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ANNOTATIONS AND ARTICLES/ANNOTATIONS ET ARTICLES

CASES REPORTED/DÉCISIONS PUBLIÉES

(CASES REPORTED CONTINUED ON THE BACK COVER)

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Case Comment on *S. (D.B.) v. G. (S.R.)* and *W. (L.J.) v. R. (T.A.)*

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I represented the two appellants in *S. (D.B.) v. G. (S.R.)*, 2005 ABCA 2, 2005 CarswellAlta 18, 7 R.F.L. (6th) 373 (Alta. C.A.) and *W. (L.J.) v. R. (T.A.)*, 2005 CarswellAlta 22, 9 R.F.L. (6th) 232 (Alta. C.A.). In this case comment, I am just going to use the word "retroactive" notwithstanding that it is a misnomer, as pointed out the Ontario Court of Appeal in *Horner v. Horner*, 2004 CarswellOnt 4246, 6 R.F.L. (6th) 140 (Ont. C.A.), at para. 79. It is a misnomer because it is not as though the payor is "being asked, after the fact to assume a liability for child support which he did not have in the first instance." I also want to point out that *S. (D.B.) v. G. (S.R.)* and *W. (L.J.) v. R. (T.A.)* were heard by one appeal panel, *Henry v. Henry*, 2005 ABCA 5, 2005 CarswellAlta 17, 7 R.F.L. (6th) 275 (Alta. C.A.) by another, and that Justice Paperny sat on both panels. In effect, there were five appeal Justices ruling on the issue of retroactive child support.

In my view, and that of the four Justices on the majority of the Court of Appeal, both parents have a responsibility to adjust their child support contribution *as a matter of course* when Guidelines incomes change. However, getting an order for retroactive child support after the fact is still not a sure bet because the Court of Appeal could not formulate a better test than the old list of factors to be considered by the Justice at first instance when exercising his or her discretion in deciding whether to grant a retroactive order. During my appeal hearing there was much talk back and forth about formulating a test for retroactive applications that would create certainty, as much certainty as there is for prospective child support applications. But the best test we have at this time is still a list of factors and judicial discretion. However, I have to hand it to Justice Paperny for doing her best to try to change the mindset of lower court Justices in how they use their discretion on retroactive child support applications.

Family-law lawyers are very well acquainted with the vagaries of the exercise of discretion. *S. (D.B.)* and *W. (L.J.)* are good examples because the two Justices at first instance refused to grant support retroactively even back to the date negotiation commenced or the applications were filed. These two Justices exercised their discretion in favor of the payors notwithstanding directions from the Alberta Court of Appeal in *Hunt v. Smolis-Hunt*, 2001 CarswellAlta 1357, 20 R.F.L. (5th) 409 (Alta. C.A.) about negotiation and commencement dates, and the "rule" in *Ennis v. Ennis*, 2000 CarswellAlta 79, 5 R.F.L. (5th) 302 (Alta. C.A.) about the filing date being the commencement date. I asked myself why does the Court contradict itself by first harping on family-law lawyers to negotiate and resolve disputes outside of court if possible, then later penalize clients

for not having immediately rushed into court. With all due respect to the dissent reasons of Justice Hunt, it is unprincipled discretion, and the contradictions resulting therefrom, which "reduce respect for the legal system."

Application to the *Haisman* rule

For those readers outside Alberta, *Haisman v. Haisman*, 1994 CarswellAlta 179, 7 R.F.L. (4th) 1 (Alta. C.A.) is a 1994 Alberta Court of Appeal decision which stands for the proposition that child support arrears cannot be vacated unless there was "past inability to make child support payments as they became due" and the payor "cannot pay and will not in the future be able to pay the arrears". I want to take this opportunity to reflect on how the *Haisman* rule and *S. (D.B.)* apply to payors whose guideline incomes were set too high.

Justice Paperny did not consider this scenario in her reasons on *S. (D.B.)* and *Henry*, but it was argued in Edmonton by myself and the two counsel who appeared for the Respondents before the Edmonton appeal panel. In my factums, I had suggested that this may be the appropriate time for the Court of Appeal to create a universal set of rules, or factors, that would apply to applications brought by both payors and recipients of child support.

During that full day of argument before the panel, my colleague Crystal Thompson brought up the *Haisman* rule and questioned whether *Haisman* applied to retroactive variation applications being brought by the payor for a credit.

Madam Justice Paperny clarified for Ms. Thompson that the *Haisman* scenario is "fundamentally different" from the scenario in which a payor had overpaid child support. *Haisman* dealt with a payor whose child support obligation was clear and had been correctly established. Then, the payor, having accumulated substantial arrears, sought to vacate those arrears. In contrast, where there has been an overpayment, the child support obligation was not set correctly.

I have run into this situation with a person who is self-employed through a closely held corporation, and for the past year and a half has paid child support on a Guideline income set at trial which is roughly double the income more recently established by an accountant retained for the purpose of providing expert evidence to correctly establish Guideline Income. The payor was self-represented at trial, and did not at that time have the resources to get the evidence necessary to prove his income was falling.

In the past year and a half, this payor did not accumulate any arrears because he borrowed money from his new spouse and extended family to faithfully make the required child support payments every month. Some of the money from his new spouse comes out of the child support she receives for the children she brought to the relationship. This payor's biggest fear has been that if he had any arrears, his ex-wife would garnishee the bank account through which he operates

his business as she had done once before, resulting in bounced checks to suppliers. Child support is not being paid through the Maintenance Enforcement Program.

Madam Justice Hunt commented at para. 61 of her dissent in *Henry* that a retroactive adjustment downwards by the payor would be totally unfair to the recipient who had "already organized his or her life relying on the receipt of payments based on a higher payor income". Justice Hunt further added that "the payor has unique knowledge of his or her own financial circumstances and could apply to reduce child support immediately upon a decrease in income."

With all due respect, self-employed payors must wait for their annual corporate financial statements to be prepared, then reviewed by a specialist accountant, before they have the evidence necessary to establish their Guidelines income at the correct level. They are never in a position to reduce child support *immediately* upon a decrease in income.

Justice Paperny had discussed the issue of delay in her decision on *S. (D.B.)*. In my opinion, the delay experienced by the payor in the above scenario is completely explainable and excusable.

But delay is only one factor in the list set out in Justice Paperny's majority decision. More problematic is the factor of respect for existing orders and certainly in law. At para. 101 of her decision in *S. (D.B.)*, Justice Paperny commented on the issue of reliance on an existing order. She noted that "policy concern that a retroactive order undermines certainty in law would prefer certainty to fairness to children." She then went on to comment that the certainty aspect lies in the method of calculation, not that the amount ordered is final, "further, in any event, the certainty objective in the context of child support is not certainty that an amount agreed on or ordered will always be the amount payable. That would be finality not certainty. The certainty aspect is how the amounts are calculated and awarded."

If certainty lies in the method of calculation, then this factor should weigh in favor of the payor applying for a credit on past overpayment.

In summary, I believe that the factors and principles elaborated by Justice Paperny should be applied universally to all applications for retroactive variation of child support, whether the application is brought by a recipient or payor. It does not make any sense to have separate sets of rules. The judicial discretion we must still contend with on retroactive variations must be open-minded enough to deal with scenario I have just described, and not simply say that *Haisman* is the law for all payors until the Court of Appeal rules directly on that point.