 34, which states with finality that "this Part", the part dealing with the father's civil liability to pay maintenance, to which the **Family Maintenance Act** is the successor legislation, "this part shall not apply to any putative father who has fulfilled the terms of any order made against him in respect to the same child under Part I." The right to be free of any further civil liability for the maintenance of his illegitimate son accrued to Mr. Soulis when he fulfilled the terms of the 1973 order by making a lump sum payment "forthwith", and that right survives the repeal of the old **Act** and the enactment of the new under the provisions of s. 23 of the **Interpretation Act**.
>
> [42] It was not an unjust provision when the **Children of Unmarried Parents Act** was in effect, and the principle of a clean break which enables parties to meet their obligations and get on with their lives is not an unjust one even by today's standards. The expectation of a child to be supported by his or her parents is undeniably just, as well. ln the present circumstances the general principles favoring the child's claim must yield to the clear, specific intention of the statute and the order made under it in 1973.
> (Emphasis added)

[20] As Davison, J. noted in **Campbell v. Wall** (1993), 127 N.S.R. (2d) 383; N.S.J. No. 528 (Q.L.)(S.C.T.D.), the court in **Gillis** did not deal with the issue of whether a lump sum made under the **FMA** can be varied. There is no finality to orders made under the **FMA**. Section 33 allows periodic or

lump sum payments of child support. Section 37, which permits variation of an order, does not restrict variation to orders for periodic payments. The Order here was made under the **FMA**, not the **CUP Act**. Taking into account the provisions of the **FMA**, and consistent with judicial authority (see **Pelech, supra** and **Willick**, **supra**), this child support agreement is subject to variation.

[21] The parties have not appealed the judge's determination that the law of Nova Scotia governs this matter. Under the **FMA** a support order may be varied when there has been a change in circumstances since the making of the last order:

> 37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.
>
> (2) When making a variation order with respect to child maintenance, the court shall apply Section 10.

(Emphasis added)

[22] Section 10 of the **FMA** requires that a court, in fixing or varying child support, do so in accordance with the **Child Maintenance Guidelines,** N.S. Reg. 53/98 as amended by O.I.C. 2000-554 (Nov. 3, 2000, effective Nov. 1, 2000), N.S. Reg. 187/2000 (the "**Guidelines**"):

> 10 (1) When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the *Guidelines*.
>
> 11 (1) Upon application during the pregnancy of a single woman or after a single woman gives birth to a child, or at any adjournment thereof, a court may order the possible father or the single woman or both of them to pay
>
> . . .
>
> (b) towards the maintenance of the child for so long as the child is a dependent child;

(Emphasis added)

[23] Where there is a prior agreement or consent order the court has a limited discretion under the **FMA** to depart from the amount of support proscribed by the **Guidelines**:

> 10(3) A court may award an amount that is different from the amount that would be determined in accordance with the Guidelines if the court is satisfied that
>
> > (a) special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or special provisions have otherwise been made for the benefit of a child; and
> >
> > (b) the application of the Guidelines would result in an amount of child maintenance that is inequitable given those special provisions.
>
> . . .
>
> (Emphasis added)

[24] Mr. Bucher agrees that the judge had jurisdiction to vary this consent order. He agrees, as well, that to avoid variation he had to bring himself within the requirements of s.10(3) of the **FMA**. It is his submission that the judge was correct in finding that the lump sum agreement met the conditions of that section.

[25] Ms. MacKay says that the lump sum child support here is not a "special provision" as contemplated by s.10(3)(a), nor, even if so, would the application of the **Guidelines** result in an amount of child support that is inequitable, as required by s.10(3)(b).

[26] Although stressing the court's right to interfere with child support agreements, the court in **Willick** cautioned that such an agreement may be considered evidence that adequate arrangements have been made for the child. This is particularly so where an agreement is made pursuant to a divorce. Before granting a divorce the court is required by s.11(2)(b) of the **Divorce Act**, R.S.C. 1985, Chap. D-3 (2nd Supp.) to satisfy itself that reasonable arrangements for the support of the child have been made. In this regard Sopinka, J. wrote at p. 687 (S.C.R.):

> As against the parties, the agreement operates as strong evidence that at the time each accepted its terms as adequately providing for the needs of the children. The correct approach was adopted by Anderson J.A. in *Dickson v. Dickson* (1987), 11 R.F.L. (3d) 337 (B.C.C.A.), at p. 358, who regarded the agreement as affording strong evidence "that the agreement made adequate provision for the needs of the children at the date the agreement was made".

> Where as here the agreement is embodied in the judgment of the court, it is necessary to consider what additional effect is to be accorded to this fact. Section 11(1)(b) of the Act provides that "it is the duty of the court ... to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made". It must be assumed that as long as the provisions of the judgment of the court stand unreversed this duty was carried out and that at the date of the judgment it provided reasonable arrangements for the support of the children. . . .

[27] The **FMA** does not contain a provision comparable to s.11(1)(b) of the **Divorce Act**. The child support agreement here was made an order of the court as a procedural step. It did not involve the court's scrutiny of the adequacy of the arrangement, as must occur on divorce.

[28] When I refer in this decision to "the application of the **Guidelines**" I do not mean simply maintenance in the basic table amount, but rather the full calculation of maintenance under the scheme of the **Guidelines**, which would include a consideration of special or extraordinary expenses under s.7, application of the undue hardship provisions of s.10 and any other relevant provisions that are necessary to determine the amount of **Guideline** maintenance that would be payable, but for the existence of a prior agreement or consent order.

[29] As stated above, s.10(3) of the **FMA** provides that a judge may order maintenance that differs from the **Guideline** amount where: (1) the order or agreement contains a special provision which directly or indirectly benefits the child; and (2) the application of the **Guidelines** "would result in an amount of child maintenance that is inequitable".

[30] This appeal concerns the **FMA** and Nova Scotia **Child Support Guidelines**, however, the Federal scheme is similar. Under the **Divorce Act**, the governing provision is s.17:

> 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; or
> >
> > (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> . . .

(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.

. . .

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

(6.2) Notwithstanding subsection (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

(a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and

(b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

(6.3) Where the court awards, pursuant to subsection (6.2), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so.

(6.4) Notwithstanding subsection (6.1), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

(6.5) For the purposes of subsection (6.4), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

[31] The judge here determined that before the consent order could be varied there must be a "material change in circumstances" (a change, such that, if

known at the time, would likely have resulted in different terms) which, in his view, was consistent with the law in **Willick**. He found that the only possible change in circumstances sufficient to warrant variation of the lump sum to the table amount of child support would relate to Zachary's alleged special needs, which needs could not have been foreseen at the time of the agreement. Those needs, if any, would be addressed through an order pursuant to s.7 of the **Guidelines** as "extraordinary expenses".

[32] The judge said:

> [32] When the parties negotiated the lump sum settlement, Ms. MacKay was completing her training as a teacher and Mr. Bucher was then, as he is now, employed in the computer industry. Ms. MacKay has been employed as anticipated, as a teacher, and Mr. Bucher has moved on as anticipated with his life and commitments. The fact Zachary is now 10 years old, is not the type of change in circumstances Sopinka J. refers to in *Willick*. There must be more. On the facts of this case the change in circumstance of the type referred to by Sopinka J. relates to the allegations of Zachary's special needs.

[33] He was not satisfied with the evidence about Zachary's special needs, remitting the matter to the B.C. court for further evidence on that issue. Subject to the possibility of periodic maintenance for those extraordinary expenses, (**Guidelines** s.7), he concluded that this was not an appropriate case in which to vary the agreement to provide for the basic table amount of support. He said:

> [36] If the court could find a change in circumstance relating to Zachary's special needs that did justify a variation in the order, it is this court's opinion this would not be an appropriate case to apply the presumptive portion of the child support guidelines. While section 8 of the *Family Maintenance Act* acknowledges the duty of every parent to provide for the reasonable needs of a child and section 10 of the *Family Maintenance Act* directs the court to determine the amount of maintenance in accordance with the guidelines, there is however section 10(3) to consider . . .
>
> [37] . . . In my opinion application of the guidelines would be inequitable because other provisions in the form of a lump sum order have already been made for the child (see *Hutchings v. Hutchings* [1999] B.C.J. # 2897 (B.C.C.A.)).

[34] The **Federal Child Support Guidelines**, SOR/97-175 (the "**Federal Guidelines**") were not in effect when **Willick** was decided. Both the Federal and Provincial **Guidelines** provide that their coming into effect is, in itself, a change in circumstances. Section 37 of the **FMA**, above at § 21,

permits variation upon a change in circumstances. Section 14 of the Provincial **Guidelines** says:

> 14 For the purposes of Section 37 of the Act, any one of the following constitutes a change in circumstances that gives rise to the making of a variation order in respect of a child maintenance order:
>
> > (a) in the case where the amount of child maintenance includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child maintenance order or any provision thereof;
> >
> > (b) in the case where the amount of child maintenance does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of a parent or of any child who is entitled to maintenance; and
> >
> > (c) in the case of an order made before August 31, 1998, the coming into force of Chapter 3 of the Acts of 1997, *An Act to Amend Chapter 160 of the Revised Statutes, 1989, the Family Maintenance Act* and the coming into force of these Guidelines.

(Emphasis added)

[35] Section 14 of the **Federal Guidelines** is to the same effect. Pursuant to the **FMA**, in order to uphold an agreement or order which does not conform to the **Guidelines**, the requirements of s.10(3) must be met. The party seeking to avoid variation of the agreement/order bears the burden of so persuading the court. Only then may the court order an amount of maintenance that is different from that required by the **Guidelines**.

[36] In light of s.14(c) of the **Guidelines** and s.10(3) of the **FMA**, I conclude that the **Willick** requirement of a "material change in circumstances" does not apply to a pre-**Guideline** agreement or consent order. With respect, the trial judge erred at law in requiring that there be a material change in circumstances in addition to the implementation of the **Guidelines**. If the existence of a prior agreement or consent order is relied upon to avoid the application of the **Guidelines**, the only relevant considerations are those set out in s.10(3).

[37] As I have already indicated, Mr. Bucher has not asserted that the Court has a general discretion to refuse variation. He agrees that the court's jurisdiction to decline to vary this consent order must be found within s.10(3) of the **FMA** but submits that this consent order meets those requirements.

[38] Mr. Bucher says that the agreement to pay lump sum child support is a "special provision" within the meaning of s.10(3)(a). What is a special provision? When an agreement is made pursuant to or in contemplation of a divorce proceeding the parties are commonly settling child support, spousal support and effecting a property division. There are often trade-offs. The non-custodial spouse may settle assets on the custodial parent in lieu of a larger amount of child support, or may undertake to pay certain child related expenses directly, thereby reducing the custodial parent's need for monthly child support. Courts have generally declined to find that a routine order for periodic child support contained in a divorce agreement, without more, constitutes a "special provision" (see, for example, **Cane v. Newman**, [1998] O.J. No. 1776 (Q.L.) (O.C.J. (Gen. Div.)) where Wein, J. concluded that an agreement which included "the kind of provisions routinely ordered under the **Divorce Act** and **Guidelines** ...." were not special provisions.). If the arrangement is out of the ordinary or unusual, plainly for the benefit of the child and reduces the need for support, then such is a special provision. I would agree, generally, with the definition of "special provision" by Master Joyce in **Hall v. Hall** (1997), 30 R.F.L. (4th) 333; B.C.J. No. 1191 (Q.L.) (B.C.S.C.):

> [17] In the first place, I am of the opinion that a "special provision" must be one which, in whole or in part, replaces the need for the *ongoing* support for the children. . . .

(See also **Wanstall v. Walker**, [1998] B.C.J. No. 1808 (Q.L.) (B.C.S.C.))

[39] Under the **FMA** an agreement for support for a child of unmarried parents is not likely to be the kind of complex arrangement common in divorce proceedings. Usually, the agreement will address only child support and not contain other financial terms. Determining what is a "special provision" is less clear. As previously stated, the **FMA** provides specifically for lump sum or periodic child or spousal support, yet s. 37 does not confine the court's power to vary a support order to those providing for periodic payments:

> 33 A court may order maintenance to be paid periodically or in a lump sum or in a combination thereof.
>
> 37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order

> respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.
>
> (2) When making a variation order with respect to child maintenance, the court shall apply Section 10.
>
> (Emphasis added)

[40] One might conclude, therefore, that a provision for lump sum child support, being the kind of arrangement contemplated by the **FMA** and subject to variation, is not "special" within s.10(3)(a). In my view, to so hold could lead to harsh results. For example, a payor who had settled a large lump sum for the support of the child would not be able to bring himself within s.10(3)(a) and would therefore be obliged to pay the **Guideline** amount, regardless of the amount of the lump sum. I am satisfied that a lump sum payment for child support does constitute a "special provision". Whether, on account of the payment of the lump sum, the Court should decline to vary the arrangement to provide for **Guideline** maintenance should be decided under s.10(3)(b).

[41] Once the arrangement is found to be a "special provision", to avoid variation the court must also be satisfied that the application of the **Guidelines** would result in an amount of child maintenance that is inequitable given the special provision (s.10(3)(b)). The wording of this section is important. The test is not one of general inequity, but a result that would produce an amount of child support that is "inequitable". In my view, this section is so worded to avoid exposing a payor to duplicative amounts of child support, resulting in excessive awards. For example, where the amount of child support that would result from application of the **Guidelines**, when added to that which has already been paid by agreement, would result in the payor effectively paying significantly in excess of the **Guideline** amount "inequitability" may be found to arise.

[42] Mr. Bucher says that in applying s.10(3)(b) the court should compare the amount of the lump sum which he paid in 1990 to the usual lump sum amounts paid at that time. He says, as well, that the amount of the payment should be evaluated relative to his 1990 income. I disagree. Section 10(3)(b) requires the court to determine, not whether the lump sum was reasonable at the time it was agreed, but whether varying the agreement to require Mr. Bucher to now pay **Guideline** maintenance would result in an inequitable amount of child support, taking into account the fact that the lump sum has been paid. The measure by which "inequitability" is gauged is

the **Guideline** amount of maintenance. Under the scheme of the **Guidelines**, the basic table amount of support is presumed to represent the appropriate level of child support for a payor parent with an income at a particular level. This amount may be increased due to special expenses or reduced on account of undue hardship. The "special provision" must be judged in comparison with the resulting figure.

[43] In determining whether the amount of child support would be inequitable it is helpful to consider the objectives of the **Guidelines**:

> The objectives of these Guidelines are
>
> (a) to establish a fair standard of maintenance for children that ensures that they benefit from the financial means of both parents;
>
> (b) to reduce conflict and tension between parents by making the calculation of child maintenance orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child maintenance orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of parents and children who are in similar circumstances.

(Emphasis added)

[44] In **Francis v. Baker,** [1999] 3 S.C.R. 250; S.C.J. No. 52 (Q.L.) Bastarache, J., writing for the Court said (at § 39): ". . . a fair description of the purpose of the Guidelines is to establish fair levels of support for children from both parents upon marriage breakdown, in a predictable and consistent manner." While he was speaking of the **Federal Guidelines**, a child of unmarried parents who have not cohabited is no less deserving of support. He recognized, as well, (at § 41) that ". . . child support undeniably involves some form of wealth transfer to the children and will often produce an indirect benefit to the custodial parent."

[45] As is reflected in the objectives, a child is entitled to support from each parent commensurate with the parent's ability to provide that support and equivalent to that which would be received by children of parents in similar circumstances. It logically follows that "inequitability" be judged against the **Guideline** amount. (see **Holtby v. Holtby** (1997), 30 R.F.L. (4th) 70; O.J. No. 2237 (Q.L.) (O.C.J.(Gen.Div.))

[46] A similar, although not identical, analysis occurs when the court is required to assess the reasonableness of an agreed support award under s.10(5) of the **FMA**:

> 10 (5) Notwithstanding subsection (1), a court may award an amount that is different from the amount that would be determined in accordance with the Guidelines on the consent of both spouses or parents if satisfied that reasonable arrangements have been made for the maintenance of the child to whom the order relates.
>
> (6) For the purpose of subsection (5), in determining whether reasonable arrangements have been made for the maintenance of a child, the court shall have regard to the Guidelines, but the court shall not consider the arrangements to be unreasonable solely because the amount of maintenance agreed to is not the same as the amount that would otherwise have been determined in accordance with the Guidelines.
>
> (Emphasis added)

[47] Where the parties agree to support which differs from the **Guidelines**, it is the "amount of support" that would be payable under the **Guidelines** to which the agreed amount is compared in assessing reasonableness. The court may approve the agreement only if satisfied that reasonable arrangements have been made for the support of the child.

[48] Section 4 of the **Federal Guidelines** provides the court with discretion to order an amount different from the **Guideline** amount for a payor with an income in excess of $150,000 where the **Guideline** amount would be "inappropriate". In deciding whether the table amount would be "inappropriate" the Supreme Court said in **Francis v. Baker, supra**:

> [43] . . . the evidence in its entirety must be sufficient to raise a concern that the applicable Table amount is inappropriate. To this end, I agree with Lysyk J. of the British Columbia Supreme Court in *Shiels v. Shiels*, [1997] B.C.J. No. 1924 (QL), at para. 27, that there must be "clear and compelling evidence" for departing from the Guideline figures.
>
> [44] While there must be an "articulable reason" for displacing the Guideline figures (see, for example, *Plester v. Plester* (1998), 56 B.C.L.R. (3d) 352 (S.C.), at para. 153), relevant factors will, of course, differ from case to case. I note, however, my agreement with MacKenzie J. in *Plester*, *supra*, as well as Cameron J.A. in *Dergousoff, supra*, that the factors relevant to determining appropriateness which Parliament expressly listed in s. 4(b)(ii), that is, the condition, means, needs and other circumstances of the children, and the financial abilities of both

> spouses, are likewise relevant to the initial determination of inappropriateness. Only after examining all of the circumstances of the case, including the factors expressly listed in s. 4(b)(ii), should courts find Table amounts to be inappropriate and craft more suitable child support awards.
> (Emphasis added)

[49] In my view, similar considerations are relevant to determining whether the application of the **Guidelines** would produce an amount of child support that is inequitable. The assessment is a child centered one. Circumstances of the parents are to be taken into account but only insofar as are relevant to the ability of the parent to contribute to the support of the child. To use examples: (i) Where a custodial parent has structured his or her affairs in reliance on the terms of a prior agreement or consent order which exceeds the **Guideline** amount and a revision of the agreement to conform to the **Guidelines** would impair that parent's ability to otherwise provide for the child, that is a factor to be taken into account when deciding whether variation would produce an inequitable amount of child support. The recipient parent may have committed to arrangements for the child, such as private school or special lessons, which are premised upon receiving the higher level of support; (see **Cane v. Newman**, **supra**, where the court concluded that the mother's reliance on the higher child support was not sufficient to forestall downward variation); (ii) An agreed higher level of support may represent acknowledgment of a child's need for support in excess of the **Guideline** amount, for example, where the child has special needs, as was the case in **Wang v. Wang** (1998), 39 R.F.L, (4th) 426; B.C.J. No. 1966 (Q.L)(B.C.C.A.); (iii) A "special provision" in an agreement may reduce the child's need for support below the **Guideline** amount, in such circumstances an order in the **Guideline** amount may be inequitable; (iv) Where application of the **Guideline** amount, when taken together with the "special provision", such as a lump sum, would result in the payor effectively paying in excess of the table amount, a variation to the **Guideline** amount may produce an inequitable level of support. This is not an exhaustive list.

[50] In my view there is no inconsistency in a court refusing to vary an agreement providing for support exceeding the **Guideline** amount, yet increasing a lower award to the **Guideline** level. Clearly a higher support award is always in a child's best interests, unless it reaches a level where it is no longer child support but becomes a transfer of wealth (see Bastarache, J. in **Francis v. Baker**, **supra** at § 41). Upholding consensual agreements

which benefit a child is in keeping with the child centered focus of the **Guidelines**. On the other hand, confirming agreements which provide a lower level of support than is presumed to be consistent with the payor's ability to pay is not, *prima facie*, consistent with the child's interests.

[51] In assessing “inequitability” it is the payor's current financial situation that is relevant, not the circumstances as they were at the time the "special provision" was made. There may be occasions, however, when the court will take into account the payor's former financial circumstances. For example, where the parent can demonstrate that he or she has current financial obligations which relate directly to the payment of the lump sum or other special provision, that factor may be taken into account in assessing whether the application of the **Guidelines** would produce an amount of support that is inequitable.

[52] Mr. Bucher says that it would be inequitable to order support in the **Guideline** amount, or to vary the agreement at all, because he relied on its' finality in structuring his current financial affairs. While that may be a factor to be considered by the trial judge in applying the two part s.10(3) analysis, in my view, that is not a sufficient reason based upon the evidence in this case, to avoid application of the **Guidelines**. If it were, every lump sum might be immune from variation.

[53] The basic table amount of child support appropriate for Mr. Bucher's current income is approximately $550 monthly. That amount may increase if Zachary has compensable special needs (**Guidelines,** s.7). Since there is as yet insufficient evidence about Zachary's special needs, it is appropriate to use the basic table amount for comparison purposes. The lump sum payment here, while a substantial single sum, does not remotely compare to that basic **Guideline** support. To require that Mr. Bucher now pay the **Guideline** sum would not, in my opinion, result in an amount of maintenance that is inequitable. It does not produce an overpayment taking into account the pre-paid lump sum.

Disposition:

[54] The judge had legitimate concerns about Ms. MacKay's credibility. That issue is only relevant to the evidence regarding special expenses. It was appropriate to remit the matter to the British Columbia court for further evidence.

[55] Mr. Bucher urges that we remit the matter to the Family Court for a consideration of Mr. Bucher's claim to be relieved of the **Guideline** amount

on account of undue hardship. I would decline to do that. There is no indication in the record that Mr. Bucher claimed relief for undue hardship within s.10 of the **Guidelines**. Even had he made such a claim, considering the relative financial circumstances of the parties and applying s.10 of the **Guidelines**, which requires a standard of living comparison, Mr. Bucher could not possibly succeed, on the record before us, on an undue hardship claim in relation to the basic table amount of maintenance.

[56] Once the further evidence is available from the British Columbia Court in respect of Zachary's special needs, the maintenance may require adjustment. If the court finds that the **Guideline** amount should be increased pursuant to s.7, it will be open to Mr. Bucher at that time to advance a claim of undue hardship.

[57] Until such time as the matter is returned from the Provincial Court of British Columbia and pursuant to s.6 of the **Maintenance Orders Enforcement Act**, I would order that Mr. Bucher pay child support in the basic table amount, consistent with his income. According to the financial information on file, that interim amount will be $550 monthly, assuming an annual income of $69,000. The effective date of the interim support is February 2, 2001. The matter of special expenses is remitted to the Provincial Court of British Columbia for the hearing of additional evidence.

[58] The respondent shall pay to the appellant costs of this appeal in the amount of $2000 plus disbursements as taxed or agreed.

Bateman, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.