IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: A.W.H. v. C.G.S., 2007 NSSC 181

Date: 20070615
Docket: 1201-55478, SFHD-009621
Registry: Halifax

Between:

H. (A. W.)

Petitioner

v.

S. (C. G.)

Respondent

Judge:	The Honourable Justice Beryl MacDonald
Heard:	April 16, 2007, in Halifax, Nova Scotia
Written Decision:	June 15, 2007
Counsel:	Corinne Corbett,, for the Applicant Gordon Kelly, for the Respondent

By the Court:

BACKGROUND

[1] On December 18, 2000 the Husband commenced a divorce proceeding. The Wife signed an Answer on January 22, 2001. On January 10, 2001 an Interim Consent Order was issued pursuant to a prior Maintenance and Custody Act proceeding. That order required the Husband to pay, beginning December 2000, on an income of $41,300.00, the sum of $570.00 per month for child support and $450.00 per month for spousal support.

[2] On December 19, 2006 the Wife commenced an Interim Application pursuant to the Divorce Act seeking an interim order for child support with retroactive application. In her application she recognized this was also a request that the Interim Order issued pursuant to the Maintenance and Custody Act be superceded or varied as a result. The Husband did not file a formal Reply to her application as is required by the Civil Procedure Rules. However, he responded to the application by engaging counsel, by filing an affidavit and the required financial information. It is clear upon reading his affidavit that he opposes the Wife's application and also seeks a remedy from this court to retroactively vary the previous order. Technically he should have filed a Response (Form 70.13B) to the Interim Application. The Wife is seeking costs in the amount of $250.00 because the Husband did not file that response. The suggestion is she did not know the particulars of his claim. There is also a concern about process. If the rules are ignored and there is no consequence why would anyone go through the time and expense of following the rules? the Husband's affidavit does reveal his response and his requested relief. However, there must be some consequence when rules of court are ignored without reason although in this case little prejudice was caused by this failure. I award costs of $150.00.

[3] The parties agreed that all matters relating to the original Maintenance and Custody Act application are to be incorporated into this proceeding under the Divorce Act and that the order made in this proceeding will be an Interim Order although some issues cannot be retried at the final hearing due either to the application of res judica or issue estoppel.

[4] The Husband's annual income has changed since the date of the previous interim order:

2001 $42,465.00

2002 $63,012.10

2003 $69,999.85

2004 $69,999.84

2005 $67,107.35

2006 $68,750.24

[5] The Husband's present employer has provided information indicating that his total income for 2007 will be $60,000.00.

[6] The Wife's annual income, without spousal support, in each of these years was:

2001 $26,594.00

2002 $25,150.00

2003 $26,866.00

2004 $26,281.00

2005 $28,323.00

2006 $29,332.00

[7] The parties have two children. Their son's birth date is February 27, 1985. He is now 22 years old. Their daughter will be 19 in August 2007.

[8] On June 1, 2004, the Husband unilaterally stopped paying child support for his son. He no longer considered him to be a “child of the marriage”.

[9] “Child of the marriage” is defined in the *Divorce Act.* The relevant definition for the purpose of this proceeding is a child who:

> *2(1)(b) is the age of majority or over and under their (the parents) charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.*

[10] Usually a child is considered to have withdrawn from a parents charge when he or she leaves home, obtains his or her own residence and has sufficient income to financially meet his or her basic needs. Children who are actively pursuing secondary or post secondary education are usually considered unable to withdraw from their parents’ charge. A child can lose and then regain the status of a “child of the marriage”.

DAUGHTER’S STATUS AND FINANCIAL POSITION

[11] The husband acknowledges that his daughter, because she is 18 years of age is a “child of the marriage” for whom table guideline child support is payable. Her educational expense is to be considered pursuant to Section 7 of the Child Support Guidelines.

[12] Since the fall of 2006 the daughter has been attending a university in the Halifax Regional Municipality and is residing with the Wife. The Wife did not file a Statement of Special or Extraordinary Expenses. She did however provide extensive information about her daughter’s financial circumstances in her affidavit to which she attached exhibits confirming her information. Thus far the daughter has financed her university education from a combination of student loans and savings from her summer and part time employment. The Husband argues that, with table guideline support, his daughter is able to meet her financial needs and as a result no award should be made pursuant to Section 7 . This section does direct a court to consider “the contribution, if any, from the child”.

[13] Case law across the country supports the proposition that children should make reasonable contributions towards their post-secondary educational expenses.

This requires an examination of the child's ability to do so, the source from which the contribution is to be made and the amount to be contributed. The decisions do not reflect any unanimity about whether a child must apply for a student loan and thus be supported by his or her parent only to the extent of his or her " financial deficit" after application of the amount received from the loans program. The differences appear to arise as a result of the "means of the parents". Children of affluent parents are generally not expected to incur debt in their pursuit of post-secondary education. Children from most middle class families generally must incur debt. Their parents do not have the means to personally finance their children's education.

[14] In coming to my decision I have reviewed two recent cases, *Lewi v. Lewi 2006 Carswell Ont 3214 (Ont. C.A.) and Rebenchuk v. Rebenchuk 2007 CarswellMan 59 (Man. C.A.).* These provide a comprehensive review of the principles that have been and should be applied when considering the contribution required from parents and children towards educational and living expenses pursuant to Section 3 (1) (b), 3(2) and Section 7 of the Child Support Guidelines.

[15] Section 7 (1) directs a court to examine the "reasonableness" of the child's educational expense "in relation to the means of the spouses and those of the child". I consider it therefore appropriate to look first at the amount of the expense inclusive of the child's living expenses, next at the means of the child to determine what he or she should contribute from sources other than debt instruments, and finally at the ability of the parents or a parent to contribute either in whole or in part to the remaining expense. In conducting this review I am mindful of the comment of Justice Rogers in *R.J.C. v. R.J.J. (2006) B.C.S.C. 1422 (S.C.) at para 20:*

> *Middle class parents are obligated to make some sacrifice to put their children through school and through university if that is the children's wish. This is not an obligation that requires the parents to risk foreclosure by taking on more debt than they could ever possibly repay or to sell capital assets if their estates are modest but it is an obligation that requires them to make some reasonable adjustments in their lifestyle. So, for example, if it means that they can contribute to their child's post -secondary tuition by not taking a vacation, or by not buying an expensive recreational vehicle, or by simply making some reasonable reduction in their luxury consumption, then those*

> *are sacrifices they could and should make. It is wholly unreasonable for a separated spouse to assert that her or she should be allowed to pander to a personal lifestyle preference at the cost of their child's university education. That said, there are, of course, circumstances in which it is patent that parents of modest means simply cannot afford to underwrite a bachelor's degree. In those cases it would be unreasonable for one to require the other to contribute to university expenses.*

[16] I have been provided with a copy of the daughter's assessment for her student loan. Tuition and fees are $6,153.00, books and instruments are $1,300 and living costs are $3,128.00 for a total of $10,581. Toward this expense the daughter was to contribute $2,226.00. As a result she could access funding in the amount of $8,335.00. No evidence has been provided to explain the living expense. The daughter lives at home with the wife who does not charge her daughter room and board. The wife is seeking the table guideline amount from the husband as a contribution towards this child's financial support presumably to cover the cost of shelter, food, clothing, transportation, entertainment, and personal incidentals. Because the table guideline amount is based on the total income of the payor these sums may or may not contribute substantially towards the actual cost. Perhaps this child did not borrow the full amount allotted. In any event the assessment requires that she contribute $2,226.00 towards her overall expenses, $3,128.00 of which is her "living cost". I have been given no information to determine the exact cost of her books and therefore have accepted the figure reported in the assessment. Pay stubs provided from the daughter's part time employment show a year to date total income to December 9, 2006 of $5,313.12. She has similar employment for 2007 and as a result it is not unreasonable to expect she will have a total income of $5,500.00 in 2007. The vast majority of reported decisions suggest some of a child's earnings should be retained by the child and not be assigned to cover the child's educational expense although there is an expectation that these funds will be used to contribute to the expense for clothing, transportation, room and board, if charged, entertainment and personal incidentals. In the circumstances of this child I think it appropriate that she contribute 60% of her earnings ($3,300.00) towards her educational expenses for tuition, fees and books that total $7,453.00 thus reducing these to $4,153.00. This child's living costs have been paid from her remaining earnings, table child support paid by the Husband and contribution from the wife representing her financial responsibility towards her daughter. The child has a deficit budget for her educational expense in the amount of $4,153.00.

SON'S STATUS AND FINANCIAL POSITION

[17] The parties son graduated from High School in June 2005 at the age of 20. Prior to becoming 19 in February 2004, he had struggled in school and this was known to the Husband who had met with the school guidance counselor to put in place programming that might assist his son in completing his education. Eventually the son was enrolled in the "FLEC" program, commenced in January 2004, which he successfully completed in June 2005. While enrolled in the "FLEC" program from January 2004 until his graduation, the parties son did obtain employment varying from part time in spring and fall to occasional full time hours in the summer months primarily with Murphy's On The Water. He worked from July until the end of October in 2004 when he returned to the FLEC program for the months of November 2004 to February 2005. During those months there is no evidence that he had any income. Murphy's is a seasonal business in respect to the work performed by the son and his employment generally is from on or about April/May until September/October. In 2006 he received $7.50 per hour. No evidence has been given about his 2005 rate of pay but I expect it was similar if not the same. Until his graduation in June 2005 the parties son resided with his mother. I have no total for the income earned by the son up to June 2005 but I am satisfied it was not of such an amount to justify a finding that he was self supporting and had withdrawn from his parents charge. He was on a slower path than some in obtaining his education but I am satisfied that this was not due to laziness or lack of motivation on his part. He was until June 2005 a "child of the marriage" and entitled to child support.

[18] Upon graduation in June 2005, the son had employment with Murphy's. No information has been provided about his total earnings in 2005. He did work for wages until November 2005 when he accepted an opportunity to crew on the Mar II on its sail to Cuba for refitting. He was not paid a wage but his expenses were paid by Murphy's. He returned in March 2006. He returned to work for Murphy's in May. The father suggests the son did move out of his mother's residence from approximately May until September 2005. The wife's testimony is that he moved out in the fall of 2006 until December of that year. During this time he was not earning sufficient income to support himself and she was paying many of his expenses. She does not provide any documentary evidence to support her claim. Whatever the date, there was a period of time when her son was not living in her home. The son paid her on average $200.00 per month for his room and board

when he was working and living with her and he did reimburse her for some of the expenses she paid for him when he was not residing with her. The Husband argues that by June 2005 his son had employment, may have moved from his mother's home and was sufficiently self-supporting to justify a finding that he was no longer a "child of the marriage". The trip on the Mar II was made as an independent choice by his son at a time when he should have been pursuing paid employment.

[19] On or about July 2006, if not before, the son returned to work with Murphy's with whom he remained employed until the end of September early October. Some evidence of his earnings was provided but it does not represent his total 2006 income. He has not been employed since then nor has he been enrolled in any post secondary training. In her supplemental affidavit sworn March 13, 2007, the Wife suggested that the son would be taking a number of courses such as the "Under 60 Ton" course, the Chartwork and Pilotage course and Navigation Safety Course through the Canadian Coast Guard and the Marine Emergency Duties course at Holland College in Prince Edward Island. At the date of the hearing the only opportunity he appeared to be pursuing was the "Under 60 Ton" course. He had also, at the last minute, applied to Memorial University in Newfoundland for enrollment in the Nautical Science Diploma Program in the fall of 2007. Acceptance is not guaranteed. I compare the son's situation since June 2005 to those children who take a year or more off school to travel or pursue other non employment opportunities. They are not generally considered to be entitled to receive child support while on "sabbatical" so to speak but can become entitled upon returning to educational pursuits. In this case the son did have periodic employment from which he paid his room and board. His mother's evidence is that he pays for his clothing and entertainment. His drain on her resources therefore was not extensive. He had no settled intention to pursue any particular career. He liked what he was doing. The Wife had plans for him but I am not satisfied these plans originated with her son. The son ceased to be a "child of the marriage" as at July 1, 2005. If he is accepted by Memorial University, or into any other post secondary course of studies in the reasonable future he will regain this status.

[20] The parties son has earned income at least from May until late August. A rough estimate of his earnings suggest he should be able to earn at least $4,500.00 during those months. However, during these months he must support himself since he is not a "child of the marriage". I have no evidence about what he will be able to contribute towards his educational expense should he be accepted at Memorial or into another post secondary training institution or program. Given that he lives

with the wife and has reduced expenses as a result, he should be able to contribute something. I have used a figure of $1,000.00 in order to consider various support options. The only institution about which I have some information is Memorial. His tuition would be $1,500.00 per year but he would have expenses for transportation, room and board, books, instruments, and personal expenditures. I have estimated these at $5,000.00.

CHILD SUPPORT FOR DAUGHTER AND SON

[21] The husband's income in 2006 was $68,750.00. I have used his T-4 statements because his line 150 income includes a deduction for a $996.00 business loss claimed from a sole proprietorship. The Husband did not disclose financial information relating to the proprietorship because he did not realize he had to so even though the Notices to Disclose served upon him does require this disclosure. In addition he testified that this business does not make a profit and is marginal. He has not operated it for any significant period of time. I have no other evidence about this proprietorship. I am not prepared to accept the deduction.

[22] The husband's earned income for 2007 will be $60,000.00 according to information provided by his employer with whom he has been employed since August 2006. I have not been convinced he will earn more than this amount and I have no evidence upon which to add additional income from the proprietorship nor from any other source. I have no evidence upon which to impute additional income to the husband.

[23] The husband's living expenses are an appropriate consideration when determining his "means" for a section 7 analysis or his "financial ability" for a section 3(2) analysis. His expense for shelter, food, clothing, motor vehicle expense, laundry, household supplies, insurance, are not unreasonable. His other expenses may be reduced somewhat. There is no evidence before me to suggest that he has an extravagant lifestyle. He has a partner who owns an expensive home to which he, as yet, has no title. His living expenses represent his share of the common expense and are not more than he likely would pay to rent his own apartment. He declared bankruptcy and was discharged in March 2004. Since then he has incurred further debt which he attributes to the requirement that he pay child and spousal support. Given the financial resources he has had and his expenses generally, the necessity to go further into debt since the bankruptcy is unexplained.

I have included in his budget some small amount of further debt to provide him with a line of credit and some financial flexibility. As a result I find his reasonable monthly expenses to be $2,500.00. Neither child support nor spousal support are included in this sum.

[24] I have reviewed some options in respect to the quantum of child support to be paid by the Husband under the various situations that can occur in this family both in respect to Section 3 (1) (b), 3(2) and Section 7. I have done so on the assumption he has paid spousal support as he had been ordered. Clearly if he no longer pays spousal support he will have ability to pay more as child support. It is unfortunate both of these issues were not tried at the same time but they were not and I must do the best with what I have. I attach Table 1 to outline those options.

[25] The percentage sharing of an expense pursuant to Section 7 does require that spousal support be added to the wife's income and deducted from the husband's income. The basis for my calculations are outlined in Table I attached to this decision. First I have looked at payment until the daughter reaches 19. In this situation the court is directed to apply the table amount and section 7 toward post secondary education costs. The combined total for this child support based on his 2007 annual income is $734.00 per month. With this payment his net disposable income will just provide for his reasonable living expenses, nevertheless I consider that the Husband has the means to pay this amount and he shall continue to pay this amount even if the son regains his status as a "child of the marriage". This is because the combined requirement for support of these two children using a combination of table amounts and proportional sharing pursuant to Section 7 produce amounts beyond the means of the Husband. If no table amount was paid for either child and if the parties shared the education cost proportional to income his monthly payment would reduce to $415.00 per month. This however, does not take into account the fact that both children live with the wife in the summer and the daughter lives with her throughout the year. A Section 3(2)(b) analysis suggests the maximum the husband can provide to support the children under these circumstances is $734.00 per month. The daughter alone is entitled to this amount if she is the only "child of the marriage". The addition of the son does nothing to change this situation. It merely means this amount will need to be shared between the two children. The first payment of this amount is due as at January 1, 2007 but I have calculated the payments of this amount to May 30, 2007 in my award for retroactive support. Therefore the first ongoing payment of this amount is to begin June 1, 2007.

[26] This is not the type of situation where payments can be directed to the child or the educational institution. Some of the needed support is to compensate the wife for providing a home for these children. While the daughter is under 19, $598.00 is payable to the wife as a result of the Table calculation. When she becomes 19 and if the son also attends university I am unable to suggest what amount of monthly support is to be retained by the wife as opposed to what she is to provide to the children to cover their educational expense. I also consider it important that this order be payable monthly so it is enforceable through the Maintenance Enforcement Program. I am satisfied that the wife will apply this support to advance the education of both children and that requiring a specific monthly amount to be paid to her is appropriate in these circumstances.

[27] A change in income or other circumstance may of course result in an application to vary the amount of child support to be paid by the husband. The Husband's obligation to pay support for his son is conditional upon the son passing the courses necessary for him to remain in his program of training or studies. Should he not do so, or upon graduation, support is to continue for a period of four months thereafter to provide the son time to find employment.

[28] The husband is to pay $734.00 per month to the wife as child support for their daughter and this amount shall not change when the son regains his status as "child of the marriage" unless the parties consent to a change or it is ordered changed in a subsequent proceeding because there has been a change in the circumstances of the husband, the wife or the children since the date of this decision.

RETROACTIVE CLAIMS

[29] The wife has requested that child support be recalculated from January 1, 2002 to May 30, 2007 based upon the husband's actual total income for each of those years. The husband resists this claim emphasizing the change in his son's status, the wife's delay in bringing this claim, the absence of financial hardship faced by the children, and the financial hardship he will face if he is ordered to make a retroactive payment. Before turning to an analysis of this case in light of the factors outlined in *S.(D.B.) v. G.(S.R.)et. al. , 2006 Carswell Alta 976 (SCC)* there is a practical problem that must be addressed. I have been asked to decide the appropriate amount for child support to be paid by the husband since 2002. I have

not been asked to review what he should have paid as spousal support since that time. He has paid and continues to be obligated to pay the $450 per month spousal support. His ability to pay spousal support in each of these years may only have been possible because he was not paying child support in the correct guideline amount. If I make a retroactive award by recalculating the child support owing based on his total annual income he may be entitled to pursue an application to retroactively vary downward the amounts of spousal support he has paid in those years. Perhaps the wife will pursue an application for a retroactive increase. This is the type of problem that can arise when parties do not regularly return to the court seeking a review of their circumstances. Calculations to correct the perceived deficiency may become difficult if not impossible. In this case absolutely nothing has occurred within the court system to resolve this matter after the interim order was issued in 2001. The wife suspected that the husband earned greater income than he did in 2001 but she made no formal arrangements to obtain that information although she testified she requested the information orally from the husband which he failed to provide. However, the wife acknowledged that the husband unilaterally increased the quantum of child support with increases in income although not in accordance with the Child Support Guidelines. She also was informed in December 2004 about his 2002 and 2003 income. In January 2005 she became aware of his 2004 income. Likely because the issue of spousal support is not before me neither the husband nor the wife have provided information about his and her financial circumstances for the years 2002 through 2005. I do know the husband's expenses for 2006 but I do not know the expenses of the wife. Once again I must consider this matter without information that may have been very useful.

[30] The majority in *S.(D.B.) v. G.(S.R.)et. al. supra* , confirmed that the decision to grant a retroactive award is discretionary. Justice Bastarache, writing for the majority, described the various issues and factors to be considered prior to making a retroactive award. Those are:

1) whether there is or is not an existing court order or agreement

2) status of the child/children

3) delay by the recipient in seeking the award

4) conduct of the payor parent

5) financial circumstances of the child/children

6) hardship imposed by a retroactive award

[31] The court did remove one factor that previously had been considered important - whether the recipient had gone into debt to support the children, encroached on capital assets or otherwise suffered financially in circumstances where this would have not occurred if the payor was paying the appropriate amount of support. Justice Bastarache says at paragraph 113:

> *...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.*

[32] The court did not say why this should be so but it may be an effort to encourage recipients to take some responsibility and, rather than deplete personal resources or go into debt, engage the legal process if necessary to ensure that the appropriate quantum of child support is paid.

[33] The majority decided that if a retroactive award is justified there are three possible commencement dates:

1) The date when the payor was given "effective" notice that child support or a change in child support was being requested. Effective notice "*does not require the recipient parent to take any legal action; all that is required is that the topic be broached." (para. 121)*

2) If there is delay and the matter has not been adjudicated upon, even where effective notice has been given, *"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*." (para.123)

3) However, the presence of "blameworthy" conduct by the payor will *"move the presumptive date of retroactivity back to the time when circumstances changed materially." (para. 124).* As a result, the date

> when the total income of the payor increased may be an appropriate date for the beginning of the retroactive order.

[34] The Supreme Court addressed the quantum to be awarded retroactively and agreed that the quantum must fit the circumstances. *"Blind adherence to the amounts set out in the applicable Tables is not required ---- nor is it recommended." (para.128)* The presence of undue hardship can yield a lesser award and there is a suggestion that undue hardship calculations required by section 10 of the child support guidelines are not required to make this finding. Sections 3(2), 4 and 9 are other areas where there is discretion to determine quantum. The majority also suggested courts could affect the quantum of awards by

> *"altering the time period that the retroactive award captures. .....For instance, where a court finds that there has been an unreasonable delay after effective notice was given, it may be appropriate to exclude this period of unreasonable delay from the calculation of the award." (para 130)*

[35] Justice Bastarache also said at paragraph 89 of the decision:

> *An adult, i.e., one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made. This is true, whether prerequisite not this adult should have received greater amounts of child support earlier in his/her life. Child support is for children of the marriage, not adults who use to have that status.*

[36] In this case, as a result of the decision I have made, the parties son was not a dependent child of the marriage at the time the wife commenced her application. However, I have also determined that if he follows a course of post secondary studies at University or other post secondary institution he will regain his status as a dependent child of the marriage. Applying the rationale suggested by Justice Bastarache, the wife would then be entitled to seek retroactive support for her son. This would seem to be an odd result. If she should have received this money for her son's support his entitlement at the time of the application should be irrelevant. However, Justice Bastarache's decision on this point relates primarily to jurisdiction and not to the result. If the court had jurisdiction to make a retroactive

order for an adult child, the discretion given to a court to consider factors such as delay may ultimately lead to no award. What Justice Bastarache's decision makes clear is that jurisdiction to make the award is a prerequisite. The Divorce Act confers jurisdiction upon the court to make orders for the support of "children of the marriage" as defined by section 2(1):

> *The question then arises when the "material time" is for retroactive child support awards. If the "material time" is the time of the application, a retroactive child support award will only be available so long as the child in question is a "child of the marriage" when the application is made. On the other hand, if the "material time" is the time to which the support order would correspond, a court would be able to make a retroactive award so long as the child in question was a "child of the marriage" when increased support should have been due. (para 88)*

[37] Justice Bastarache decided the "material time" is the time of the application and as a result I dismiss the wife's application for retroactive support for the parties' son.

[38] While there is no jurisdiction to retroactively increase the amount to have been paid for a child who is an adult at the time of the application, is there authority to retroactively decrease the amount payable because the child has become an adult? This may also be considered to be a retroactive award. This problem does not appear to have been considered by the Supreme Court. Based on the court's reasoning one might conclude there is no jurisdiction to retroactively vary in either situation. However, a determination that child support for a child should terminate at some prior date is not a retroactive award. It is a finding that nothing at all should have been paid for that adult child. The court continues to have the jurisdiction to determine a child's status at any time. Who is to bear the economic consequences of this determination in respect to support paid while the child was an "adult" has also been considered to be in the discretion of the court. I do consider it appropriate to give some relief to the husband and as a result I have not calculated any support owing for his son after June 1st, 2005.

[39] In this case there was an existing court order. I have no evidence that the children suffered any economic deprivation as a result of their father's failure to pay the appropriate amount of child support. They did work while going to school

but I have no evidence that they would not have done so if the appropriate child support had been paid.

[40] The husband experienced a significant increase in his income in 2002. He did increase his child support payment but the increase was not in accordance with what was required pursuant to the table amount of the child support guidelines. The records provided by the wife from the maintenance enforcement program show that the husband first increased the amount of total support payable by him beginning with his payment on March 15, 2002. He did so again beginning with his payment on April 15, 2003 and again with the payments beginning May 15, 2004 until July 15, 2004 when her reverted to the original amount required by the interim order presumably on the basis that his son no longer was entitled to receive child support. The wife did know that the husband had experienced increases in his income. I am not satisfied that her delay in formally seeking an increase has been adequately explained. She would have been aware that the husband had declared bankruptcy from which he was discharged in March 2004. She would have understood the financial circumstances that existed at the time the parties separated. She is of limited financial means and the combination of these factors may have discouraged her from applying to increase child support. However, she is intelligent and capable. She did understand that child support should increase with income. Her failure to take any formal measures may have lulled the husband into believing his increases were satisfactory and she was taking into consideration his known economic circumstances by not pressing him to strictly adhere to the guidelines.

[41] While the husband had on occasion increased child support he also chose to decrease it unilaterally and he stopped paying support for his son altogether at a time when he was not entitled to do so. He made no formal application to vary child support. He resented two vacations his son took using money he saved and reduced his support on those occasions. Several of his cheques over the years were returned N.S.F. and he did not replace them. His behaviour in respect to paying child support is not blameless. I do note however that his income is now reduced from what it was and that his borrowing power to pay a retroactive award is somewhat limited.

[42] Table 2 is a calculation of the difference between what the husband paid and what he should have paid pursuant to the table guideline if a retroactive award could be made for both the son and the daughter. (I did note some discrepancy in

the information about the husbands payments in 2007.) The delay by the wife in bringing a formal action and the husband's present economic circumstances argue against a retroactive award going back as far as 2002. The husband's conduct, his significant increases in income and his means to pay something towards a retroactive award, if only by using a debt instrument, argue in favor of the award.

[43] I have no convenient mathematical formula to calculate a retroactive award factoring out what might have been paid for the son but cannot because he was not a child of the marriage when the wife commenced her application. The husband remains obligated to pay any "arrears" owing for support for him pursuant to the Maintenance and Custody Act Order but that amount may be reduced from the time when the son lost his status as a child of the marriage.

[44] After considering all of the circumstances, I have determined the husband should pay retroactive child support based upon the amounts owed from January 1, 2006 until May 30, 2007 for a total amount of $6,848.00.

[45] In the child support amounts shown as paid by the husband on Table 2 are credit for cheques that were returned N.S.F. These represent outstanding payments still owed to the wife and they must be reimbursed. From the information provided it appears the total owing in this category is $2,367.00.

[46] I reserve jurisdiction to resolve any mathematical errors if any are reflected in this decision. Counsel for the wife is to prepare the order.

[47] Neither party has spoken to the issue of costs. If costs are requested written submissions are to be provided to this court by the wife, with a copy to the husband 14 days after the date of this decision. The husband's submissions are to be provided, to this court with a copy to the wife, within 10 days of the receipt of the wife's submissions. If the husband has raised an issue in his submissions not considered in the wife's submissions she may file a further submission addressing those issues within 5 days of receiving the husband's submissions.

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Beryl MacDonald, J.

Table 1 (a)

Child Support Payment Options			
Imput Information			
2006	Husband's Income for Table	$68,750.00	
	Husband's Income for Section 7	$63,350.00	64.60%
	Wife's Income for Table	$29,332.00	
	Wife's Income for Section 7	$34,732.00	
	Wife's Spousal Support	$5,400.00	
2007	Husband's Income for Table	$60,000.00	
	Husband's Income for Section 7	$54,600.00	61.10%
	Wife's Income for Table	$29,332.00	
	Wife's Income for Section 7	$34,732.00	
	Wife's Spousal Support	$5,400.00	
2006	Daughter's Education Expense after her contribution	$4,153.00	
2007	Daughter's Estimated Education Expense after her contribution	$4,153.00	
	Son's Estimated Education Expense after his contribution	$5,500.00	
2006/ 2007	Husband's Reasonable Living Expenses per month	$2,500.00	

Table 1 (b)

Year	Table	Section 7	Remaining Monthly NDI to Husband
2006 at Sept 1st One child in Univ.	$598.00	$224.00	$2,866.00
2007 One child in Univ.	$523.00	$211.00	$2,500.00
2007 Two children in Univ., Two table	$851.00	$491.00	$1,892.00
2007 Two children in Univ., one table	$523.00	$491.00	$2,220.00
2007 No Table share Education Expense only		$491.00	$2,743.00

* When a child does not live at home the table amount often considered inappropriate but it may be for the summer months. In addition Sec. 3 (2) (a) permits of such an analysis which maybe useful in applying an overall amount to contribute pursuant to Section 3 (2) (b).

Table 2

Child Support comparison of amounts paid versus amounts required based upon Husband's total annual income					
Factors Considered: Previous Order:					
				Monthly	Yearly
2001	Husband's annual income				$41,300.00
	Child Support (2 children)			$570.00	$6,840.00
	Spousal Support			$450.00	$5,400.00
There were	From 2001 until July 1, 2005 - 2 children				
There was	From July 1, 2005 - 1 child				
Year	Annual Income	Table Monthly	Table Yearly	Child Support Paid (Total Less Spousal)	Difference
2001	$42,465.00	$585.00	$7,020.00	$6,840.00	$180.00
2002	$63,012.00	$838.00	$10,056.00	$7,450.00	$2,606.00
2003	$69,999.00	$915.00	$10,980.00	$6,746.00	$4,234.00
2004	$69,999.00	$915.00	$10,980.00	$7,314.00	$3,665.00
2005 to June 30 .... from July 1	$67,107.00	$883.00 $545.00	$5,298.00 $3,270.00	$7,350.00	$1,218.00

2006 to Apr 30 .... from May 1 .... from Sept 1 Table + Sec. 7	$68,750.00	 $556.00 $598.00 $822.00	 $2,224.00 $2,392.00 $3,288.00	 $3,445.00	 $4,459.00
2007 Jan 1 - May 30 Sec 3 (2)	$60,000	 $734.00	 $3,670.00	 $1,281.00 *	 $2,389.00 *
TOTAL					$18,751.00
*Amounts paid need to be rechecked. Information about 2007 suggested either $1,281 or $1,861 was paid					