NOVA SCOTIA COURT OF APPEAL
Citation: ***St-Jules v. St-Jules***, 2012 NSCA 97

Date: 20120918
Docket: CA 348221
Registry: Halifax

Between:

Yvan St-Jules

Appellant

v.

Vivian St-Jules

Respondent

Judges:	Oland, Hamilton and Beveridge, JJ.A.
Appeal Heard:	April 13, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs payable forthwith by the appellant to the respondent in the amount of $1,500 inclusive of disbursements.
Counsel:	Appellant, in person Susan M. Litke and Daniel Roper, Senior Law Student, for the respondent

Reasons for judgment:

[1] Yvan St-Jules appeals the Variation Order granted by Justice Mona Lynch following the January 31, 2011 hearing of the respondent, Vivian St-Jules' application to vary the parties' November 23, 2007 Corollary Relief Judgment ("CRJ"). The appellant father's main concerns relate to the judge's decisions with respect to child support, including her deeming two outstanding joint matrimonial debts to be child support for the purposes of s. 178(1)(c) of the **Bankruptcy and Insolvency Act**, R.S.C., 1985, c. B-3 ("**BIA**"), with the effect that he will not be released from those debts when he is discharged from bankruptcy. The father was represented by counsel when the CRJ was granted, but not at the variation hearing or on appeal. The mother has been represented throughout.

Facts

[2] The parties married in 1993 and separated in 2004. They have two teen-aged sons who are in the primary care of their mother and live with her in a mobile home purchased for approximately $20,000 when the matrimonial home was sold. The father lives in a highly mortgaged house he bought in 2006 which is valued at $220,000 in his bankruptcy documents.

[3] During the marriage, the father worked for the Canadian Forces. In the Spring of 2006, after separation and before the CRJ, he retired from the Forces and commenced work as a bus driver and part-time gymnastics instructor.

[4] Custody and access were resolved by an Interim Order dated January 30, 2007 and an Amended Interim Order dated August 31, 2007. The parties entered into a Partial Agreement and Minutes of Settlement ("Partial Agreement") dated November 23, 2007 dealing with matters of support, financial obligations and division of property. The Orders and Partial Agreement were incorporated into the CRJ, which recited the father's 2007 income as $32,322.66 and the mother's 2006 income as $8,639.56. Subsequent disclosure indicated the father's 2007 income was significantly higher, $42,469. The mother's income from social assistance has remained at the same level.

[5] The Partial Agreement provided that, in lieu of paying child support, the father would be solely responsible to and would indemnify the mother from certain matrimonial debts:

> 4. **CHILD SUPPORT**
>
> a) **The Petitioner and Respondent agree that the Petitioner shall not presently be required to pay child support in light of pending division of his pension and his assumption of the matrimonial debt as per paragraph 6(c). Either the Petitioner or the Respondent may make application for review of child support at any time.**
>
> (b) The Petitioner will maintain the children on his medical insurance for so long as they are eligible and will promptly submit any expenses paid for by the Respondent for reimbursement and will, on receipt of same, pay these monies to the Respondent. The Petitioner also agrees that he will reimburse for outstanding expenses which have already been presented to him by the Respondent.
>
> 5. **RELEASE OF SPOUSAL SUPPORT**
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> Neither the Petitioner nor the Respondent shall pay any amount by way of support, whatsoever, to the other. Therefore, each party releases any claim that they may have under any applicable Federal or Provincial legislation. It is agreed that there shall be no variation of this paragraph including future misfortune based upon financial considerations or disease that would change the general intent and spirit of this paragraph.
>
> 6. **DIVISION OF ASSETS AND DEBTS**
>
> (a) The mobile home at 11 Commodore Avenue, Middle Sackville, Nova Scotia is to be in the sole ownership of the Respondent.
>
> (b) The Petitioner will give the Respondent her mother's table.
>
> (c) **The Petitioner will be solely responsible for and will indemnify the Respondent from the following debts of the marriage**:
>
> (i) CIBC, consolidated loan - $43,435.10;
>
> (ii) RBC line of credit - $20,197.79;

(iii) CIBC chequing overdraft - $1,531.14; and

(iv) Bank of Montreal (Small Claims Order) - $9,551.48.

The petitioner agrees to make regular payments regarding the said debts and at least to make the minimum monthly payment required by these creditors. [Emphasis added]

[6] Of the total matrimonial debt of $74, 715.51 listed in paragraph 6(c), the mother is jointly and severally liable for two listed debts – the $43,435.10 CIBC consolidated loan and the $9,551.48 Bank of Montreal debt, totalling $52,986.58.

[7] The father substantially failed to make any monthly payments on the matrimonial debts as required by paragraph 6(c). Instead, he referred these creditors to the mother for payment.

[8] The father re-enlisted in the Forces in 2009. His annual income rose from $46,353 in 2008 to $73,000.

[9] The mother applied to vary the CRJ. There was a pre-hearing conference held on June 28, 2010. The judge ordered the father to file his financial information before August 9, 2010, including his income tax returns and notices of assessment for 2006, 2007, 2008 and 2009, detailed information as to the payments he had made on the matrimonial debts listed in paragraph 6(c), information concerning the claims he made for the children's medical expenses, his three most recent pay stubs and a statement of income. The application to vary was set for January 31, 2011.

[10] On July 14, 2010, the father made an assignment in bankruptcy. The documents filed in connection with his bankruptcy suggest the total amount owing at that time on the matrimonial debts listed in paragraph 6(c) was $72,676, of which $50,795 related to the two joint debts. The father also applied for and received a second voluntary discharge from the Forces in October 2010 and returned to work as a school bus driver and part-time gymnastics instructor at a much reduced income.

[11] The father did not file the required financial information with the court before August 9, or by the time of the next pre-hearing conference on November 8, 2010. As a result, the judge ordered him to pay costs of $350 immediately to the mother, which he did not do. He was also ordered to file his financial information by November 22, 2010, together with any medical opinion from his doctor that he wished to rely on to support his claim that he left the Forces in the fall of 2010 for medical reasons. He was informed that his doctor must attend the January 31 hearing if he wished to rely on any such opinion. He was told the hearing would proceed on affidavit evidence from the parties and a date was set for the filing of his affidavit. He filed only a portion of the required financial information, no opinion from his doctor and no affidavit. His substantial failure to file resulted in the judge having very incomplete financial information before her with respect to the father's personal and financial circumstances, especially the matrimonial debts listed in paragraph 6(c).

[12] In November 2010, the father applied to Nova Scotia Legal Aid for the appointment of counsel. His application was denied because his income was too high. His appeal of this decision to the Legal Aid Commission was dismissed on January 19, 2011.

[13] On January 24, 2011, one week before the scheduled hearing, the father made a motion before the judge for an adjournment of the hearing to give him time to reapply to Legal Aid with additional information concerning his pension from the Forces. His motion was denied and the hearing proceeded on January 31, 2011. At the hearing, the father provided a copy of a letter authored by Mr. Barry McClatchey, a clinical social worker with the Forces, in support of his argument that he left the Forces in 2010 for medical reasons. The letter was not admitted into evidence as the father did not subpoena Mr. McClatchey and he did not attend the hearing. Mr. St-Jules' trustee in bankruptcy testified.

[14] Following the hearing, the judge gave an oral decision and a variation order followed. She found the father was intentionally underemployed and imputed an annual income of $65,000 to him:

> With regard to child support, . . . I also, based on the evidence before me, find that Mr. St. Jules is underemployed. I have nothing before me that would indicate . . . that it was necessary for him to quit a job that he was paid over seventy thousand dollars a year ($70,000), so I do find he is intentionally

> underemployed, that he could be earning seventy thousand dollars a year ($70,000), and he has chosen not to earn that, and to become a bus driver and teach gymnastics only. He understood that he has an obligation to his children, and he should be doing everything to earn income to help support the children. He has not done so. The only evidence that I have before me as to why was a letter, and as I indicated to Mr. St. Jules, even if I could consider the letter, the letter simply states what was told to the author by Mr. St. Jules. It is not a medical opinion as to why Mr. St. Jules, for any medical reason, could not continue to work in the military. So the evidence before me indicates that he is intentionally underemployed, pursuant to Section19 of the child support guidelines, and he has not provided the income information in a timely fashion and a complete fashion. Therefore, I do find that I will impute income not to the full extent of the seventy thousand dollars ($70,000) that he earned while in the Forces, but I am going to impute income to Mr. St. Jules in the amount of sixty-five thousand dollars ($65,000)...

[15] She ordered him to pay the mother $783.08 towards the children's medical expenses:

> With regard to the reimbursement of the medical expenses, I find it quite astonishing, Mr. St. Jules, that the order clearly indicated that you were supposed to reimburse Ms. St. Jules for any medical expenses she paid for the children. You put it through your insurance and you didn't give her the money.

[16] She clarified that the minimum monthly amount the father was to have paid towards the matrimonial debts listed in paragraph 6(c) was $1,740:

> ...looking back at the evidence that was presented in 2007 and Mr. St. Jules' own evidence that he provided to the Court at that time, he indicated that he was making payments in the amount of seventeen hundred and forty dollars ($1,740) a month on the bills, the four bills, that were outstanding. The drafters of the minutes of settlement did not indicate the amount that he should be paying, it just indicated the minimum amount. But Mr. St. Jules indicated that he was paying the minimum amount by paying the seventeen hundred and forty dollars ($1,740).
>
> I do find based on the evidence before me that that should have been clearer in the original order. It should have indicated what exactly the minimum payments would have been, and that would have been seventeen hundred and forty dollars ($1,740) a month. So I will amend the order, because it is something that should have been made – should have been clearer at the time, and should have been in the order. It was the intent, I find, of both parties at the time that that's which – was to be paid. So I am going to amend paragraph C to indicate the

> [father] agreed to make regular payments to the creditors in the monthly amount of one thousand seven hundred and forty dollars ($1,740) on the matrimonial debts.

[17] She interpreted the Partial Agreement incorporated into the CRJ to mean that the father was to be solely responsible for, and to indemnify the mother against, the matrimonial debts listed in paragraph 6(c) and to pay the $1,740 minimum monthly payments to the paragraph 6(c) creditors, in lieu of paying child support to the mother for a period of time. She found that if the father had made the monthly payments as required, the mother's share of the matrimonial debts would have been paid on January 1, 2010:

> On January 1st, 2010, the portion of the matrimonial debt attributable to Vivian St. Jules will be fully satisfied by such payments, and again, Mr. St. Jules, it was very clear that the -- what you were doing was paying those debts instead of paying child support. The amount that you should have paid would have paid off the debts that Ms. St. Jules is responsible for at this point, and by you not doing that, the order should have been clearer, and I'm making the order clearly now, because it should have been an order that was made at the time.
>
> The part of the order that dealt with child support, [4(a)], indicated that Mr. St. Jules would . . . not be paying child support at that point, because he was paying . . . the matrimonial debt. . . . Mr. St. Jules agreed to assume the matrimonial debt in exchange for not paying child support, and the order -- that part of the agreement, which is paragraph [4(a)], will be amended to what . . . should have been clear . . . at the time. And that the matrimonial debt provided in paragraph [6(c)] are deemed to be child support. And the payments were made in lieu of making child support to the respondent, and to pay it in lieu of the respondent paying on those debts. Mr. St. Jules was paying -- Ms. St. Jules's portion of the debt in lieu of paying child support, and instead of paying an amount directly to Ms. St. Jules and Ms. St. Jules making the payments on the debt.

[18] Following from her finding that the mother's portion of the matrimonial debts would have been paid by January 1, 2010, if the father had complied with his obligations under the CRJ, and having found the father knew the mother was seeking child support by that time, the judge ordered the father to start paying monthly child support to the mother effective January 1, 2010 in the amount of $917:

> I do find, whether I'm looking at the date of the application or the **D.B.S.** case [**D.B.S. v. S.R.G.**, 2006 SCC 37] from the Supreme Court of Canada, that Mr. St. Jules has notice as of January 1st, 2010, that Ms. St. Jules was seeking child support for the children, and therefore, I am going to make the order from that time, January 1st, 2010, which is after the application was actually made. And although it wasn't served on Mr. St. Jules . . . he understood she had a lawyer and ... there was discussion about child support in 2009. So, January 1st, 2010, Mr. St. Jules should have been paying nine hundred and seventeen dollars ($917) a month.

[19] Having satisfied herself the CRJ obligated the father to be solely responsible for, and to indemnify the mother with respect to, the matrimonial debts listed in paragraph 6(c), including the two matrimonial debts for which the mother is jointly liable, in lieu of not paying child support to the mother for a period of time, the judge deemed the jointly held matrimonial debts in 6(c) to be child support under s. 178(1)(c) of the **BIA** and ordered that they survive the father's discharge from bankruptcy:

> So any debts held jointly by the parties shall survive a future bankruptcy of the petitioner, and they're deemed to be child support under Section 178 of the *Bankruptcy and Insolvency Act*.

[20] The Variation Order gave effect to the judge's decision, including deeming the joint matrimonial debts to be child support under s. 178(1)(c) of the **BIA**:

> 3. The Corollary Relief Judgment dated November 23, 2007 which incorporated a Partial Agreement and Minutes of Settlement dated November 23, 2007 shall be amended and varied by replacing paragraph 4(a) of the Agreement with the following:
>
> **Child Support**
>
> a) Yvan St-Jules shall pay no child support to Vivian St-Jules for the period from December 1, 2007 up until December 31, 2009 in exchange for his agreement to assume her portion of the matrimonial debts and to make the minimum monthly payments on the matrimonial debts totalling $1,740.00 per month as outlined in paragraph 6(c) and (d) (as amended) of the Partial Agreement and Minutes of Settlement dated November 23, 2007.

> b) The minimum monthly payments payable by Yvan St-Jules to the creditors on the matrimonial debts totalling $1,740.00 per month as outlined in paragraph 6(c) and (d) (as amended) of the Partial Agreement and Minutes of Settlement dated November 23, 2007 shall be deemed to be child support payments and shall be paid to the creditors in lieu of making child support payments to Vivian St-Jules.
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> c) The jointly held matrimonial debts as outlined in paragraph 6(c) of the Partial Agreement and Minutes of Settlement dated November 23, 2007 shall survive a present or future bankruptcy of Yvan St-Jules and such jointly held debts shall be deemed to be child support under section 178(1)(c) of the *Bankruptcy and Insolvency Act*.

4. The Corollary Relief Judgment dated November 23, 2007 which incorporated a Partial Agreement and Minutes of Settlement dated November 23, 2007 shall be amended by adding the following sub-paragraph as 6(d) immediately following sub-paragraph 6(c) of the Agreement:

> Commencing December 1, 2007, Yvan St-Jules shall make regular payments to the said creditors in the monthly amount of $1,740 regarding the said debts which amount equals the total minimum monthly payments on the debts to said creditors. On January 1, 2010, the portion of matrimonial debt attributable to Vivian St-Jules will be fully satisfied by such payments.

Issues

[21] The father argues the judge erred by (1) refusing to adjourn the hearing, (2) imputing to him an annual income of $65,000, (3) ordering him to pay $917 per month child support commencing January 1, 2010, (4) ordering him to reimburse the mother $783.08 for the children's medical expenses and (5) deeming the two joint matrimonial debts listed in paragraph 6(c) of the Partial Agreement to be child support for purposes of s. 178(1)(c) of the **BIA**, with the effect that he will not be released from those debts when he is discharged from bankruptcy, if they are outstanding at that time.

Fresh Evidence

[22] The father made a motion to admit substantial fresh evidence to be considered by the Court in reaching its decision. The documents he wants

considered are not attached to an affidavit, but are included in his factum and a separate booklet.

[23] *Civil Procedure Rule* 90.47(1) permits this Court to admit fresh evidence on "special grounds". The reason new evidence is only admitted on "special grounds" is because an appeal is not a retrial. The justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. The appellate process should not be used to routinely augment the trial record or the finality of the trial process would be lost and cases would be retried on appeal whenever additional evidence is submitted; **R. v. M.(P.S.)**, (1992) 77 C.C.C. 3(d) 402 at 411.

[24] In deciding whether there are "special grounds" to admit fresh evidence, we apply the test set out in **Palmer v. The Queen**, [1980] 1 S.C.R. 759, ¶ 775. Justice Fichaud recently referred to this test in **Nova Scotia (Community Services) v. T.G.**, 2012 NSCA 43, leave to appeal denied August 9, 2012 (SCC):

> [77] Moving to the fresh evidence motion itself, the test stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Admission is governed by four factors: (1) whether there was due diligence in the effort to adduce the evidence at trial; (2) relevance to the issue at trial; (3) credibility of the new evidence; (4) whether the evidence could reasonably have affected the result. The test applies to civil as well as criminal cases: *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44, para. 8; *United States of America v. Shulman*, [2001] 1 S.C.R. 616, para. 44; *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, para. 107.
>
> [78] The evidence must be in admissible form. If it is inadmissible, obviously it could not affect the result under *Palmer's* fourth criterion. *R. v. O'Brien*, [1978] 1 S.C.R. 591, per Dickson, J. at page 602; *R. v. Dell*, [2005] O.J. No. 863 (C.A.), per Sharpe, J.A., at para. 85; *R. v. Kelly*, [1999] N.B.J. No. 98 (C.A.), at para. 71; *R. v. Assoun*, 2006 NSCA 47, para. 302. A motion to admit fresh evidence isn't just a generic preview of the type of evidence that would be offered, in admissible form, at a future new trial.

[25] Much of the material the father wants us to admit is not relevant because it predates the CRJ. The legal obligations of the parties based on that material was determined by the CRJ, which was not appealed. As such, this material would not

have been relevant at the variation hearing and would not have affected the result. Each of the other documents the father wants us to admit could either have been adduced at the hearing if the father had complied with the judge's orders to file, or is not relevant to the issues the judge had to decide and therefore would not have affected the result. With respect to Mr. McClatchey's letters in particular, they could have been adduced at the hearing if the father had subpoenaed the author as directed by the judge. It would not be appropriate to admit them now, in effect allowing an end run around the hearing process.

[26] Accordingly, I would not admit the proposed fresh evidence.

Adjournment

[27] The father argues that the judge erred by not granting him an adjournment.

[28] As set out by Saunders, J.A., in **Sharpe v. Abbott**, 2007 NSCA 6, this Court gives deference to a trial judge's decision whether to grant or deny an adjournment:

> [74] ...A trial judge's right to supervise and control the trial process includes a wide discretion to grant or refuse adjournments. The exercise of that discretion is owed considerable deference on appeal unless it can be shown that the judge erred in principle, or that the judge did not exercise his or her discretion judicially. **Webber v. Canada Permanent Trust Co.** (1976), 18 N.S.R. (2d) 631 (A.D.), and **Moore v. Economical Mutual Insurance Co. and Long**, [1999] N.S.J. No. 250 [N.S.C.A.].

In **Moore**, cited in the passage from **Abbot**, Justice Cromwell said:

> **33** The decision to grant or refuse an adjournment is within the discretion of the presiding judge. It is a discretion which the judge is particularly well placed to exercise. An appellate court should not substitute its judgment for that of the presiding judge but should limit its review to determining whether the judge applied a wrong principle or the decision gave rise to an injustice.

[29] I am satisfied the judge did not err in refusing to adjourn the hearing, one week before it was scheduled to take place, to allow further time for the father to reapply for legal aid. He was aware of the hearing date seven months in advance, yet waited until less than three months before the scheduled hearing to apply for a

legal aid lawyer. When he did, his application was refused because his income was too high. As the judge explained during the adjournment hearing, the additional pension information he wanted to provide to Nova Scotia Legal Aid had an adjournment been granted, would not have changed their position as his income would have been even higher. If he wanted to retain private counsel, he had seven months to do so. If he suffered any prejudice from her refusal to adjourn, it was of his own making.

[30] The mother and the children, on the other hand, would have been prejudiced by the adjournment. It would have extended the time for the father to ignore his child support obligations. The mother would have continued to receive calls she considered harassing from the unpaid creditors.

[31] The judge did not apply wrong principles of law and exercised her discretion judicially in refusing an adjournment. I would dismiss this ground of appeal.

Imputed Income

[32] The father argues the judge erred in imputing to him an annual income of $65,000. He argues he is not intentionally underemployed because he had to stop working with the Forces because of the stress caused by what he argues were the mother's unjustified efforts to obtain child support.

[33] The jurisdiction of a court to impute income for child support purposes arises from s. 19 of the **Federal Child Support Guidelines**, SOR/97-175:

> **19.** (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> > (*a*) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
> >
> > ...

> (*f*) the spouse has failed to provide income information when under a legal obligation to do so; ...

[34] In **D.B.S. v. S.R.G**, 2006 SCC 37, at ¶ 136, the Supreme Court of Canada confirmed that in cases dealing with child support, the standard of review continues to be that as stated in **Hickey v. Hickey**, [1999] 2 S.C.R. 518 where Justice L'Heureux-Dubé stated:

> 10 When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
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> 11 Our Court has often emphasized the rule 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. These principles were stated by Morden J.A. of the Ontario Court of Appeal in *Harrington v. Harrington* (1981), 33 O.R. (2d) 150, at p. 154, and approved by the majority of this Court in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, *per* Wilson J.; in *Moge v. Moge*, [1992] 3 S.C.R. 813, per L'Heureux-Dubé J.; and in *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 691, *per* Sopinka J., and at pp. 743-44, per L'Heureux-Dubé J.
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> 12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[35] I reject the argument that the judge committed reviewable error in imputing an annual income of $65,000 to the father for **Guideline** purposes. There was evidence before her to support her decision. In his divorce proceedings, the father had "under projected" his 2007 income by $10,000. He subsequently failed to report his income annually to the mother as required by the CRJ. He failed to provide the financial disclosure ordered by the judge. He testified his income in 2009 was nearly $70,000. He provided no independent evidence that his voluntary discharge from the military in the Fall of 2010 was medically necessary despite having been directed by the judge on how to do this. He had twice, without apparent good reason, quit a well-paid job with the military at times when court proceedings considering his child support obligations were ongoing.

[36] Even if Mr. McClatchey's letter had been introduced into evidence, as the judge noted, it would not have been helpful to the father. Mr. McClatchey was his clinical social worker. He did not, and could not, provide a medical opinion that the father's departure from the military was medically necessary. As the judge noted, his letter was, for the most part, a recitation of what the father had told him.

[37] We must remember that this is an appeal, not a retrial or an opportunity for us to substitute our views for those of the judge at first instance. As noted in **Hickey**, trial judges must be given considerable deference by appellate courts when such fact-based and discretionary decisions are reviewed. We are not to intervene unless the judge made an error of law, significantly misapprehended the evidence or was clearly wrong. Here, the judge made no error of law, did not misapprehend the evidence and was not clearly wrong.

[38] I would dismiss this ground of appeal.

Child Support

[39] The father argues the judge erred in ordering him to pay child support to the mother in the amount of $917 per month commencing January 1, 2010. He argues he cannot afford to pay child support in this amount to the mother given his expenses, including the mortgage on his home of $1,635 per month according to his bankruptcy filings. He also argues that he shouldn't have been ordered to pay this amount to the mother retroactively, for the seven months prior to his being served with the mother's variation application.

[40] This Court is to give deference to the judge's decision unless she made an error of law, seriously misapprehended the evidence or was clearly wrong.

[41] The amount of child support the judge ordered the father to pay to the mother on an ongoing basis is in accord with the tables incorporated in the **Child Support Guidelines**. She did not err in ordering the father to pay monthly child support to the mother of $917. The father's obligation to support his children arose prior to and outweighs his obligation to pay his house mortgage and other expenses.

[42] Nor did the judge err in ordering that the father begin paying $917 per month as of January 1, 2010. She referred to the **D.B.S.** case, which directs trial judges to take a holistic view when deciding whether to order retroactive child support, to consider why support was not sought earlier, the conduct of the payor parent, the circumstances of the child (whether the child will get a discernible benefit from the award), whether it will cause hardship to the payor parent, and the date and quantum of the retroactive award.

[43] While the judge did not specifically analyse the facts she found, by reference to the **D.B.S.** factors, her reasons make it clear she did not err by ordering this child support retroactive to January 1, 2010. The judge found the father had notice in 2009, that the mother was seeking child support payable to her, despite the fact her application to vary was not served on him until June 10, 2010. She found that the mother applied when she did because her portion of the matrimonial debt would have been paid by that time if the father had complied with the terms of the CRJ. The judge was critical of several aspects of the father's past behaviour. She was critical of his substantial failure to pay the matrimonial debts listed in paragraph 6(c) that he had undertaken and was ordered to pay; of his assignment into bankruptcy when he thought this would make the mother solely liable for two of those matrimonial debts; of his directing those creditors to the mother for payment despite the provisions of 4(a) and 6(c) of the Partial Agreement; of his attempt to get the mother disqualified from legal aid representation; of his two applications for the Child Tax Credit despite his agreement the mother would be entitled to this as the primary caregiver of the children; of his failure to pay for the children's medical expenses; and of his failure to disclose his annual income and to report changes in his income sources

to the mother. With the two children living with the mother, who was receiving social assistance, there is no suggestion receipt of this child support would not benefit them. The judge found that any hardship to the father was brought about by himself, by quitting his well-paid job with the Forces and by not paying the debts required by the CRJ, which he agreed he could have paid more of had he wished. Self-imposed hardship is of less concern when deciding if retroactive child support should be ordered, **D.B.S.,** ¶ 116.

[44] The father has not satisfied me the judge erred in ordering him to pay child support of $917 per month to the mother commencing January 1, 2010. She correctly apprehended the evidence, applied correct principles of law and her decision is not clearly wrong.

[45] I would dismiss this ground of appeal.

Deeming jointly held matrimonial debt to be child support

[46] The father's last ground of appeal concerns the judge's order that the two jointly held matrimonial debts referred to in paragraph 6(c) of the CRJ be deemed to be child support, with the effect that he will continue to be liable to pay the CIBC and BMO joint matrimonial debts following his discharge from bankruptcy. He argues she had no jurisdiction to make this order and, alternatively, if she had jurisdiction, she erred in making it.

[47] The question of whether the judge had jurisdiction to make the order is one of law, to be reviewed by this Court on the standard of correctness. The question of whether the judge erred in making this order on the facts she found is one of mixed fact and law, to be reviewed on the standard of palpable and overriding error unless there is an extractable error of law.

[48] With respect to the father's jurisdiction argument, Justice Lynch is a judge of the Supreme Court of Nova Scotia (Family Division) in Halifax. As such, section 32A of the **Judicature Act**, R.S.N.S., c. 240, s. 1, gives her the powers and duties possessed by the Supreme Court in relation to a number of matters including child support and enforcement of child support orders:

> 32A (1) The Supreme Court (Family Division) has and may exercise . . . the powers and duties possessed by the Supreme Court in relation to, and has and may exercise jurisdiction in relation to, proceedings in the following matters:
>
> ...
>
> (i) maintenance of children, ...
>
> ...
>
> (k) enforcement of . . . maintenance orders...

[49] The essence of the proceeding before the judge involved child support and its enforcement, clearly within her jurisdiction. To deal with these issues, she had to interpret the CRJ to determine the father's obligations with respect to child support. Once these obligations were determined, the judge had to consider how to enforce these obligations. On the facts before her, this necessarily required her to consider what effect the father's outstanding bankruptcy would have on enforcement. I am satisfied that in resolving how the child support order should be enforced, the judge had the jurisdiction to deem, as she did, the CIBC and BMO joint matrimonial debts to be child support. Once the father is discharged from bankruptcy, the effect of s. 178(1)(c) of the **BIA** is that these debts representing unpaid child support, will automatically survive his bankruptcy:

> **178.** (1) An order of discharge does not release the bankrupt from
>
> ...
>
> (*c*) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt; [emphasis added]

See **Graves v. Hughes**, 2001 NSSC 68, paras 9-10.

[50] This result differs from the general rule that discharge from bankruptcy gives the bankrupt a 'clean slate' and releases him from the obligation to pay his debts. The policy goal behind s. 178(1)(c) is explained in Robert A. Klotz,

Bankruptcy, Insolvency and Family Law, 2 ed (Toronto: Carswell, 2001) (loose-leaf updated 2003, release 1) at 3.2, p. 3-11.

> The spirit of bankruptcy legislation is to ensure that no debt or liability for support is prejudiced by the bankruptcy. While rehabilitation of the debtor is a cornerstone of the public policy which informs the BIA, there is no good policy reason why this should be at the expense of the economically dependent members of the family. As a result, claims for support receive a far more favourable treatment in bankruptcy than any other claims. Their enforcement is not stayed by the bankruptcy, nor extinguished by the discharge; arrears are provable in bankruptcy and they receive a degree of priority in the trustee's distribution; if the support recipient is bankrupt, the support entitlement does not normally constitute an asset of the estate. As a result, the characterization of a given debt as "support" has important ramifications.

[51] I am satisfied the judge had the jurisdiction to deem the two joint matrimonial debts to be child support.

[52] With respect to the father's second argument, I am not satisfied the judge erred in doing so. She interpreted the Partial Agreement incorporated in the CRJ to mean that the father agreed, and was ordered, to be solely responsible for, and to indemnify the mother with respect to, the matrimonial debts listed in paragraph 6(c), including the two debts for which the mother is jointly liable, in lieu of paying child support to the mother for a period of time. She referred to the linkage between paragraphs 4(a) and 6(c) ("the Petitioner shall not presently be required to pay child support in light of... his assumption of the matrimonial debt as per paragraph 6(c)") in reaching her conclusion. Here the judge was not faced with an ambiguous agreement or order which does not specify whether a given debt or indemnity obligation is in the nature of child support. The wording here was clear that the father's assumption of the matrimonial debts listed in 6(c) and indemnification of the mother for these debts, was in lieu of child support. The father admitted as much during the hearing.

[53] The judge made no error in deeming the unpaid CIBC and BMO joint matrimonial debts to be functionally equivalent to outstanding child support.

[54] I would dismiss the appeal. The father made a motion in chambers prior to his appeal hearing before Justice Fichaud, who left costs of the motion to be determined on appeal. Taking the motion into account, I would order the father to

pay costs forthwith to the mother, in the amount of $1,500 inclusive of disbursements.

Hamilton, J.A.

Concurred in:

Oland, J.A.

Beveridge, J.A.