IN THE FAMILY COURT OF NOVA SCOTIA
Citation: K.S. v. M.H., 2008 NSFC 17

Date: 20080508
Docket: FLBMCA-055021
Registry: Bridgewater

Between:

K. S.

Applicant

v.

M. H.

Respondent

Revised Decision:	The text of the decision has been revised to protect the identity of certain parties. This revised version is released on March 6, 2009.
Judge:	The Honourable Judge William J. Dyer
Heard:	April 22, 2008, in Lunenburg, Nova Scotia
Counsel:	Shawn O'Hara, for the Applicant M.H., self-represented

By the Court:

Legal History

[1] On February 10, 1998 a Family Court Judge approved a consent order ("the last order") by which M.H. was to pay to K.S. a notional amount of monthly support for the benefit of their child, K.S. ("the child"), born October 21st, 1997.

[2] The last order also required M.H. to notify K.S. "immediately upon any change in his employment and/or financial circumstances". The presiding judge also stated in the order: "Failure to so notify shall result in an order against the respondent retroactive to the date of such change." Additionally, M.H. was ordered to provide K.S. "with a copy of his notice(s) of Assessment from Revenue Canada by May 31 of each year".

[3] The court file discloses that M.H. was living in the Port Hawkesbury, Nova Scotia area in early 1998. On an earlier occasion, the court had awarded sole custody of the child to K.S. (Inexplicably, a signed copy of the final custody order is not in the file.)

The Current Application

[4] On October 1, 2007 K.S. started an Application to Vary under section 37 of the **Maintenance and Custody Act** (**MCA**). She stated a belief that M.H. was employed and asserted he had not complied with the 1998 consent order. K.S. sought a complete review of M.H.'s financial circumstances and a retroactive increase in child support, effective as of the "1999 taxation year". (A claim for specified section 7 **Child Maintenance Guideline** (**CMG**) expenses was also made but abandoned at the hearing.)

[5] K.S. provided court officials with the last known civic address and work address of M.H. when she commenced her application. The Application and Summons, along with the usual Notices to file routine financial information, went out by ordinary mail. The Family Court envelopes were returned and marked as "Moved". Court staff then initiated attempts at personal service through the Sheriff's Office in Halifax. By then, K.S. had provided additional information to assist in the personal service efforts.

[6] By mid-November, 2007 K.S. was represented by legal counsel. Sheriff's reports indicated that several attempts at service at the home and at the work place of M.H. had proven unsuccessful. The court ordered further personal service efforts and that M.H. disclose his personal Income Tax Returns since 1998, plus proof of his current income. K.S. had obtained a telephone contact number for M.H. as well as his e-mail address. The telephone number and other updated information was passed along to the Sheriff's office.

[7] On November 30, 2007 a Sheriff's report was received which indicated that M.H. had been contacted (by telephone) but that he refused to cooperate with arrangements for service.

When attempts were made to locate M.H. at his residence, it was learned that his apartment was vacant.

[8] By mid-December, 2007 the application was stalled because of the personal service issue. On K.S.' motion, the court then authorized an order requiring M.H.'s employer to make extensive disclosures to the court under section 29A (2) of the **MCA**. A separate order authorized continuing efforts for personal service and substituted service via M.H.'s employer. The documents went out by Priority Post Courier and were accepted by the employer. M.H. did not attend a scheduled court appearance on January 7, 2008. The corporate employer ignored the court order which was directed to it. Pursuant to **Family Court Rule** 12.01 (2), the court determined that M.H. was avoiding service, was not responding to the application, and would not attend court unless compelled to do so. A Warrant for M.H.'s arrest was approved. M.H. was finally located and detained pursuant to the Warrant. He was released from custody on his written Undertaking to appear on the next scheduled court date and to comply with the mid-November, 2007 financial disclosure order.

[9] M.H. appeared in the Family Court on February 18, 2008**.** After being informed of his right to retain legal counsel and the complexity of the matters to be determined, M.H. informed the court that he did not intend to engage counsel. M.H. provided limited financial disclosure at the time of his first court appearance. On K.S.'s motion, an interim child support order was approved for $261 monthly starting February 1, 2008. (M.H.'s then estimated annual income was about $29,300.) Before closing that day, K.S. gave notice that she would be seeking court costs; and the court reiterated the advisability of M.H. retaining a lawyer and that he fully comply with the disclosure orders.

[10] By the time of a March 10, 2008 court appearance, M.H. had submitted some, but not all, of his Income Tax Summaries. He still had not provided written proof of his 2007 income from all sources or his 2007 tax return. Another "Production Order" was authorized in the courtroom on March 10, 2008 while M.H. was in attendance. A contested hearing was scheduled for April 22, 2008 at the Courthouse in Lunenburg commencing at 10:00 a.m. M.H. was given an adjournment notice as a reminder. M.H. was informed by the court about the hearing process and encouraged to submit an Affidavit in response to K.S.'.

[11] Through inadvertence, court staff sent the last Production Order to M.H.'s former address; it was returned to the court. When the error was detected, a Family Court Officer undertook to contact M.H. by telephone and by e-mail. Before noon on April 21, 2008 an e-mail from the Family Court Officer went out to M.H.. The subject line read: "Court Hearing - Tuesday, April 22, 2008 @ 9:30 a.m. in the Lunenburg Courthouse". In the e-mail it was pointed out that M.H. still had not filed with the court the following:

1. True copy of his 2007 T-4 Statement of Remuneration Benefits slip
2. True copy of the last pay stub from his employment for 2007 or a letter from his employer confirming his total 2007 income .
3. A true copy of his personal Income Tax Return for 2007 and/or Notice of Assessment.
4. A true copy of his 2006 T-4 Statement of Remuneration Benefits slip.

5. A true copy of his last pay stub from his employer for 2006 or a letter from his employer confirming his 2006 total income.
6. A true copy of his personal Income Tax Return for they year 2006 and/or Notice of Assessment.

[12] The communication closed with this: "Please be sure to have these documents with you and arrive early enough at the courthouse to have the court reporter make sufficient copies to allow for Ms. K.S.'s counsel to have a copy and for the Judge to have a copy."

[13] On April 22, 2008 at the Lunenburg Courthouse the case was called for hearing. By 10:15 a.m. M.H. was not present, nor was there anyone in the courtroom on his behalf. No messages had been received from him. On the court's direction, K.S. then presented her case, including oral testimony and Exhibits. K.S. closed her case and tendered her Exhibits. Counsel for K.S. was in the closing stages of his submissions to the court when, around 11:00 a.m., a telephone message was received from the Sheriff's Office at the Bridgewater Courthouse to the effect that M.H. was there and inquiring about the case.

[14] When K.S.' counsel was informed, he voiced opposition to reopening or otherwise delaying conclusion of the case, or retrying the case later that day or on another occasion. Counsel was scheduled for an appearance in another court following conclusion of the Family Court case. I exercised my discretion and determined that K.S.' position should be sustained and that M.H. should be immediately informed *via* the court reporter that the matter was concluded except for counsel's interrupted submissions, that a written decision on the merits would be released, and that he should seek legal advice regarding the events and the court's decision when received. M.H. thereafter reportedly referred to "car problems" when briefly speaking to the court reporter. But, at no time, was there any explanation offered for the attendance at the Bridgewater Courthouse instead of Lunenburg where the hearing had been scheduled, or for the absence of any alerts to a possibly delayed arrival.

[15] In the circumstances, I said my decision would include an explanation of the events and my ruling not to reopen or otherwise delay concluding the matter.

K.S.' Circumstances

[16] According to K.S., she and M.H. did not live in a common-law relationship, nor did they ever marry. She said that he left her when she was three months' pregnant. Nothing much else was said about the 1998 circumstances except that she was living and working in rural Cape Breton, first as a part-time casual childcare worker, and eventually as a full-time worker until she relocated to the Bridgewater area with her fiancé. Her fiancé had taken employment at a local manufacturing plant.

[17] K.S. and the child resided with her parents for several years until she was able to establish an independent residence. She said that after 1998 she believed that M.H. continued to live and/or work in Cape Breton but she had no knowledge as to his precise whereabouts. Because she continued to reside at the same location from 1998 until 2006, she believes that

M.H. was well aware of how to contact her but chose not to do so. Admittedly, K.S. initiated no attempts to locate M.H. during the intervening years although some of her acquaintances reportedly had seen him.

[18] In June, 2006 M.H. contacted K.S. by e-mail and expressed an interest in getting to know the child. He had secured her e-mail address through mutual acquaintances without a great deal of effort. M.H. and K.S. communicated by e-mail for a couple of months, then had telephone contact, and subsequently met personally in the absence of the child. Thereafter, it was agreed that M.H. could visit the child, which he did on the understanding that he would start paying child support at the rate of $200 monthly which was intended to include half of the child's childcare expenses of about $40 monthly. She said they also agreed that they would split the costs "equally" for extracurricular activities and clothing. M.H. was supposed to deposit money directly into her bank account at the end of each month. The parties did not reduce their understandings to writing.

[19] According to K.S., both parties were aware of the **Child Support Guidelines** (**CMG**) and they did some "on-line research". Relying on a disclosed income of about $20,000, they arrived at the $200 per month support figure. I accept K.S.' evidence that M.H. paid a total of $2,705 under their informal agreement between August 4, 2006 and August 3, 2007. (The total amount of agreed payments would have been $3,000 for the same time frame.)

[20] According to K.S., M.H. abruptly stopped contributing to the child's support after August, 2007. This followed on the heels of M.H. stopping his visits with the child in May, 2007 which occurred without any expressed reasons. As a result of access cessation, the child has required counselling. When child support was arbitrarily stopped K.S. confronted M.H. who challenged her to take him to court.

[21] K.S. did not detail the financial consequences to her or the child of M.H.'s failure to pay any support in the intervening years. However, I am satisfied she assumed full responsibility for her child's well-being without contribution from M.H. or anyone else until she started her present relationship. It would be no leap of faith to infer that the child would have benefitted from support had M.H. paid it when he should have and that the child's needs are likely greater now than they were ten years ago. The extent to which K.S.' partner may be subsidizing the current support shortfalls was unstated; but he is under no obligation, in any event. I am satisfied that K.S., the child, and her partner live a modest existence and that her child will derive benefit from any potential award of current and/or retroactive support.

M.H.'s Circumstances

[22] From M.H.'s incomplete financial disclosure, I find his historical income to be accurately reflected in the spreadsheet prepared by K.S.' counsel which is reproduced below:

Year	Income	Child Support	Guideline Amount	Difference

		Paid		
1999	$ 5,782.00	$0.00	$0.00	$0.00
2000	$ 9,046.00	$0.00	$ 70.00/$840.00	$840.00
2001	$13,021.00	$0.00	$115.00/$1,380.00	$1,380.00
2002	$18,987.00	$0.00	$150.00/$1,800.00	$1,800.00
2003	$18,620.00	$0.00	$146.00/$1,752.00	$1,752.00
2004	$18,373.00	$0.00	$144.00/$1,728.00	$1,728.00
2005	$21,939.00	$0.00	$178.00/$2,136.00	$2,136.00
2006	$25,000.00 (imputed)	$1,140.00	Old = 4@$212 =$848.00 New = 8@$216= $1,728	$1,436.00
2007	$29,239.14	$1,565.00	$260.00/$3,120.00	$1,555.00
Totals:		**$2,705.00**		**$12,627.00**

[23] The chart demonstrates the basic amount of child support potentially due and payable under the **CMG** Nova Scotia Tables (as amended effective May 1, 2006) and explains K.S.' total claim of $12,627 for the years 1989 - 2007 inclusive for a full retroactive award. Alternatively, K.S. seeks an award for the three full calendar years preceding notice to M.H. In the absence of complete tax return information, imputation of $25,000 in total 2006 income is fair and reasonable.

[24] In correspondence to K.S.' counsel, on March 18, 2008, M.H. claimed his employment with the call centre was terminated, effective March 11, 2008, the very next day after the court scheduled the hearing. No reasons were disclosed. M.H. wrote that he had filed for "employment benefits" and was waiting for a decision. He undertook to forward a copy of his "ROE" by the end of the month (March). He did not do so. He did finally provide a copy of his T4 for 2007. He self-disclosed expected 2008 income of about $16,115 if he qualified for employment insurance benefits, and if his income is annualized.

[25] M.H. did not file an affidavit or testify; therefore, little is know about his circumstances except as may be gleaned from his financial documents and K.S.' evidence. On those occasions when he attended court, he disclosed no health or other issues which might affect his ability to

obtain and maintain regular employment. He filed no financial statements regarding his past or present assets and liabilities. Neither did he submit past or present household budget information.

[26] Looking at M.H.'s potential 2008 income, I have considered his income earning capacity as demonstrated by his work history and what is known or may reasonably be inferred about his health, education, and skills. [See **Marshall v. Marshall** 2008 NSSC 11.] At this juncture, I see no reason to reduce his 2008 income for **CMG** purposes to something in the $16,000 range despite recent employment changes. However, the $29,00 figure submitted on behalf of K.S. is likely overly optimistic. A fair and reasonable income is $25,000 (i.e., as in 2006) which I impute to him under **CMG** section 19.

[27] I find that M.H. did not notify K.S. after February, 1998 until early 2006 of changes in his employment and/or financial circumstances as ordered. With hindsight, and recent disclosures, it is now known that he was employed in the intervening years and that his income had steadily increased by about 500%. I find that he also failed to comply with the Income Tax Assessment disclosure requirements of the order to which he had consented. I find that he paid no support during the intervening years until 2006 when an informal understanding was reached. I find that when the latter was accomplished it was done on the basis of M.H.'s <u>understated</u> annual income.

[28] I find that M.H. knew K.S.' whereabouts at all material times or could have readily determined them. That M.H. had no difficulty in making contact in 2006, when he made a conscious decision to do so, underscores the point.

[29] I find that M.H. knew or ought to have known by virtue of his 1998 court appearance, and the consent he proffered to the court, that failure to make timely disclosure could result in a retroactive order effective as of the date of any unreported changes. The court could not have expressed the consequences of non-compliance in any simpler or clearer terms.

[30] The Supreme Court of Canada decisions in **D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra, 2006 SCC 37** give direction for retroactive child maintenance claims. I will refer to it as the SCC Decision. (Any <u>emphasis</u> is mine, unless otherwise stated.) The four Alberta appeals collectively addressed the issues of enforceability and quantification of child support in situations where it was neither paid nor claimed when it was supposedly due. Two of the appeals were under the **Divorce Act**; and two were under former Alberta legislation. Two of the appeals involved claims for retroactive awards where no support payments had ever been paid by the other parent. Speaking for the majority of the court, Bastarache J. stated that the ultimate goal must be to ensure that children benefit from the support they are owed at the time when they are owed it and that any incentives for payor parents to be deficient in meeting their obligations should be eliminated.

[31] The following appears at paragraph 5 of the SCC Decision:

> ... A modern approach compels consideration of all relevant factors in order to determine whether a retroactive award is appropriate in the circumstances. Thus, while the propriety of a retroactive award should not be presumed, it will not only be found in rare cases either. Unreasonable delay by the recipient parent in seeking an increase in support will militate against a retroactive award, while blameworthy conduct by the payor parent will have the opposite effect....

[32] Later (at paragraph 38), there is this:

> **...** The contemporary approach to child support was delineated by Kelly J.A. in *Paras v. Paras*, [1971] 1 O.R. 130. In that case, the Ontario Court of Appeal established a set of core principles that has been endorsed by this Court in the past and continues to apply to the child support regime today: see *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Willick v. Willick*, [1994] 3 S.C.R. 670. These core principles animate the support obligations that parents have towards their children. They include: child support is the right of the child; the right to support survives the breakdown of a child's parents' marriage; child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and finally, the specific amounts of child support owed will vary based upon the income of the payor parent.

[33] The SCC Decision canvasses situations where retroactive awards may be ordered. They include circumstances in which there has already been a court order for child support to be paid, situations where there has been a previous agreement between the parents, and situations where there has not already been a court order for child support to be paid. In the present case a judge determined entitlement but ordered only notional support because of the payor parent's limited income.

[34] Under section 8 of the **Maintenance and Custody Act** (**MCA**), everyone who is a parent of a child that is under the age of majority is under a "legal duty to provide reasonable needs for the child except where there is a lawful excuse for not providing the same". Under section 9 of the **MCA**, upon application, a court may make an order, including an interim order, requiring a parent to pay maintenance for a dependent child. Under section 10 (1), when determining the amount of maintenance to be paid for a dependent child, the court must do so in accordance with the **Child Maintenance Guidelines** (**CMG**).

[35] The stated objectives of the Provincial **CMG** mirror the Federal objectives and also reflect those broadly stated in the SCC Decision. Under section 37 of the **MCA**, the court has authority to make an order varying, rescinding or suspending, prospectively or retroactively, an existing child maintenance order where there has been a change in circumstances since the making of the last order or the last variation order.

[36] The Supreme Court addressed the specific issues which affect retroactive child support awards starting at paragraph 85. (In the present case the status and entitlement of the child is not in issue.) Bastarache J. wrote that it may not always be appropriate for a retroactive award to be ordered, especially if the award does not resonate with the purposes behind the child support

regime. He said this would be so where the child would get no discernible benefit from the award. He added that retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. The SCC majority decision cautions that no one factor is decisive and encourages trial courts to strive for a holistic view of the matter and decide each case on the basis of its particular facts.

[37] Starting at paragraph 100 of the SCC decision, this will be found:

> 100 The defining feature linking the present appeals is that an application for child support – either as an original order or a variation – could have been made earlier, but was not. The circumstances that surround the recipient's choice (if it was indeed a voluntary and informed one) not to apply for support earlier will be crucial in determining whether a retroactive award is justified.
>
> 101 Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice: see *Chrintz v. Chrintz* (1998), 41 R.F.L. (4th) 219 (Ont. Ct. (Gen. Div.)), at p. 245. On the other hand, a recipient parent will generally lack a reasonable excuse where (s)he knew higher child support payments were warranted, but decided arbitrarily not to apply.
>
> 102 Not awarding retroactive child support where there has been unreasonable delay by the recipient parent responds to two important concerns. The first is the payor parent's interest in certainty. Generally, where the delay is attributable to unreasonableness on the part of the recipient parent, and not blameworthy conduct on the part of the payor parent, this interest in certainty will be compelling. Notably, the difference between a reasonable and unreasonable delay often is determined by the conduct of the *payor* parent. A payor parent who informs the recipient parent of income increases in a timely manner, and who does not pressure or intimidate him/her, will have gone a long way towards ensuring that any subsequent delay is characterized as unreasonable: compare *C. (S.E.) v. G. (D.C.).* In this context, a recipient parent who accepts child support payments without raising any problem invites the payor parent to feel that his/her obligations have been met.
>
> 103 The second important concern is that recipient parents not be encouraged to delay in seeking the appropriate amount of support for their children. From a child's perspective, a retroactive award is a poor substitute for past obligations not met. Recipient parents must act promptly and responsibly in monitoring the amount of child support paid: see *Passero v. Passero*, [1991] O.J. No. 406 (QL) (Gen. Div.). Absent a reasonable excuse, uncorrected deficiencies on the part of the payor parent that are known to the recipient parent represent the failure of *both* parents to fulfill their obligations to their children.
>
> 104 In deciding that unreasonable delay militates against a retroactive child support award, I am keeping in mind this Court's jurisprudence that child support is the right of the child and cannot be waived by the recipient parent: *Richardson*, at p. 869. In fact, I am not suggesting that unreasonable delay by the recipient parent has the effect of eliminating the payor parent's obligation. Rather, unreasonable delay by the recipient parent is merely a factor to consider in deciding whether a court should exercise its discretion in ordering a retroactive award. This factor gives judges the opportunity to examine the balance between the payor parent's interest in certainty and fairness to his/her children, and to determine the most appropriate course of action on the facts.
>
> 105 This factor approaches the same concerns as the last one from the opposite perspective. Just as the payor parent's interest in certainty is most compelling where the recipient

parent delayed unreasonably in seeking an award, the payor parent's interest in certainty is least compelling where (s)he engaged in blameworthy conduct. Put differently, this factor combined with the last establish that each parent's behaviour should be considered in determining the appropriate balance between certainty and flexibility in a given case.

106 Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A similar approach was taken by the Ontario Court of Appeal in *Horner v. Horner* (2004), 72 O.R. (3d) 561, at para. 85, where children's broad "interests" – rather than their "right to an appropriate amount of support" – were said to require precedence; however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments: see *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Ct. (Gen. Div.)); *Whitton v. Shippelt* (2001), 293 A.R. 317, 2001 ABCA 307; S. (L.). A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support: see *Dahl v. Dahl* (1995), 178 A.R. 119 (C.A.). And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.

107 No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: see *A. (J.) v. A. (P.)* (1997), 37 R.F.L. (4th) 197 (Ont. Ct. (Gen. Div.)), at pp. 208-9; *Chrintz*.

108 On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. Whether a payor parent is engaging in blameworthy conduct is a subjective question. But I would not deny that objective indicators remain helpful in determining whether a payor parent is blameworthy. For instance, the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct. In this context, a court could compare how much the payor parent should have been paying and how much (s)he actually did pay; generally, the closer the two amounts, the more reasonable the payor parent's belief that his/her obligations were being met. Equally, where applicable, a court should consider the previous court order or agreement that the payor parent was following. Because the order (and, usually, the agreement) is presumed valid, a payor parent should be presumed to be acting reasonably by conforming to the order. However, this presumption may be rebutted where a change in circumstances is shown to be sufficiently pronounced that the payor parent was no longer reasonable in relying on the order and not disclosing a revised ability to pay.

109 Finally, I should also mention that the conduct of the payor parent could militate against a retroactive award. A court should thus consider whether conduct by the payor parent has had the effect of fulfilling his/her support obligation. For instance, a payor parent who contributes for expenses beyond his/her statutory obligations may have met his/her increased support obligation indirectly...

...

5.3.3 Circumstances of the Child

110 A retroactive award is a poor substitute for an obligation that was unfulfilled at an earlier time. Parents must endeavour to ensure that their children receive the support they deserve when they need it most. But because this will not always be the case with a retroactive award, courts should consider the present circumstances of the child – as well as the past circumstances of the child – in deciding whether such an award is justified.

111 A child who is currently enjoying a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need. As I mentioned earlier, it is a core

> principle of child support that, after separation, a child's standard of living should approximate as much as possible the standard (s)he enjoyed while his/her parents were together. Yet, this kind of entitlement is impossible to bestow retroactively. Accordingly, it becomes necessary to consider other factors in order to assess the propriety of a retroactive award. Put differently, because the child must always be the focus of a child support analysis, I see no reason to abstract from his/her present situation in determining if a retroactive award is appropriate.
> ...
> 113 Because the awards contemplated are retroactive, it is also worth considering the child's needs at the time the support should have been paid. A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her: see *S. (L.)*. This is not to suggest that the payor parent's obligation will disappear where his/her children do not "need" his/her financial support. Nor do I believe trial judges should delve into the past to remedy all old familial injustices through child support awards; for instance, hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child. I offer these comments only to state that the hardship suffered by children can affect the determination of whether the unfulfilled obligation should be enforced for their benefit.
> 5.3.4 Hardship Occasioned by a Retroactive Award
> 114 While the *Guidelines* already detail the role of undue hardship in determining the quantum of a child support award, a broad consideration of hardship is also appropriate in determining whether a retroactive award is justified.
> 115 There are various reasons why retroactive awards could lead to hardship in circumstances where a prospective award would not. For instance, the quantum of retroactive awards is usually based on past income rather than present income; in other words, unlike prospective awards, the calculation of retroactive awards is not intrinsically linked to what the payor parent can currently afford. As well, payor parents may have new families, along with new family obligations to meet. On this point, courts should recognize that hardship considerations in this context are not limited to the payor parent: it is difficult to justify a retroactive award on the basis of a "children first" policy where it would cause hardship for the payor parent's other children. In short, retroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not. Courts should be attentive to this fact.
> 116 I agree with Paperny J.A., who stated in *D.B.S.* that courts should attempt to craft the retroactive award in a way that minimizes hardship (paras. 104 and 106). Statutory regimes may provide judges with the option of ordering the retroactive award as a lump sum, a series of periodic payments, or a combination of the two: see, e.g., s. 11 of the *Guidelines*. But I also recognize that it will not always be possible to avoid hardship. While hardship for the payor parent is much less of a concern where it is the product of his/her own blameworthy conduct, it remains a strong one where this is not the case.

[38] Regarding the date for potential retroactive change, the SCC decision said a court will have four choices: the date when an application was made to a court; the date when formal notice was given to the payor parent; the date when effective notice was given to the payor parent; and the date when the amount of child support should have increased. The SCC adopted the date of effective notice as a general rule. By "effective notice", the court was referring to "any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated." Effective notice does not require the recipient to take any legal action - "all that is required is that the topic be broached". The SCC

stated that by awarding child support from the date of effective notice, a fair balance between certainty and flexibility is maintained:

> Awaiting legal action from the recipient parent errs too far on the side of the payor parent's interest in certainty, while awarding retroactive support from the date it could have been claimed originally erodes this interest too much. Knowing support is related to income, the payor parent will generally be reasonable in thinking that his/her child's entitlements are being met where (s)he has honestly disclosed his/her circumstances and the recipient parent has not raised the issue of child support.

[39] And the SCC directed that it will generally be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent. However, there is an important qualifier:

> The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. 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.

[40] The proper approach was be summarized:

> ... payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing

[41] In the present case, M.H. disregarded a Family Court order for the better part of eight years. K.S. had no idea that there had been changes in his circumstances until 2006 when he finally elected to make contact. When that occurred and when the parties discussed and informally agreed on child support arrangements, M.H. had effective notice of K.S.' intentions to secure payment. Both parties adhered to the agreement for about a year. But, there is no evidence that K.S. gave M.H. actual or effective notice in 2006 of her intention to seek review and/or payment of any support that may have been due during the intervening years - that did not happen until she launched her current application. There is no evidence that she made even the most cursory attempts to locate M.H. before 2006 or to request from him, directly or through

court processes, the information she knew she was entitled to receive. And, there is no evidence that her failure was connected to fear of recrimination, lack of financial resources, poor advice sought and received, or other good cause. Evidence of hardship experienced by K.S. or the child , past or present, has not emerged. On the other hand, there is no evidence of hardship experienced by M.H. to explain his past conduct, or potential hardship which may impact on his ability to respond to an award. There certainly is no evidence that he was (or is) financially supporting any other child(ren).

[42] I conclude that K.S. should be awarded retroactive support which should reach behind the effective date of notice to M.H.. With respect, however, I find that she unreasonably delayed bringing remedial action sooner than she did. Her delay is offset in large measure by M.H.'s unexplained, blameworthy conduct for much of the time. I exercise my discretion and order that M.H. pay to K.S. child support retroactively for the years 2004 to 2006 inclusive, plus support for 2007, including those months predating the formal application. I determine the net total arrears due and payable to be $6,855.00. (M.H. has been given credit for the money admittedly paid.) In making this award, I am cognizant that the SCC decision's "three year rule" presumptively speaks from the formal application date. K.S. shall have Judgment for this sum and may move to immediate enforcement by garnishee through MEP. Commencing effective January 1, 2008 support shall be at the rate of $216 monthly, due and payable on the first day of each month thereafter until otherwise ordered. (The current award is based on an income of $25,000 imputed to M.H..)

[43] K.S. seeks a substantial award of court costs, but stopped short of seeking a solicitor-client award. Party-and-party costs are not intended to fully indemnify a successful litigant. K.S.' fees and disbursements had climbed to over $2,500 even before the start of the hearing. I am satisfied that her legal bill would have been even higher had the file been charged out at prevailing rates. Extraordinary efforts have been devoted to locating M.H., compelling him to provide financial disclosure, and to otherwise respond to the case on the merits. K.S.' efforts were thwarted at virtually every step of the way. In the circumstances, I exercise my discretion and order that M.H. pay forthwith to K.S.' counsel in trust the sum of $1,500 in costs. This sum may be added to the Judgment when entered.

[44] So there is no ambiguity surrounding M.H. future disclosure, I order that he shall provide to K.S. before June 1st each year, commencing in 2008, with a true copy of his personal Income Tax Return (whether filed with the Canada Revenue Agency or not) and true copies of his Notices of Assessment or Reassessment upon their receipt by him.

[45] Counsel for Ms. K.S. shall submit an appropriate order.

Dyer, J.F.C.