SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: J.D.G. v. J.A.B., 2012 NSSC 20

Date: 20120222
Docket: SFH MCA-014656
Registry: Halifax

Between:

J.D.G.

Applicant

v.

J.A.B.

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	January 23, 2012
Counsel:	Nicholas LeBlanc on behalf of J.D.G. Colin Campbell on behalf of J.A.B.

By the Court:

Introduction

[1] J. is the son of Mr. G and Ms. B. He's twenty years old and lives with Ms. B. J. hopes to attend university this September and is currently completing his grade twelve diploma.

[2] In August 2010, Mr. G applied to terminate J.'s maintenance and to address the arrears that accumulated pursuant to a 2003 order. In response, on November 2, 2011 Ms. B applied to vary child maintenance, retroactively, to January 1, 2007. Her application relies on the Supreme Court of Canada's decision in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry*, *Hiemstra v. Hiemstra*, 2006 SCC 37.

The order sought to be varied

[3] In 2003, Mr. G was ordered to pay monthly child maintenance of $377.00. This amount was comprised of a payment of $302.00 pursuant to section 3 of the *Nova Scotia Child Maintenance Guidelines*, NS Reg 53/98 and a payment of $75.00 toward arrears, which the order fixed at $3,020.00. According to the order, Mr. G's annual income was $35,880.00 and Ms. B's was $32,000.00. Annually, before June 15 of each year, the parents were to exchange their income tax returns (whether filed or not) and any Notices of Assessment.

[4] I've not been asked to vary the arrears fixed by the 2003 order. My decision will outline Mr. G's obligations from June 2003 to date. I will not attempt to reconcile payments the Maintenance Enforcement Program has received with those I determine Mr. G owed. I leave that task to the Maintenance Enforcement Program. However, in its reconciliation, I want to be clear that the arrears of $3,020.00 fixed in 2003 are unaffected by my decision.

The hearing

[5] The applications were scheduled to be heard on September 6, 2011. Mr. G was granted an adjournment to allow his newly retained counsel to prepare. The hearing proceeded on January 23, 2012. Mr. G filed an affidavit and a Statement of Property on January 20, 2012. Ms. B was permitted to offer direct testimony to respond to this evidence because it came too late for her to file a response.

The claims

[6] The claims before me are tied to specific periods of time, as follows:

a. from June 2003 until the end of 2008, Mr. G wants to vary arrears of child maintenance that accumulated;

b. retroactive to January 1, 2007, Ms. B wants child maintenance varied; and

c. as of January 2009, Mr. G wants child maintenance terminated while Ms. B wants child maintenance to continue to the present and prospectively.

[7] From 2003 to the end of 2006, Mr. G's annual income was less than the amount upon which his child maintenance payments were based. Thereafter, it was more. As a result, I break the period from June 2003 to the end of 2008 into two briefer periods. For the first period, from June 2003 to the end of 2006, there is Mr. G's application to vary his child maintenance obligation so as to reduce his arrears. For the second period, from the beginning of 2007 to the end of 2008, Ms. B seeks to vary Mr. G's child maintenance obligation so as to increase the amount Mr. G should have paid to her. The importance of this distinction will become apparent shortly.

Retroactive applications

[8] The Nova Scotia Court of Appeal addressed the issue of retroactive claims in *Smith v. Helppi*, 2011 NSCA 65. That appeal arose from a case like this, an application to reduce child maintenance on a retroactive basis under the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 37(1). In *Smith v. Helppi*, 2011 NSCA 65, Justice Oland, who wrote the unanimous decision, distinguished between a retroactive *award* of child maintenance and a retroactive *reduction* of child maintenance. A retroactive award increases child maintenance while a retroactive reduction does the opposite, whether by recalculating payments that should have been made or by forgiving arrears that have accumulated. The law that guides an application to reduce child maintenance retroactively differs from the law that governs an application to increase child maintenance retroactively. Here, I have both claims: Mr. G claims a retroactive reduction of child maintenance while Ms. B claims a retroactive award as I outlined in paragraph 7.

[9] I will address Mr. G's claim for a retroactive reduction first. His was the first application filed and its historic element dates back the farthest.

Mr. G's application to reduce child maintenance retroactively
June 2003 to the end of 2006

[10] As Justice Oland noted in *Smith v. Helppi*, 2011 NSCA 65, a retroactive reduction in child maintenance decreases child maintenance either by recalculating payments that should have been made or by forgiving accumulated arrears. Mr. G has not asked that I forgive arrears. He asks that I recalculate the payments he says he should have made.

[11] Mr. G doesn't challenge J.'s entitlement to child maintenance prior to January 2009. He asks that the amount of his payments between June 2003 and the end of December 2008 be varied to reflect his actual income during that time. As I've said, I'm breaking this time period into two briefer periods because the claims and analysis relating to the two periods differ.

[12] In *Smith v. Helppi*, 2011 NSCA 65, Justice Oland referred to the New Brunswick Court of

Appeal's decision in *Brown,* 2010 NBCA 5. This case is now reported as *P.M B. v. M.L.B.* and I'll refer to it by these initials elsewhere in my reasons. In *P.M B. v. M.L.B.*, 2010 NBCA 5 at paragraph 21, Justice Robertson wrote that the jurisdiction to partially or fully remit arrears depends on the answers to two questions: "Was there a material change in circumstances during the period of retroactivity and, having regard to all other relevant circumstances during this period, would the applicant have been granted a reduction in his or her support obligation but for his or her untimely application?" Justice Robertson said that "As a general proposition, the court will be asking whether the change was significant and long-lasting; whether it was real and not one of choice." This general proposition relates to the question of whether there was a material change in circumstances during the period of retroactivity. The Nova Scotia Court of Appeal approved of *P.M B. v. M.L.B.*, 2010 NBCA 5, at paragraph 21 of *Smith v. Helppi*, 2011 NSCA 65.

[13] To review, Mr. G must prove a number of things for his claim to succeed. He must prove there has been a material change in circumstances: this means proving a change has occurred, proving the change was significant, proving the change was long-lasting, proving the change was a real change and proving it was not one of his choice. He must also show that a reduction would have been granted, but for his untimely application. All of these things must be proven for Mr. G's claim to succeed. If any is not proven, his claim must fail.

Was there a material change in circumstances during the period of retroactivity?

[14] In *P.M B. v. M.L.B.*, 2010 NBCA 5 at paragraph 21, Justice Robertson articulated the meaning of a material change in circumstances by identifying the requirements that the change be significant and long-lasting, real and not one of choice.

[15] Mr. G argues the decrease in his income is a material change in circumstances and an appropriate basis for varying his child maintenance payments retroactively. In the calculations provided as Exhibit D to his affidavit filed on November 26, 2010, Mr. G reviewed his income and the *Nova Scotia Child Maintenance Guidelines* from 2003 to the end of 2008. In doing so, he recognized that both decreases and increases in his income should be reflected in the retroactive variation of his maintenance obligation.

[16] The order which fixed Mr. G's child maintenance stated that his annual income was $35,880.00. His income that year and over the next few years was less. The table below shows his total income from 2003 to 2006. Without his tax returns, I'm only able to show his total income from line 150 of his Notice of Assessment: I'm not able to calculate his income for the purposes of the *Guidelines*.

Year	Income
2003	35,278.00
2004	25,045.00

2005	15,039.00
2006	9,341.00

[17] Without considering whether the income change was significant, long-lasting or real, I consider whether the change not one of Mr. G's choice, for this is where Ms. B challenges Mr. G's claim.

[18] At the time of the 2003 order, Mr. G worked at Xerox. Ms. B testified that shortly after the order was made, Mr. G told her that he'd rather quit his job than pay. Mr. G was asked about this. His first response was to ask what job he held. He next answered by saying he didn't quit. He then said that he didn't remember and that it wasn't possible that he'd quit rather than pay maintenance. He was asked to explain how he left this employment and he said that he would "probably assume that it was for a medical reason or a better opportunity". His subsequent income tax returns show his income declined by ten thousand dollars in each of the next two years and by six thousand dollars in the third year. This belies Mr. G's assumption that he left Xerox for a better opportunity. When he was later asked whether his health had ever affected his employment, Mr. G said "possibly" and said no more.

[19] Mr. G didn't identify any efforts he made to replace his earnings from Xerox or what might have prevented him from making efforts to secure other work where he'd earn a similar income.

[20] Mr. G provided a copy of his payment ledger from the Maintenance Enforcement Program. The ledger shows lengthy periods when Mr. G did not meet his maintenance obligation to J. Notably, Mr. G failed to make any payments from the date of the order (which was granted on June 9, 2003) until January 22, 2004. This is consistent with Ms. B's testimony that early in 2004 she received a large amount, which was Mr. G's vacation pay when he left his job.

[21] It isn't for Ms. B to prove that the decrease in Mr. G's income was "not one of choice". Mr. G bears the burden of proving the decrease in his income was involuntary. He's failed to explain credibly the loss of his employment at Xerox. He offered a number of reasons why he might have left but couldn't explain why he did leave. He didn't suggest that his employment was terminated by his employer. Mr. G's failure to meet his child maintenance obligation in the period following the 2003 order is consistent with the comment Ms. B alleges he made that he would quit his job rather than pay child maintenance, as is the fact that he left this employment.

[22] Mr. G didn't describe any efforts he made to earn income which would replace his earnings at Xerox and he didn't describe any disability or other limitation on his ability to secure equally remunerative employment in the years following his employment at Xerox. He has not discharged the burden of proving the decrease in his income was involuntary.

[23] To find that a change has been material, I must be satisfied that the change was not a matter of Mr. G's choice. Only if there is a material change do I need to consider the second question of whether Mr. G's application would have been granted if it had been made on a timely basis, since both questions must be positively answered in order for me to reduce his child maintenance retroactively. If

the change isn't a material one, I need go no further.

[24] Mr. G has failed to prove that the decrease in his income was involuntary. A decrease that is not shown to be involuntary is not a material change in circumstances. I find that there has been no material change in circumstances.

[25] As the result of reaching this conclusion, it isn't necessary for me to address the issue of whether a reduction would have been granted but for the untimely application. I decline to vary Mr. G's child maintenance payments during the period from June 2003 to the end of 2006. During this period, Mr. G's child maintenance obligation continues at the rate of $302.00 each month. As noted at paragraph 4 or my reasons, the child maintenance comprised of the repayment of earlier fixed arrears is unchanged.

Ms. B's application to increase child maintenance retroactively January 2007 to the end of 2008

[26] Ms. B applied on November 2, 2011 to vary Mr. G's child maintenance payments as of January 1, 2007.

Jurisdiction

[27] Jurisdiction to award child maintenance retroactively is limited to cases where the person for whom maintenance is sought was entitled to support at the time the application was filed. If the person wasn't a child at the time of the application's filing, there's no jurisdiction to make a retroactive order for maintenance, according to Justice Bastarache at paragraphs 86 to 90 of *DBS v. SRG, LJW v. TAR, Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37.

[28] As a result, it's critical to determine whether J. was a dependent child, as defined by section 2(c) of the *Maintenance and Custody Act*, at the time of Ms. B's application on November 2, 2011. If J. wasn't, that disposes of Ms. B's application.

Was J. a dependent child when the application was filed?

[29] In *Harris*, 2006 NSCA 79, at paragraph 10, Chief Justice MacDonald noted that it is a factual determination whether a child is dependent. He quoted from Justice Bateman's reasons in *Davis v. Hill*, 2005 NSCA 104 at paragraph 22 that "The case law is replete with examples where children remain dependents for maintenance purposes, even though not actually attending an educational institution."

[30] On November 2, 2011, J. was 20. He was living at his mother's home and financially dependent on her. He was unemployed and waiting to begin his courses in the Flexible Learning Education Centres (FLECs) program on November 7, 2011. This program continues until the end of June 2012. J. enrolled in the FLECs program to earn his high school diploma. I was told that J. needed a high school diploma so he could be admitted into university. J. currently takes prescribed medication

for his mental health.

[31] I find that J. was a dependent child on November 2, 2011 and, consequently, that I have jurisdiction to award child maintenance retroactively, if such an award is appropriately made.

The approach to retroactive awards

[32] In considering whether I should make a retroactive award, I'm to balance the competing principles of certainty and flexibility, while respecting the core principles of child maintenance. The core principles were identified in *Richardson*, 1987 CanLII 58 (S.C.C.) and *Willick*, 1994 CanLII 28 (S.C.C.) and were endorsed by the Supreme Court in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 at paragraph 38: child maintenance is the child's right; the child's right to maintenance survives the breakdown of the parents' relationship; child maintenance should, as much as possible, perpetuate the standard of living the child experienced before the parents' relationship ended; and the amount of child maintenance varies, based upon the parent's income.

[33] In deciding if a retroactive award is appropriate, I'm to consider: the reason for Ms. B's delay in claiming maintenance; Mr. G's conduct; J's past and present circumstances; and whether a retroactive award would result in hardship. All of these factors must be considered and no one is dispositive, according to Justice Bastarache, who wrote for the majority of the Supreme Court of Canada in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37 at paragraph 99.

Ms. B's delay

[34] My first consideration is the reason for Ms. B's delay in claiming maintenance. Ms. B has a positive duty to seek a variation in child maintenance as Mr. G's ability to pay improves. According to Justice Bastarache at paragraph 103 of *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37: "Recipient parents must act promptly and responsibly in monitoring the amount of child support paid". An unreasonable delay in seeking a variation militates against a retroactive award. Acceptable reasons for delay include: whether Ms. B had reasonable fears that Mr. G would react vindictively to a claim for increased maintenance; whether she had deficient legal advice or insufficient financial or emotional wherewithal to pursue the claim.

[35] J. was a few months shy of his twelfth birthday when the 2003 order was granted. Mr. G was questioned about his provision of maintenance for J. He couldn't recall whether he paid maintenance before the court ordered him to do so in 2003. According to Ms. B, the 2003 child maintenance order is the only source of child maintenance.

[36] I have already canvassed the evidence relating to Mr. G's employment and payment of maintenance immediately following the 2003 order. In the three years from May 2005 until June 3, 2008, one payment of $1,441.00 was received by the Maintenance Enforcement Program.

[37] Ms. B's earlier application for child maintenance was difficult. She anticipated losing her job. When she was laid off in 2001 it took her over a year to find another job. Fearing the loss of her job,

she asked Mr. G for child maintenance. She says that Mr. G offered her $20.00 per month. She applied to the court. She testified that Mr. G wouldn't attend court. Ultimately, she was required to *sub peona* Mr. G's employer and Mr. G's pay records for that application. Mr. G didn't recall whether there were difficulties in his attending court in 2003 and he didn't recall whether his employer and pay records were the subject of a *sub peona*.

[38] The 2003 order required each parent to disclose income tax information to the other. It appears that neither complied. Without Mr. G's tax returns, Ms. B couldn't know whether to pursue a claim for additional support.

[39] Ms. B testified that Mr. G did make direct maintenance payments to her in 2007 and when he first went "out west". However she says he "harassed me to the point where I sent him back the money". She said he "called me continually and was very demanding".

[40] J. was hospitalized on January 9, 2009. According to Ms. B this was as a result of "a significant deterioration in his mental health and exacerbation of pre-existing mental health issues" which occurred "over 6 – 7 days immediately following a physical assault on [J.] and me" by Mr. G. Mr. G was charged with assault and, thereafter, a Peace Bond prevented Mr. G from communicating with Ms. B and J. and from entering on her property.

[41] In light of her history with Mr. G, I conclude that Ms. B had reasonable fears in pursuing child maintenance from Mr. G.

Mr. G's conduct

[42] I have no evidence of Mr. G's conduct other than as I've noted above.

J.'s past and present circumstances

[43] Ms. B testified that J. has issues with his mental health. Mr. G doesn't readily admit that J. has problems with his mental health. He initially characterized J.'s problems as "teen-ager issues", though he ultimately accepted that J. has mental health problems and he told me that J. has been hospitalized annually since 2006.

[44] In 2007, J. lived with his mother. He turned sixteen years old in September. Mr. G paid no maintenance for J. through the Maintenance Enforcement Program in 2007. Mr. G testified that he began to work in Alberta in 2007 and "worked most of [the year]" in Alberta. Both parents agree that Mr. G gave money directly to Ms. B. Ms. B says she returned it. Mr. G offered no evidence about this.

[45] In 2008 J. turned seventeen. He lived with his mother. Mr. G paid no maintenance for J. through the Maintenance Enforcement Program until June 2008. From June 3, 2008 to the end of 2008, the Maintenance Enforcement Program received payments of $3,379.63 which exceeded the $1,812.00 owed for that time frame. The payments served to decrease arrears which stood at $10,249.50 at the end of May, 2008. Mr. G says he took a few months off and spent most of the year in Alberta. When

he reviewed the income shown on his 2008 Notice of Assessment, Mr. G revised his opinion to say that he "didn't work very long" in Alberta that year.

[46] On January 9, 2009, J. was admitted into the psychiatric ward at the IWK Health Centre. He was discharged from the hospital in early February to an in-patient program. This was a voluntary program. J. left the in-patient program in late February before he had completed it. From the end of February until April 2009, J. lived in homeless shelters and, by times, at his mother's.

[47] In April 2009, J. moved in with his paternal grandmother who "lived far outside the city" according to Ms. B. While at his grandmother's, J. stayed with his mother off and on. This enabled him to attend appointments and to see friends. Ms. B says that she paid J.'s bills for clothing and health needs as they were presented to her. She maintained his coverage on her health plan. She did not provide J. with money directly. She says she had contact with J. and saw him regularly.

[48] Ms. B was asked if she paid J's rent at his grandmother's. She did not: she says she didn't know he was charged rent by his grandmother. Ms. B acknowledged that she didn't supply as much money as his grandmother did. There is no evidence that J.'s grandmother charged J. any rent. Mr. G says that he provided financial support to J. through J.'s grandmother. Neither Ms. B nor Mr. G was able to prove the contribution he or she said was made.

[49] In August 2009, J. and his grandmother moved into a duplex owned by J.'s grandfather. Mr. G. pays for one side of the duplex, while the entire building is owned by his father. Mr. G's side of the duplex is comprised of an upstairs portion and a downstairs apartment. According to Mr. G, he lived upstairs, while J. lived downstairs. Of course, Mr. G would only live in the upstairs portion of the unit when he was in Nova Scotia since he was working in Alberta. During this time, Ms. B says she saw J. almost daily and that she maintained his insurance, paid for his medication and therapy. Asked about Mr. G's provision for J. during this period, she said that she had no knowledge of any money from Mr. G or anyone else. Based on the money she provided, she didn't "see what else there was to pay for".

[50] In September 2009, J. turned eighteen.

[51] Mr. G says he encouraged J. to attend school or earn his General Equivalency Diploma (GED) while J. lived at the duplex. Mr. G paid for course materials. J. didn't finish the courses.

[52] Ms. B says that she maintained J.'s medical and dental coverage and paid for out of pocket expenses, such as his "weekly/biweekly counseling", dental work and prescription medications. She regularly bought his groceries, clothing, work supplies and bus passes. She supplied his spending money. She says she also maintained a room for him, where J. regularly stayed when Mr. G returned from Alberta. During the period from August 2009 to May 2010, Mr. G says that he asked J. to pay "$300 a month to live in the apartment, but he never paid me or my father any money."

[53] The parents don't agree when J. left the duplex. Ms. B says this occurred in June 2010 when J. went to live in an apartment where he stayed until August 2010, returning to live in his father's portion of the duplex for a few weeks. While J. had this apartment, Ms. B said she provided significant

financial support because J. wasn't able to maintain employment. She says she provided his deposit and most of his rent while he had the apartment.

[54] According to Mr. G, J. moved out in May 2010 and returned on August 1, 2010, staying until September 2010. Mr. G said that during the latter period, he told J. that J. had to pay $300.00 and if he didn't, he'd be asked to leave. According to Mr. G "In September, J. did not find a job and he was not studying so he could not pay me the amount and he refused to get a job so I told him to leave."

[55] While Mr. G says that J. was hospitalized annually every year since 2006, I don't know when his period of hospitalization occurred in 2010.

[56] J. had his nineteenth birthday in September 2010. Since the fall of 2010, J. has lived with his mother.

[57] Completing high school has been difficult for J. He was a student in the FLECs program from mid-November 2010 until early March 2011. Through the FLECs program, J. earned his GED. The official transcript of J.'s GED tests is dated January 11, 2011.

[58] After completing his GED, J. was eligible for admission into the Nova Scotia Community College. Ms. B didn't know if there were openings at the Community College during the winter term which would allow J. to start in January 2011. She said he was eligible for September admission. His acceptance letter was dated March 11, 2011. His confirmation fee was paid March 30, 2011.

[59] J. was hospitalized for two months in the spring of 2011. He otherwise lived with his mother throughout the year. He enrolled at the Community College on a full-time basis in September 2011. Classes began on September 6, 2011 according to the program information provided by Ms. B. His classes were from Monday to Friday. He left the Community College at the end of September and re-enrolled in the FLECs program in November 2011. J. is currently studying courses (including grade twelve English) which are required for university admission. His goal is to earn his grade twelve diploma which, his mother says, is necessary for him to gain admission into a university. His classes are from 8:30 a.m. until 2:30 p.m. J. wasn't employed in 2011.

Hardship

[60] Mr. G. filed a Statement of Expenses. According to his Statement, he saves $500.00 each month. His Statement of Expenses shows he has a monthly surplus of $349.00. He budgets for monthly debt payment of $1,000.00 on total debts of $25,500.00, maintenance of $800.00 for his other children and access expenses of $800.00 each month.

[61] Mr. G testified that he works six months each year because he has children he's "trying to do [his] best to raise." His other children are aged 17, 7 and 6. He says the children's "mother lets [him] be involved in raising" them and he doesn't "want to be away all year". There was no evidence that Mr. G is unable to work more than six months of the year in Alberta. He testified that he worked most of the year in Alberta in 2008 and all of the year there in 2009. Mr. G's work schedule is such that

when he works he is in Nova Scotia for one of every three weeks and in Alberta for the other two.

[62] According to Ms. B, Mr. G has told her that he is expecting “a large income tax refund” and that he “wants me to remove myself from the maintenance enforcement program to prevent the garnishment of a large income tax refund he is expecting.” Mr. G did not respond to this evidence.

[63] Mr. G didn’t introduce evidence to show that a retroactive award would cause him hardship.

Conclusion

[64] While J. did live away from his mother during a portion of the period during which a retroactive order is sought, he was under the age of majority when this occurred and he had not completed secondary school education. As well, he was hospitalized for some portion of this time and his ill health meant he was unable to work. Since reaching the age of majority, J. has lived with his mother and been dependent upon her, either because of his health or education needs.

[65] Ms. B’s delay was reasonable. Mr. G’s conduct does not entitle him to rely on the certainty provided by the 2003 order. J.’s circumstances show he could have benefit from past payments and that he could still derive benefit from those payments. Mr. G’s current income circumstances are favourable. He has an ability to work more and to earn more than he does. Based on all the considerations outlined in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37, I find that it is appropriate to award child maintenance on a retroactive basis.

The commencement date

[66] Having made the decision to make a retroactive award of child maintenance, I must fix the date to which the award should be retroactive. The presumed commencement date is the date of effective notice: the date on which Ms. B made known her interest in reviewing and adjusting child maintenance. Notice is to be viewed very expansively. As soon as notice is given, Mr. G cannot safely assume that the current state of affairs is fair and his reliance on certainty is less appropriate.

[67] Here, the date of effective notice is the date when Ms. B filed her claim on November 2, 2011. This is the first date she provided any notice of her claim. She didn’t identify this claim during conciliation on March 28, 2011 or at the conference on May 10, 2011. There was no evidence that the topic was broached at any earlier time.

[68] Justice Bastarache accepted section 25(1)(a) of the *Federal Child Support Guidelines*, SOR/97-175, as a rough guideline for retroactive awards at paragraph 123 of *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37: “it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent.” There is an exception to the three year limitation. If the payor has committed some blameworthy act that has interfered with the pursuit of maintenance, the commencement date for the

retroactive maintenance is the date the payor's income changed.

[69] At paragraph 124 of *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, 2006 SCC 37, Justice Bastarache said that the date when increased maintenance should have been paid "will sometimes be a more appropriate date from which the retroactive order should start." He explained that this occurs where the parent paying maintenance "engages in blameworthy conduct." If there's blameworthy conduct, the paying parent cannot claim he reasonably believed he was meeting his obligation to maintain his child. Justice Bastarache was clear at paragraph 124:

> This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances — including an increase in income that one would expect to alter the amount of child support payable — is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

[70] Mr. G did not disclose the increase in his income that occurred in 2007, when his total annual income reached $65,000.00. This amount is almost double the amount on which Mr. G's 2003 child maintenance obligation was based. It is an increase one would expect would alter his child maintenance payments. I find this is blameworthy conduct on Mr. G's part that moves the presumptive date of retroactivity to the beginning of 2007.

Determining child maintenance

[71] Mr. G disclosed his income through various documents. In the table below, I've stated the source of his income information for each year and his annual income as disclosed in the material he provided. Where the documents allowed me to calculate his income for child maintenance purposes, I've shown this amount, making the adjustment, such as deducting union dues pursuant to Schedule III, section 1(g) of the *Nova Scotia Child Maintenance Guidelines*.

Year	Source of income information	Income
2007	North American Mining Inc T4; Golusky Trucking & Contracting Ltd T4 (2); Grimshaw Trucking LLP T4; Duke's Transport Ltd T4; Staples Canada Inc T4 (union dues are deducted from income)	64,605.46
2008	Notice of Assessment and Government of Canada T4E; Operating	51,416.31

	Engineers Local 955 Trust Funds T4; North American Mining Inc T4 (union dues are deducted from income)	
2009	Notice of Assessment and North American Mining Inc T4; Operating Engineers Local 955 Trust Funds T4 (union dues are deducted from income)	92,423.17
2010	Notice of Assessment (union dues are deducted from income)	69,044.70
2011	No documentation provided	

[72] Mr. G does not dispute that J. is entitled to child maintenance until January 2009. Accordingly, in the table below, I provide the amount of the monthly payments Mr. G owed for J. from January 2007 to the end of December 2008.

Year	**Income for *NSCMG* purposes**	**Monthly child maintenance payment**
2007	64,605.46	562.00
2008	51,416.31	447.00

[73] At the end of December 2008, J. was still under the age of majority. He didn't turn nineteen until September 2010. According to section 8 of the *Maintenance and Custody Act*, Mr. G is under a legal duty to provide for J. while J. is under the age of majority unless there's a lawful excuse for not providing maintenance. In *W.L. v. S.W.*, 2010 NSFC 31, Judge Dyer most recently dealt with a maintenance application where the issue of lawful excuse was raised. His Honour noted, at paragraph 49, that most courts have focused on the presence or absence of economic dependency as the dispositive factor. Earlier jurisprudence had attempted to identify whether the child's departure from the family home resulted from a parent's expulsive conduct. Throughout the period that J. lived outside his mother's home he was in contact with her and financially dependent upon her and, by times, dependent as well on his grandmother and father. If it was a concern, and it has not been identified as one, there's been no evidence of conduct on Ms. B's part which compelled J. to leave her home.

[74] Following his return to his mother's home in September 2010, J. has been involved with the FLECs program, earning his GED and working toward completing his high school diploma. He attempted studies at the Nova Scotia Community College but was unable to remain in that program. J. was entitled to receive maintenance throughout the retroactive period.

[75] In 2009, Mr. G's income for the purposes of determining child maintenance was $92,423.17. I do not have disclosure of Mr. G's income for 2011. In that absence, I use his 2010 income of

$69,044.70 for both 2010 and 2011. The amount of his monthly payments in these years is shown in the table below.

Year	Income for *NSCMG* purposes	Monthly child maintenance payment
2009	92,423.17	782.00
2010	69,044.70	599.00
2011	69,044.70	599.00

Current and prospective child maintenance

[76] J. is twenty and he continues to live with his mother. He isn't employed and he's pursuing his grade twelve diploma so he will qualify for university admission. He takes medication prescribed for his mental health condition. According to section 2(c) of the *Maintenance and Custody Act*, a child over the age of majority who is unable, by reason of illness, disability or other cause, to withdraw from the charge of the parents or provide himself with reasonable needs is a dependent child and, by virtue of section 7 of the *Act*, entitled to be supported.

[77] In *Martell v. Height*, 1994 CanLII 4145 (NS CA), the Court of Appeal heard an appeal with regard to a decision under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3 relating to support for a twenty-one year old who had completed a bachelor's degree in political science and was studying cartography at the College of Geographic Sciences at Lawrencetown. At issue was whether the daughter remained "a child of the marriage" pursuant to section 2(1) of the *Divorce Act*, which is that *Act*'s parallel to the "dependent child" provision of section 2(c) of the *Maintenance and Custody Act*. Writing for the entire Court of Appeal, Justice Freeman said at paragraph 8 of his reasons:

> As a general rule parents of a *bona fide* student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field. In making this determination the trial judge cannot be blind to prevailing social and economic conditions: a bachelor's degree no longer assures self-sufficiency.

[78] J. doesn't yet have a grade twelve diploma. He is attempting to qualify for admission to university. J. has demonstrated an ability to secure admission to the Nova Scotia Community College, though he was unable to continue his studies there. I accept that J. has the ability to undertake university studies and order that Mr. G remain responsible for J.'s maintenance.

[79] Looking to Mr. G's most recently disclosed annual income of $69,044.70, I order Mr. G to pay child maintenance of $584.36 each month. This amount differs from the monthly amount in 2010 and

2011 as a result of the recent amendment of the *Federal Child Support Guidelines*, SOR/2011-267 which the *Nova Scotia Child Maintenance Guidelines* adopt by reference in Schedule I, section 1. As he was ordered in 2003, I order that he make his payments on the fifteenth of each month, starting on January 15, 2012.

Conclusion

[80] Mr. LeBlanc will prepare the order dismissing Mr. G's application to reduce child maintenance retroactively and granting Ms. B's application to vary child maintenance retroactively.

[81] The retroactive child maintenance to be paid is as follows: in 2007, monthly child maintenance should have been $562.00; in 2008, monthly child maintenance should have been $447.00; in 2009, monthly child maintenance should have been $782.00; from the beginning of 2010 until the end of 2011, monthly child maintenance should have been $599.00.

[82] The order will provide that Mr. G pay current child maintenance of $584.36 each month commencing on January 15, 2012. The order will require each parent to provide the other with a copy of the complete tax return he or she prepares (whether filed or not) and the Notice of Assessment and any Notice of Reassessment received from the Canada Revenue Agency on an annual basis. This will begin on June 15, 2012 with the provision of the tax return. The provision of the Notice of Assessment and any Notice of Reassessment will be within two weeks of its receipt.

_____

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia