
CANADA / JUDGMENT

D.L.D. v. R.A.G.

2010 BCSC 1080

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1080 D.L.D. v. R.A.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.L.D. v. R.A.G.,

2010 BCSC 1080

Date: 20100730

Docket: F990704

Registry: Vancouver

Between:

D.L.D.

Plaintiff

And

R.A.G.

Defendant

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Appearing on her own behalf:

D.L.D.

Counsel for the Defendant:

K.M. Lai

Place and Date of Hearing:

Vancouver, B.C.

March 8 and 12, 2010

Written submissions of the defendant received April 12, 2010

Written submissions of the plaintiff received April 30, 2010

Place and Date of Judgment:

Vancouver, B.C.

July 30, 2010

- [1] The parties were formerly wife and husband. They have filed cross-applications to vary an order that the father pay child support for their two children.
- [2] The father applies to retroactively vary the September 3, 2002 order of Justice Shaw (the "Order") for the years 2004 to 2009 on the basis that his income decreased in 2004 and 2005. He initially filed his application in 2006. He seeks to have the 2004-2005 maintenance payable accord with the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines], but also pleads undue hardship with respect to the years 2006 to 2009. Further, he asks that arrears be cancelled.
- [3] Justice Shaw awarded less child support than prescribed by the Guidelines to account for the father's increased access costs after the mother moved to Ontario. The mother filed an application on February 20, 2009, to have the child support retroactively increased to the Guidelines amount for the three years that she was in Ontario because the father failed to exercise his access and for the years 2006 to 2009. She opposes the father's undue hardship claim. She also requests ongoing maintenance in accordance with the Guidelines including certain extraordinary expenses.
- [4] The mother also sought further production of financial information but I am satisfied that the information before the Court is sufficient and there is no need to further delay this already overly delayed application. Updated information would not contribute meaningfully to its resolution.

Background

- [5] The parties married on July 22, 1995, and divorced on December 3, 2002. They have two children, A.A.D., born in November 1995, and A.D., born in March 1997, who reside with their mother.
- [6] The father has three other children. He had K.G. with his first wife in Jamaica in September 1989, D.R.M. with C.M. in July 2000, and A.T. with his current spouse, J.T., in May 2006. There is an existing order that the father pay child support of \$143 per month to C.M. for D.R.M.

[7] The incomes of the parties over the past six years have been as follows:

Year

Mother

Father

2004

\$1

\$14,862

2005

\$4,679

\$1,133

2006

\$48,852

\$16,863

2007

\$67,599

\$27,453

2008

\$69,488

\$38,049

2009

\$75,374

\$44,095 (based on pay stub as 2009 tax filing not made)

[8] At the time of the Order in 2002, the father was earning \$37,000 per year working for Brinks Canada. The Guidelines amount was \$525 per month but, as noted, Justice Shaw reduced support to \$300 per month due to the father's high access costs. The mother had moved to Ontario in order to attend the University of Waterloo, where she earned a bachelor's degree.

- [9] In 2003, Brinks Canada asked the father to obtain a psychiatric evaluation as he was suffering from stress and anxiety that was affecting his work. By August 2003, he was on a leave of absence receiving short-term disability benefits. By February 2004, he was collecting Employment Insurance sickness benefits. Brinks Canada terminated his employment in 2005.
- [10] The mother disputes that the father's unemployment arose from his medical condition. She asserts that he was terminated for failing to comply with his employer's requests for medical reports. While there is some evidence of this, I am not satisfied on a balance of probabilities that this was the case.
- [11] The mother also asserts that in 2005, when the father's reported income was only \$1,133, he was working under the table. She notes he voluntarily paid maintenance totalling \$985.50 during that year. The father denies earning any additional income and there is insufficient evidence to establish that he did.
- [12] Other than the \$985.50 paid in 2005, the only child support payments the mother has received since 2002 have been those recovered through the efforts of the Family Maintenance Enforcement Program ("FMEP"). As of April 8, 2010, the father still owed \$7,338.20 including interest and fees.

Child Maintenance from 2006 to the Present

- [13] The father applied to vary the Order on February 16, 2006. The application has a somewhat tortured history and is only now before the court for hearing. Without venturing into the details, the hearing has been delayed for a number of reasons including changes of counsel, delayed production of financial information, adjournments, interim orders and an appeal of an interlocutory order arising from the mother's erroneous understanding of her financial disclosure obligations under the Guidelines.
- [14] I am, therefore, satisfied that the application to retroactively vary the child maintenance from 2006 to the present does not raise the same issue of cancelling arrears as does the application for the period of 2004 to 2005. Had this application been dealt with when it was commenced, only the months of January and February 2006 would have been in arrears.
- [15] The mother seeks an order that the father pay Guidelines maintenance from January 1, 2006, to the present. Based on the father's income, the amounts under the Guidelines would have been:

Year

Income

Guideline Amount

January-April 2006

May-December 2006

\$16,863

\$239

\$267

2007

\$27,453

\$432

2008

\$38,049

\$584

2009

\$44,095

\$670

[16] Normally, aside from the issue of retroactivity, this would be the end of the matter and the father would be required to pay the Guidelines amounts. However, the father has made a claim of undue hardship.

Undue Hardship

[17] Section 10 of the Guidelines states:

10. (1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

10. (2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

....

(c) the spouse has a legal duty under a judgment, order or written separation agreement to support any person;

(d) the spouse has a legal duty to support a child, other than a child of the marriage, who is

(i) under the age of majority,

[18] Consideration of an undue hardship claim involves a two-step analysis. In *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528, 64 B.C.L.R. (3d) 94 (C.A.), the court stated:

- [45] The undue hardship test under s. 10 is two-fold. The spouse applying for relief under this section must prove that payment of the table amounts would cause undue hardship under s. 10(1) having regard to the criteria in s. 10(2). If this test is met, the applicant must go on to establish that, if required to pay the amount of maintenance otherwise payable under the guideline table, the standard of living of his or her household would be lower than that of the household of the other spouse. If this dual test is met, the court has a discretion to award a different amount of maintenance than that otherwise required under the Guidelines.
- [19] Justice Prowse then explained what constituted undue hardship at:
- [51] Since the basic tables were designed to be a "floor" for the amount of maintenance payable, rather than a ceiling, it is not surprising that the authorities have held that the threshold for a finding of undue hardship is high. . Hardship is not sufficient; the hardship must be "undue", that is, "exceptional", "excessive" or "disproportionate" in all of the circumstances. The onus is on the party applying under s. 10 to establish undue hardship; it will not be presumed simply because the applicant has the legal responsibility for another child or children and/or because the standard of living of the applicant's household is lower than that of the other spouse. The applicant must lead cogent evidence to establish why the table amount would cause undue hardship.
- [20] The court in *Van Gool* at para. 48 referred to *Swift v. Swift*, [1998] O.J. No. 501 (C.J. Gen. Div.), in which Justice Robertson commented:
- [5] Undue hardship is a tough threshold to meet. Payment of child support is often seen as a financial hardship by the payor and the new family. It generally consumes a large portion of much needed cash or discretionary income. The payment of the guideline amount will rarely be a hardship that is undue in the legal sense.
- [6] Synonyms for undue include: excessive, extreme, improper, unreasonable, unjustified. It is more than awkward or inconvenient. The application of the guidelines may result in interference with existing financial planning strategy in many payor families.
- [21] The Concise Oxford Dictionary, 11th ed., defines "exceptional" as "unusual; not typical." It defines "excessive" as "more than is necessary, normal, or desirable." "Disproportionate" is defined as "too large or small in comparison with something else."
- [22] The language in these definitions clearly suggests that in order to find undue hardship there must be a deviation from what would be considered normal or reasonable. Thus, in *Sutton v. Sutton*, 1999 CanLII 6318 at para. 13 (B.C.S.C.), Master McCallum stated that "[e]vidence of hardship might include evidence of having to move from one's accommodation, give up a vehicle, operate on a restricted diet and so forth."
- [23] The court must balance the interests of those dependent upon the payor's income. As explained in *Reid v. Nelson* (2002), 30 R.F.L. (5th) 153 (Ont. C.J.):

- [27] All of the father's children deserve and are entitled to his support, regardless to which family they belong. In a second-family situation, I would expect clear and cogent evidence, not conjecture or speculation, from which an inference could reasonably be made that the children in the second family would suffer from some significant deprivation, should a table amount of support be ordered for the child of the first relationship. By this, I mean food, clothing, shelter or some medical or other health need.
- [24] The father submits that the term "disproportionate" requires the court to compare the payor's circumstances, in particular net disposable income, to those of the recipient's. I disagree. As noted in *Chong v. Chong* (1999), 47 R.F.L. (4th) 301 at para. 25 (B.C.S.C.):

It seems clear from these decisions that the terms "exceptional", "excessive", and "disproportionate" used to qualify the term "undue" only relate to the payor's circumstances. To suggest these terms involve a comparison of the payor's circumstances with those of the recipient's would defeat the objectives of the Guidelines and the presumptive rule in s. 3 (1) that the amount of child support ordered shall be the amount set out in the Tables.

And, as pointed out in *Matthews v. Matthews* (2001), 14 R.F.L. (4th) 129 at para. 11 (Ont. S.C.J.), the circumstances set out in s. 10(2) of the Guidelines each relate to the payor's circumstances and, as such, the recipient's circumstances are not relevant to a determination at the first stage. Therefore, the term "disproportionate" invites a comparison of the Guidelines amount to the payor's circumstances: *Harder v. Harder*, 2000 BCSC 347.

- [25] During an analysis of the facts in this matter, certain principles must be kept in mind. In *R.D.O. v. C.J.O.*, 2003 BCSC 804, 40 R.F.L. (5th) 329, Justice Martinson said:
- [31] Using a purposive approach to statutory interpretation, the undue hardship section of the Guidelines should be interpreted in light of: the principle stated in the Divorce Act that parents have a joint financial obligation to maintain their children in accordance with their relative abilities to contribute to the performance of that obligation; and the objectives of the Guidelines, and in particular the objective of establishing a fair standard of support for children that ensures that they continue to benefit from the financial means of both parents after separation.
- [32] Looked at in that manner, the undue hardship section of the Guidelines is designed to provide relief to parents who have made every effort to meet their child support obligations, but who, for reasons of undue hardship, have been unable to do so. Parliament could not have intended to provide relief to parents who have wilfully ignored their child support obligations. Providing relief in those circumstances would be not only contrary to the principle underlying the enactment of the Guidelines and the objectives of the Guidelines, but contrary to public policy.

[Emphasis in original.]

Is the Father's Hardship "Undue"?

- [26] The father submits that he has met the first part of the test since he has a legal duty to support children under the age of majority. For one of his children, D.R.M., there is an outstanding maintenance order and he has an obligation to support his child from his current relationship, A.T. He also states that, when he can, he forwards money to support his oldest child who is 21 and resides in Jamaica, although that is not pursuant to any legal obligation.
- [27] In considering the issue of undue hardship, a payor must identify the hardship. The father's evidence is that he is having difficulty meeting his financial commitments. Essentially, he claims that he cannot afford to pay child maintenance even in the amount of the existing Order.
- [28] In 2006 the father's income was \$16,863. His living expenses, according to his financial statement sworn that year, were \$22,755.36. Those expenses do not appear excessive. In 2007 his income was \$27,453. Assuming his expenses were similar to his 2006 expenses, his income that year was sufficient to meet his needs. In 2008 his income was \$38,049. Including his child maintenance obligations, his annual expenses were \$32,967. In 2009 his income was \$44,095. He shows expenses, including the garnishment for current support payments and arrears of \$900 per month, of \$45,530.88.
- [29] The father deposes that he and his current spouse buy the cheapest food available on sale, rely on the food bank to supplement this, and barely have any money left for clothing. It is significant that he provides for his present family yet has made almost no voluntary payments to support his two children that are the subject of this application.
- [30] In my opinion, the application of the concept of "undue hardship" must be informed by the subject matter: a child's right to support and the joint obligation of the child's parents to provide it. But for the separation of the parties, the father would undoubtedly have ensured that his children had a home and food was on the table. The fact that the parties have separated does not change such priorities.
- [31] The father's cable expense is currently \$50 per month, the internet fee is \$50 per month and telephone expenses are \$90 per month. He proposes to cancel his cable and internet. The father and his current spouse also maintain two vehicles at a cost of between \$380 and \$445 per month.
- [32] The fact that the father experiences some financial restrictions or hardship does not mean he suffers from undue hardship. He now acknowledges having to economize; however, the fact is he continues to incur expenses for two cars, internet and cable while not voluntarily paying support for his children. He still claims it is reasonable for his family to have two cars because he and his spouse "have different working schedules and have to juggle taking care of two children in their household". Yet, while having two cars may be convenient, there is no evidence that he could not rely upon public transportation.

- [33] The father entered into a fourth relationship and had a fifth child knowing of his existing obligations. Because of this, as the court in *Jackson v. Holloway* (1997), 161 Sask. R. 31, 35 R.F.L. (4th) 272 at para. 19 (Q.B.), pointed out, the father "has an obligation and is expected to organize his affairs with due regard to that obligation." While the father relies on the fact that he did not intentionally have all of his children, as noted by the court in *Reid*:
- [24] That a subsequent child was unplanned is not all that relevant. Most adults know the kind of activity that results in conception of children and this father evidently engaged in that activity, at least twice, aware that he had a prior child that resulted from the same type of pastime.
- [34] Garnishment proceedings were commenced against the father in 2007. His arrears have been reduced from a high of \$18,699 in October 2007 to \$6,138.20 plus default fees of \$1,200 as of April 8, 2010. Notwithstanding the monthly garnishment, the father appears to be meeting his obligations with respect to his present family although he has incurred some debt. I also note the father provided no evidence that he has asked FMEP to review the amount being garnished, provided for in s. 13.1 of the Family Maintenance Enforcement Regulation, B.C. Reg. 19/2009, because he can no longer meet his basic needs for food, clothing and shelter.
- [35] I am not satisfied that the father has met the criteria for undue hardship based on the test set out in *Van Gool* with respect to both the existing Order and the Guidelines amounts from 2006 onwards.
- [36] In addition, during the first four-and-a-half years of the Order, the father only paid \$985.50 in 2005. No partial payments were made during any other year. From 2007, payments have only been pursuant to FMEP actions. I can only conclude that the father has wilfully chosen not to meet his obligations. As well, he is apparently entitled to a tax refund for 2009 but has failed to file his return, presumably because any refund will be sent to FMEP. As previously noted, by *Martinson J.* in *R.D.O.* the undue hardship section is designed to provide relief to parents who have made every effort to meet their obligations. Providing relief to parents who have wilfully ignored their obligations would be contrary to the purpose of the Guidelines and public policy.
- [37] Given that the father has failed to establish undue hardship, I am not required to analyse the relative standards of living of each household.

Retroactivity

- [38] The mother filed an application in February 2009 seeking to retroactively vary the existing Order on the basis that there had been a change in the children's province of residence and the father's income. I am satisfied that those constitute a material change in circumstances within the meaning of s. 17(4) of the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, and s. 14 of the Guidelines.

[39] If a change in support is granted retroactive to 2006, assuming there were no arrears, the following would occur:

Year

Father's Income

Guideline Amount

Amount Ordered

Balance due arising from variation per month

Total for years

2006

\$16,863

\$239 (Jan.-April)

\$247(May-Dec.)

\$300

-\$61

-\$33

- \$508

2007

\$27,453

\$433

\$300

+\$133

+\$1,596

2008

\$38,049

\$584

\$300

+\$284

+\$3,408

2009

\$44,095

\$671

\$300

+\$371

+\$4,452

The result would be an additional \$8,948 due over and above any arrears that remain owing.

[40] In *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, Bastarache J. stated:

133 In determining whether to make a retroactive award, a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.

[41] In applying these principles in *T.A.R. v. L.J.W.*, the majority of the Court stated:

144 In this appeal, the chambers judge considered factors that I have listed as being relevant to a decision of whether retroactive support should be granted. Perras J. seemed to attach particular significance to the hardship that could be caused by a retroactive award. This is not surprising, given that the \$15,771 sought by the mother is a very large sum to pay for a father earning around \$23,000 annually. Concerning the father's conduct, it is important that Perras J. did not find the father to be acting deceitfully. Rather, Perras J. found that he "honoured his obligation faithfully". That said, Perras J.'s prospective order clearly recognized that the father's income mandated higher child support payments than what he actually paid.

145 While he did not consider all the factors I have listed by name, I am satisfied that Perras J. took a holistic view of the matter and came to the conclusion that it would not be appropriate to order a retroactive child support award in the circumstances. For instance, he seemed to consider the father's conduct far from blameworthy. He noted that the children in question are presently living in a home with a household income "in the low \$50,000's". While there are other children from a previous relationship to support with this income, it remains substantially greater than what the father earns to help support his new spouse and her children.

[42] Applying these principles, I note that while the father is blameworthy given his failure to make even partial payments, he did begin these proceedings in 2006 to attempt to deal with his obligations. Given his current income, the relatively recent application of the mother, her greater income and the father's new family obligations, including debts incurred to support them, I am of the view that the father's obligations should not be retroactively increased for the period prior to February 2009, the date of the mother's application. The

order will therefore be retroactive to February 1, 2009.

- [43] However, the mother is also entitled to a prospective order. The child maintenance payable under the 2002 Order shall be varied to the current Guidelines amount of \$670 per month, based on the available information which indicates the father's 2009 income was \$44,095, effective February 1, 2009 and continuing on the first day of each month thereafter for so long as the children remain children of the marriage as defined by the Divorce Act.

Child Maintenance from 2002 to 2005

- [44] The mother seeks to retroactively increase the maintenance payable for the years 2002 to 2005 on the basis that the father failed to exercise access and, therefore, should not have had the benefit of the reduced maintenance payable premised on his exercising access. The Order provided that the father would bear the costs of access which was to be in British Columbia during the summer, on spring break and on alternating winter breaks, as well as in Ontario.
- [45] Typically, a parent cannot be financially penalized for failing to exercise his or her right to access. However, in this instance, the father was not paying the Guidelines amount. This amount was reduced by \$225 per month, or \$2,700 per year, on the basis of the costs the father would incur in exercising access. If the father was not going to exercise access, the children were legally entitled to receive the full Guidelines amount. If anything, the father was financially rewarded by not exercising access and the children did not benefit.
- [46] In D.B.S. at para. 106, the Court defined blameworthy conduct as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support." There is no question that the father's conduct would fit within this definition. The Court then found:

107 No level of blameworthy behaviour by payor parents should be encouraged. ... 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: [Emphasis added.]

The \$2,700 reduction per year was supposed to go towards the father maintaining contact with his children, presumably because this was in the best interests of the children. The father was not at liberty to spend the money generated from this reduction as he pleased.

- [47] The Court in D.B.S. also referred to *Tedham v. Tedham*, 2003 BCCA 600, 44 R.F.L. (5th) 204, in which the judge's interim support order was made based on incorrect financial information. The court found:

[61] The Guidelines make it clear that parents are to share the financial support of their children relative to their ability to do so. The effect of the trial judge's order in this case was to penalize Ms. Tedham and, more importantly, the children, because Mr. Tedham underestimated his income. The fact that he did so honestly cannot relieve him of his responsibility for an appropriate level of child support.

The same applies here. Even if the father honestly believed he would exercise access, when he did not, the children were penalized.

[48] However, even though I find that the father was obligated to pay the full Guidelines amount, I must consider whether I should change the Order retroactively. For the reasons set out above, with particular emphasis on the mother's delay in the bringing the application, I decline to retroactively increase the maintenance payable from 2002 to 2005.

Cancellation of Arrears/Reduction of Ordered Amount from 2004 to 2005

[49] Before assessing whether arrears should be cancelled, I note that it is unclear whether the Order was made under the Divorce Act or the Family Relations Act, R.S.B.C. 1996, c. 128. In *Weinstein v. Weinstein* (1995), 8 B.C.L.R. (3d) 23, 15 R.F.L. (4th) 353 (C.A.), the court found that an application to cancel arrears accumulated under an order for maintenance pursuant to the Divorce Act must be brought pursuant to the Divorce Act. A court has no jurisdiction to deal with the matter if it is brought pursuant to the Family Relations Act. Here, the father relied on the Family Relations Act in his notice of motion. I will proceed on that basis. If the matter was originally determined under the Divorce Act, the father could have applied to amend the proceedings. Regardless of which Act is used to determine the issue, the outcome would be the same.

[50] In British Columbia, the general principles relevant to an application for cancellation of arrears were set out in *Earle v. Earle*, 1999 CanLII 6914 (B.C.S.C.). Those that are applicable to this case are:

- a) there is a substantial onus on the applicant to show a change in circumstances;
- b) the applicant must provide full financial disclosure under oath that the change in financial circumstances was significant, long-lasting and not by choice and that efforts were made to earn money but were unsuccessful;
- c) arrears will only be cancelled if the applicant is unable to pay now and in the future;
- d) the applicant's responsibility for a second family does not relieve him of his legal obligation to support his first family;
- e) delay in enforcement is not a factor unless the applicant can show the delay has prejudiced him in a material way; and
- f) the rule against hoarding or windfalls does not apply to arrears of child support.

[51] The test for cancelling arrears of child maintenance is whether it would be grossly unfair not to do so: *British Columbia (Director of Maintenance Enforcement) v. Wiebe* (1992), 39 R.F.L. (3d) 220 at para. 21 (B.C.S.C.).

[52] The British Columbia Court of Appeal in *Luney v. Luney*, 2007 BCCA 567, 45 R.F.L. (6th) 10, stated:

[20] On appeal [in *Longstaff v. Longstaff* (1993), 86 B.C.L.R. (2d) 1], the order reducing his arrears and future support obligations was found to be unsupportable. Rowles J.A. noted for the Court:

The onus was on the respondent to show that it would be grossly unfair not to cancel or reduce the arrears. When all of the evidence is taken into account, it was not open to the chambers judge to conclude as he did that a portion of the arrears of child maintenance should be cancelled. [At para. 49.]

...

The evidence presented by the respondent was inadequate to establish a case for reduction in the arrears of maintenance. For reasons already stated, the respondent failed to show that his capacity, means, needs and financial circumstances had altered sufficiently from the date of the original order to merit a variation in the existing order. In particular, there was no evidence to show that the respondent had made any attempt to find any other employment. [Para. 51; emphases added.]

At para. 54, she also quoted from the judgment of Huddart, L.J.S.C. (as she then was) in *Barton v. Barton* [1985] B.C.J. No. 776 (Co. Ct.) (Q.L.) as follows:

To cancel arrears on a child maintenance order merely because that order, never sought to be varied, cannot at a moment in time be enforced, encourages a lack of diligent effort to pay in the hope that the more diligent parent will give up any attempt to enforce the order at whatever cost in lost savings and extra effort.

If the courts are to respect the principle that parents share equally the responsibility for the care of their children, no result should be permitted that gives any appearance of favouring a parent whose efforts to fulfil that responsibility have been less than those of the other who shoulders it by dint of energetic and sustained application of his or her resources. [At 10.]

[53] The Court of Appeal recently revisited the issue in *Dubreuil v. Poloway*, 2010 BCCA 297, and confirmed the test as explained in *Longstaff*.

- [54] The question then is whether it would be grossly unfair not to cancel or reduce the arrears? The father's explanation for not paying the support ordered is lack of income. It appears that, to some extent, he was disabled from working during 2004 and 2005. However, I note that in 2004 when his income was \$14,862, he did not pay anything, even though under the old tables he still would have been required to pay \$210 per month. He also has not provided satisfactory evidence of his efforts to earn income during those years.
- [55] The test enunciated in Earle is that the applicant must show an inability to pay both now and in the future. The father's inability to pay in 2004 and 2005 was remedied by his return to work in 2006. His responsibility to his new family does not relieve him of his responsibilities to his first family.
- [56] In my opinion, the father has failed to show that it would be grossly unjust not to cancel the arrears. The maintenance originally ordered was \$300 per month; the Guidelines amount was \$525. He did not expend any funds exercising access. Only \$985.50 was paid in 2005. It is troubling that he did not even make partial payments in 2004 or 2006. In my view, given his lack of effort to make some form of payment, it would be inequitable to grant him the relief he now seeks. I decline to vary the amount of the Order for the years 2004 to 2005. I also decline to reduce or cancel the arrears which began in 2002 when the father had a full-time job and still made no payments.

Special Expenses

- [57] The mother asks for an order that the father pay certain extraordinary expenses under the Guidelines. These include \$2,500 for a psycho-educational assessment for one of the children, \$2,000 per year per child for tutoring, \$1,600 for summer camp for the two children and \$600 per year for sports and recreation expenses, also for both children.
- [58] The father requests that extraordinary expenses be agreed upon before they are incurred. He did not have the opportunity to reply to the mother's last affidavit concerning these expenses; however, he objects to the need for a private psycho-educational assessment and tutoring at Sylvan Learning Centre. Given the father did not have the opportunity to file materials on the issue of extraordinary expenses and the fact that I am not satisfied on the material filed that the expenses claimed are appropriate the mother's application respecting them is adjourned generally.
- [59] The father is responsible for his share of extraordinary expenses. If the parties are unable to agree on those expenses the mother is at liberty to set the matter down for resolution of the issue of extraordinary expenses.
- [60] The parties did not address the issue of revised access terms so I make no order with respect to access.
- [61] The plaintiff has been substantially successful. Unless there are circumstances of which I am not aware she is entitled to her costs.

"Punnett J."

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