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2010 CarswellAlta 1061, 2010 ABCA 192, [2010] A.W.L.D. 3013, [2010] A.W.L.D. 3014, [2010] A.W.L.D. 3025, [2010] W.D.F.L. 3142, [2010] W.D.F.L. 3144, [2010] W.D.F.L. 3180

Hojnik v. Hojnik

Laura Lee Hojnik (Respondent / Plaintiff) and Alan Christopher Hojnik (Appellant / Defendant)

Alberta Court of Appeal

Colleen Kenny J. (ad hoc), Frans Slatter J.A., and J.D. Bruce McDonald J.A.

Heard: April 26, 2010
Judgment: June 16, 2010
Docket: Calgary Appeal 0901-0072-AC

Proceedings: reversing *Hojnik v. Hojnik* (2009), 2009 CarswellAlta 2300 (Alta. Q.B.)

Counsel: Diann P. **Castle** for Appellant

Darren M. Beattie for Respondent

Subject: Family

Family law --- Support — Child support under federal and provincial guidelines — Retroactive award

Parties were married in 1977, divorced in 2002 and had son and daughter during marriage — Father's income under Federal Child Support Guidelines at time of divorce was $120,000, and mother's was $27,784 — In December 2002, father was ordered to pay $1,528 per month to support children of marriage — Order said mother and father were to exchange tax returns in May of each year — Father's income increased over years to $200,000 in 2009 — Every year, father sent a letter to mother outlining his raise and sent post-dated cheques for increase amount but did not include bonuses in calculation — Mother and father did not exchange tax returns though mother asked — From 2004 to 2006, daughter was apprentice and made small income and father reduced support to $1050 — Mother did not say anything to father about change in support — Son was in post-secondary school away from home and father paid all school expenses plus $350-400 toward living expenses — In July 2007, Maintenance Enforcement Program advised father he was in arrears as result of his reduction in support payments — Father made application to vary divorce judgment with respect to ongoing child support for son, for finding that daughter was no longer child of marriage as of June 30 2004, to set arrears of child support if any and to set extraordinary expenses for post-secondary school, and judge held both children were children of marriage during relevant time and that father should pay retroactive child support from January 2003 — Trial judge found father's decision to unilaterally reduce child support blameworthy conduct — Father appealed judgment — Appeal allowed — Trial judge's finding that daughter was child of marriage was reasonable, however, type of

program she was in required court to consider whether amount under Guidelines was appropriate and trial judge did not do so — Mother acquiesced to change in support by her silence — Fundamentally unfair for mother to allow father to pay son's expenses and claim child support should be paid retroactively.

Family law --- Support — Child support — Duty to contribute — Child at school

Parties were married in 1977, divorced in 2002 and had son and daughter during marriage — Father's income under Federal Child Support Guidelines at time of divorce was $120,000 and mother's was $27,784 — In December 2002, father was ordered to pay $1,528 per month to support children of marriage — Order said mother and father were to exchange tax returns in May of each year — Father's income increased over years to $200,000 in 2009 — Every year, father sent a letter to mother outlining his raise and sent post-dated cheques for increase amount but did not include bonuses in calculation — Mother and father did not exchange tax returns though mother asked — From 2004 to 2006, daughter was apprentice and made small income, and father reduced support to $1050 — Mother did not say anything to father about change in support — Son was in post-secondary school away from home and father paid all school expenses plus $350-400 toward living expenses — In July 2007, Maintenance Enforcement Program advised father he was in arrears as result of his reduction in support payments — Father made application to vary divorce judgment with respect to ongoing child support for son, for finding that daughter was no longer child of marriage as of June 30 2004, to set arrears of child support if any and to set extraordinary expenses for post-secondary school, and judge held both children were children of marriage during relevant time and that father should pay retroactive child support from January 2003 — Trial judge found father's decision to unilaterally reduce child support blameworthy conduct — Father appealed judgment — Appeal allowed — Son was still child of marriage as long as he was in post secondary school — However, father was entitled to credit for school, rent and living expenses — Court ordered fresh trial on issue of reasonable support for child attending school in different city.

Family law --- Support — Child support — Duty to contribute — Child withdrawing from parental control

Parties were married in 1977, divorced in 2002 and had son and daughter during marriage — Father's income under Federal Child Support Guidelines at time of divorce was $120,000 and mother's was $27,784 — In December 2002, father was ordered to pay $1,528 per month to support children of marriage — Order said mother and father were to exchange tax returns in May of each year — Father's income increased over years to $200,000 in 2009 — Every year, father sent a letter to mother outlining his raise and sent post-dated cheques for increase amount but did not include bonuses in calculation — Mother and father did not exchange tax returns though mother asked — From 2004 to 2006, daughter was apprentice and made small income and father reduced support to $1050 — Mother did not say anything to father about change in support — Son was in post-secondary school away from home and father paid all school expenses plus $350-400 toward living expenses — In July 2007, Maintenance Enforcement Program advised father he was in arrears as result of his reduction in support payments — Father made application to vary divorce judgment with respect to ongoing child support for son, for finding that daughter was no longer child of marriage as of June 30 2004, to set arrears of child support if any and to set extraordinary expenses for post-secondary school, and judge held both children were children of marriage during relevant time and that father should pay retroactive child support from January 2003 — Trial judge found father's decision to unilaterally reduce child support blameworthy conduct — Father appealed judgment — Appeal allowed — Son was still child of marriage as long as he was in post secondary school — However, father was entitled to credit for school, rent and living expenses — Court ordered fresh trial on issue of reasonable support for child attending school in different city.

Cases considered:

Hickey v. Hickey (1999), [1999] 2 S.C.R. 518, 172 D.L.R. (4th) 577, 1999 CarswellMan 254, 1999 CarswellMan 255, 46 R.F.L. (4th) 1, 240 N.R. 312, [1999] 8 W.W.R. 485, 138 Man. R. (2d) 40, 202 W.A.C. 40 (S.C.C.) — referred to

L. (R.E.) v. L. (S.M.) (2007), 40 R.F.L. (6th) 239, 76 Alta. L.R. (4th) 47, 409 A.R. 57, 402 W.A.C. 57, 2007 ABCA 169, 2007 CarswellAlta 690, 283 D.L.R. (4th) 390 (Alta. C.A.) — referred to

S. (D.B.) v. G. (S.R.) (2006), 61 Alta. L.R. (4th) 1, 31 R.F.L. (6th) 1, 391 A.R. 297, 377 W.A.C. 297, 2006 SCC 37, 2006 CarswellAlta 976, 2006 CarswellAlta 977, 351 N.R. 201, [2006] 10 W.W.R. 379, 270 D.L.R. (4th) 297, [2006] 2 S.C.R. 231 (S.C.C.) — referred to

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — referred to

s. 2(1) "child of the marriage" (b) — considered

Limitations Act, R.S.A. 2000, c. L-12

Generally — referred to

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Federal Child Support Guidelines, SOR/97-175

Generally — referred to

s. 3 — referred to

s. 3(2) — considered

s. 3(2)(b) — considered

s. 7 — referred to

s. 7(1)(e) — considered

s. 7(2) — considered

APPEAL by father of judgment reported at *Hojnik v. Hojnik* (2009), 2009 CarswellAlta 2300 (Alta. Q.B.), concerning retroactive child support.

Per curiam:

Introduction

1 This is an application by the father to vary the Divorce Judgment with respect to ongoing child support for the parties' son, for a finding that the parties' daughter was no longer a child of the marriage as at June 30, 2004, to set arrears of child support, if any, and to set the section 7 expenses for the children's post secondary school expenses. The mother filed a cross motion to vary the quantum of child support on both an ongoing basis and retroactively to January 1st, 2003.

History

2 The parties have two children currently aged 24 and 21. The parties divorced in 2002. At the time of the Divorce, the father was ordered to pay $1,528 per month in child support for the two children, along with $60 per month in sec. 7 expenses, based on an income of $120,000 per annum. The payments were to continue until age 18, or for so long as the children continue in a recognized post secondary school full time and earn passing marks, until obtaining his or her post-secondary first degree or qualification. Section 7 expenses were to be shared proportionately and the parties were to exchange tax returns annually in May of each year. The father was to provide postdated cheques in February each year for the next 12 months.

3 Both parties' income increased. The father's income went from $120,000 in 2002 to $200,000 in 2008 and 2009. The father increased his support payments each year and advised the mother of any increases in his salary when he supplied the next 12 months worth of postdated cheques to her. The increase was calculated on his base pay but did not include bonuses. The mother's income went from $28,000 in 2002 to $80,000 in 2008 and 2009. She did not advise the father of any increase in her income.

4 In 2004, the daughter turned 18 and started at S.A.I.T. apprenticing as a cabinet maker. She went to school for 8 weeks a year and worked full-time as an apprentice the rest of the year. She earned $8,565.00 for 6 months of 2004, $13,272 in 2005 and $26,613 in 2006. The father reduced support to $1,050 in October of 2004 because in his view the daughter was working full time. He notified the mother of this and the reason for the reduction, stopped payment on the outstanding post-dated cheques, and heard nothing from her. The mother did not notify MEP at this time. Between 2004-2007, the father paid the daughter's apprenticeship fees and gave her money for car repairs, tools for her apprenticeship and other miscellaneous amounts totaling $4,970. In June of 2006, the daughter moved out of her mother's house and moved in with her boyfriend.

5 In March of 2007, the son turned 18, and was living at home with his mother. He started Mount Royal College in September of 2007. The father proposed to the mother that he would pay all of the son's post secondary school expenses plus pay to the son $350-$400 month towards living expenses no matter where he lived. The mother then sent the father a note setting out all of the tuition expenses and asked that he pay them, which he did. In September of 2008, the son moved out of the mother's house and went to the University in Lethbridge. The father found rental accommodation for him and paid $350 a month to his son for rent. He also provided additional funds to his son for living expenses.

6 In July of 2007, MEP advised the father he was in arrears as a result of his reduction in the support payments. The mother had contacted MEP in the spring of that year. MEP advised the father he was still required to pay support for his daughter back to 2004. The father paid all of the arrears prior to the hearing of this matter in 2009.

7 A *viva voce* hearing was held to deal with the father's application to vary support.

8 The trial judge found that the father's decision to unilaterally reduce support and his failure to disclose his income annually by the exchange of tax returns constituted blameworthy conduct justifying retroactive child support prior to the presumptive date of notice for making such awards. He further held that the mother's failure to provide her tax returns was not the same issue as the father's failure to do so, as he was the payor. The trial judge then set support retroactive to January 1, 2003. The Divorce Judgment was dated December 10, 2002.

9 The trial judge also found that the daughter remained a child of the marriage from 2004 to June 30, 2006. She was attending post-secondary school full-time and working toward qualification as a cabinet maker, because she was either an apprentice or in a co-op program. The trial judge acknowledged that she was earning an income but that it was not significant, and she still had to buy all of her own tools and supplies. She moved out of her mother's house and in with her boyfriend in July of 2006. Although she continued to attend school as an apprentice, the trial judge found she was no longer a child of the marriage because she moved in with someone else and was therefore not under the charge of either parent.

10 The trial judge also found the son to be a child of the marriage as he was still going to school full-time. He found that the fact the son was living on his own was different from the daughter's situation and he was therefore still a child of the marriage. The trial judge did not direct that the support to be paid directly to the son as requested by the father.

11 The father was given credit for the section 7 expenses in the nature of tuition and books for 2004 to 2006 that he had paid for the daughter, but he was not given credit for any tuition costs he paid after 2006 because the court determined the daughter was no longer a child of the marriage after that time. The father was also given credit for the section 7 expenses he had paid on behalf of the son, such as tuition, however the trial judge did not give the father credit for the rent he had paid on behalf of his son as he found that was not a section 7 expense.

12 The grounds of appeal are as follows:

> 1) The trial Judge erred in finding the daughter to be a child of the marriage from 2004-2006 while she was in the apprenticeship program.
>
> 2) The trial Judge erred by going back to January 2003 when it was the father who brought the application to vary support.
>
> 3) The trial Judge erred in finding that the father had engaged in blameworthy conduct by not providing his tax returns although the mother did not provide hers.
>
> 4) The trial Judge erred in finding that the son was a child of the marriage although he was living on his own, and in ordering the father to pay child support to the mother although the son was not living with her.
>
> 5) The Trial Judge erred in not giving the father credit for the $350 per month that he had paid for his son's rent while attending the University of Lethbridge for a 6 month period.

Neither party argued the applicability of the *Limitations Act*, R.S.A. 2000, c. L-12.

Legislation

13 The relevant legislation is as follows:

The Divorce Act sec. 2(1) "child of the marriage" means a child...who...(b) is the age of majority or over and under their charge but unable by reason of illness, disability, or other cause, to withdraw from their charge or to obtain the necessaries of life.

Child Support Guidelines

3.(2) Unless otherwise provided under these guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

(a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

(b) if the court considers that approach to be inappropriate, the amount that it considers appropriate having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

7.(1) In a child support order, the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:....

(e) expenses for post secondary education...

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

Standard of Review

14 A support order should not be overturned unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. *Hickey v. Hickey*, [1999] 2 S.C.R. 518 (S.C.C.) at para 11.

1) The trial Judge erred in finding the daughter to be a child of the marriage from 2004-2006 while she was in the apprenticeship program.

15 In July 2004, the daughter started an apprenticeship cabinet making course at S.A.I.T. She had the option to attend school for 2 years and then do on-the-job training for 2 years, or to take courses for 8 weeks each year and do on-the-job training, for which she was paid, for the other 10 months of each year. She chose the latter. The father was of the view that his daughter was not attending school full time as required under the Divorce Judgment, but rather that she was working full-time. He stopped paying support for her. The trial judge found that she was attending school full time and working towards a qualification as contemplated under the Divorce Judgment and the Divorce Act.

16 The trial Judge's finding that the daughter was still a child of the marriage between 2004 and 2006 is reasonable. She was still in a full-time program of education working towards a certificate in cabinet making.

The fact that the program entailed on the job training in addition to course work does not necessarily detract from the fact that she was attending school full-time. Many programs these days entail some portion of on the job training.

17 Pursuant to section 3(2) of the Child Support Guidelines, where a child is over the age of majority, the court must consider whether the amount as set out in the guidelines is appropriate, and if not then the court must look at the circumstances of the child and the ability of each parent to contribute to the support of the child.

18 The daughter earned significant income for a student from 2004-2006. She also earned a scholarship for her program. She lived at home with her mother. The type of program she was enrolled in where she was able to work 10 months of the year, along with the income she was earning each year, clearly required the court to consider whether the amount under the guidelines, as if she were a child under the age of majority, was appropriate. That analysis was not done by the trial judge. We are of the view that the guideline amount was not appropriate in the circumstances of this case. One must then look at the circumstances of the child and the ability of each parent to contribute to the support of the child.

19 Support under section 3 of the Guidelines is intended to help defray the cost of having to support children in a manner relative to the incomes of the parties. The support is intended to cover things such as the incremental cost of food, utilities, housing, transportation, and clothing which would be incurred by the custodial parent over and above his or her own costs. In this case the mother had no mortgage on her house, she was earning between $54,000 and $72,000 per year during this period, she was receiving child support for the parties' son, and the daughter was earning significant income. The mother would not have had to cover any of the daughter's entertainment, travel, clothing or personal expenses. Her incremental costs would have been for things like food and utilities. Given the income earned by the daughter, the Court would be entitled to examine whether it was reasonable for the mother to allow her to live rent free. In the appropriate case, the child's income might be such that even though the child is a full-time student, some contribution towards rent and food might be called for.

2) The trial Judge erred by going back to January 2003 when it was the father who brought the application to vary support.

20 The agreement entered into between the parties which resulted in the wording of the Divorce Judgment was poorly drafted. It required that the father would provide to the mother 12 postdated cheques for the following 12 months in February each year, and that the parties would exchange tax returns in May of each year. There is no mention of when child support would be adjusted, but it was clearly not to be in February as the tax return would not be available at that time. Perhaps it was intended that the tax return be provided in May and then the support adjusted in February of the following year when a new series of postdated cheques were due. It was clearly not contemplated that support would be varied commencing January 1st, 2003, as that was the date the first payment was due under the Divorce Judgment.

21 What makes this case so difficult is the bonus. The father may or may not receive a bonus in any given year and he does not know the amount until he receives it. It would be extremely difficult for either party to plan with such an unknown. It was appropriate for the father to pay support on an ongoing basis based on his salary at the time. One way to deal with the bonus is to have the father pay a lump sum at the time he receives his bonus to make up the child support differential that bonus creates. This is fair to both parties but was not contemplated in this agreement. In fairness to the then counsel who drafted the agreement, the father was not employed with his current employer, and the fact of the bonuses was unknown at the time of drafting the agreement.

22 The agreement provided that guideline income be determined with reference to the father's tax returns. Those are prepared and available in April of each following year. Support is then adjusted on a go forward basis for the next year until a new tax return is available. There are cases where current income is used to set child support but this is not one of those cases. The father was following the process contemplated by the agreement between the parties in setting child support. What was not included, however, were his bonuses. Exchange of the tax returns would have ensured on a go forward basis that the child support paid the following year reflected the income earned by the father the previous year.

23 The tax returns were to be exchanged in May and therefore it is reasonable to assume that support would be adjusted commencing February 1st , 2004 based on the income disclosed in the 2002 tax return, which was filed in April 2003. The adjustments would continue to be made each February 1st thereafter reflecting the income shown on the previous tax return. The earliest possible date for retroactive arrears of child support would therefore be February 1st, 2004.

3) The trial Judge erred in finding that the father had engaged in blameworthy conduct by not providing his tax returns although the mother did not provide hers.

24 The father disclosed each year to the mother the increase in the salary he received, and paid increased child support based on that increase in salary as soon as he received it. He was not required to do that under the agreement entered into between the parties. What he did not include were his bonuses. The father started new employment in March of 2003 in which he continues to the present day. He receives bonuses each year, but they are completely discretionary and vary widely in amount. For example, his bonus in 2003 was $8,000. The father received two bonuses in 2006 totalling about $69,000.

25 The father did not provide the mother with copies of his tax returns each year as required by the Divorce Judgment. The trial judge found as a fact that the mother had asked for the tax information in some fashion each year but did not receive it. The trial judge also found that it was not relevant that the mother did not disclose her tax information each year as required because the father was the payor and therefore he had no excuse for not providing his tax returns.

26 The trial judge reviewed *S. (D.B.) v. G. (S.R.)*, 2006 SCC 37 (S.C.C.) and *L. (R.E.) v. L. (S.M.)*, 2007 ABCA 169 (Alta. C.A.) from this court. He found that not disclosing income which would alter child support was blameworthy conduct. He took the retroactive support back to January 2003 which was the effective date for support to commence under the Divorce Judgment. The Divorce Judgment, granted on December 10, 2002, set the parties' incomes and set the support to be paid, including section 7 expenses, commencing January 1st, 2003.

27 We agree that the father should have disclosed his tax returns as required in the Divorce Judgment each year. That, however, could not have been reasonably contemplated until April 2004 as the support had been set in December, 2002 for 2003 pursuant to the terms of the Divorce Judgment.

28 It has never been a justification for disobedience of a court order that some other party is also in breach of the court order. The failure of one spouse to provide tax returns does not justify the other spouse doing the same thing. In this case, as in most, the incomes of both parties were necessary to determine child support. That is because the children were over the age of 18, triggering s. 3(2)(b) of the Guidelines, and because that data is always needed under s. 7 of the Guidelines. The chambers judge was therefore entitled, on this record, to find "blameworthy conduct".

29 A finding of blameworthy conduct is not, however, the only factor that goes into determining whether support should be adjusted retroactively, and if so how far. All of the circumstances must be considered. In this case the father did not disclose his bonuses, and has not given any explanation why. He did however indicate why he had stopped paying support on behalf of the daughter (because he took the view she was not a full-time student), and the son (because he proposed to pay all of the tuition expenses, plus pay the son a monthly living allowance). Not only did the mother not object to this proposal, she acquiesced in it to a significant degree. For example, when the proposed new arrangements respecting the son were made, the mother responded by sending a note setting out all the tuition expenses, which the father paid. It was not unreasonable for the father to think that his proposal had been accepted.

30 The trial judge erred in proceeding automatically to order retroactive support merely because he had found some element of blameworthy conduct. He should have examined all the circumstances.

31 The determinative factor in this case is the acquiescence of the mother to the new proposed support arrangements made by the father. These proposals by the father and the acquiescence of the mother preclude any retroactivity earlier than the date the father received notice that these arrangements were not acceptable. This would have been when he received notice from MEP in July of 2007 that he was in arrears of support under the Divorce Judgment.

32 The father sent detailed letters to the mother about the changes he proposed in the support for the daughter and the son which included reasons why he thought this was appropriate. In the case of the son the mother responded to the letter outlining the expenses the father was to pay under his proposal. He also sent a letter to his son confirming the arrangements and paying the expenses.

33 It is fundamentally unfair for the mother to allow the father to pay these expenses and then turn around and claim that support should be paid retroactively based on the Divorce Judgment. The mother knew the father had not provided tax returns and if she was not prepared to agree to the new arrangement without seeing them, she should have done something then.

34 It is important to note that this application was commenced by the father who sought a court order confirming the arrangements he assumed had been consented to by both parties. The letter from MEP made him realize that he needed to update the court order to reflect their agreement. It was only in response to the father's motion that the mother brought her cross-application to enforce the original Divorce Judgment.

35 Separated parents should be encouraged to resolve their differences in a reasonable way. The justice system provides significant resources to help with this such as parenting after separation courses, alternate dispute resolution, dispute resolution officers, judicial dispute resolution, four way meetings, collaborative law, and the encouragement of settlement by way of costs awards. All of that effort is undermined if the courts are too quick to overturn arrangements reached by parents, even if they overlooked the need to properly document them and amend any court orders.

36 The new arrangements proposed by the father were not so unreasonable or unfair in substance, nor were they arrived at in any unfair or oppressive atmosphere such that the court should interfere. The failure to provide tax returns cannot be condoned, but both parties are equally guilty, and there are remedies available should either party wish to enforce this obligation.

4) The trial Judge erred in finding that the son was a child of the marriage although he was living on his own

and in ordering the father to pay child support to the mother although the son was not living with her.

37 The trial judge found that the son was still a child of the marriage as he was in full-time attendance at a post secondary educational institution. He found that the son's status did not change when he moved out and went to live with others in Lethbridge while he attended university there.

38 We agree that the son is still a child of the marriage as long as he continues to attend post secondary education full time, and earns passing grades, until completion of his first degree or qualification as set out in the Divorce Judgment. The trial judge erred however in not considering whether the table amount of support was inappropriate pursuant to section 3(2) of the Guidelines where the child is an adult and attending university in another city.

39 The purpose of section 3 support is to assist with the increased costs of shelter, utilities, food etc. that are incurred when a child is residing with a parent and still a child of the marriage. The mother does not incur all those additional costs while the son is not residing with her. Often a child away at university will return on weekends and holidays and over the summer break. Even when the child is away, a room in the house is held for the child. Therefore some, but not all, expenses of the household continue while additional costs incurred in living away from home must be considered. It is more appropriate in those circumstances to refer to section 3(2)(b) of the guidelines and to calculate the actual reasonable costs of the child's attendance at school in a different city, and then determine the contribution to be made to those costs by the child as well as each parent. This can take into consideration any additional costs for times the child returns home for school break or in the summers. That analysis was not done by the trial judge and the information necessary to make findings of fact on that issue was not before the trial judge. It will be necessary for that matter to return for a fresh hearing on those issues unless the parties can reach agreement themselves.

5) The Trial Judge erred in not giving the father credit for the $350 per month that he had paid for his son's rent while attending the University of Lethbridge for a 6 month period.

40 The trial Judge gave the father no credit for the rent payments, yet required him to continue to pay section 3 support to the mother for the son even though he was not living with her. Section 3 support would necessarily have included accommodation and therefore, the father would have paid that cost twice. The mother acquiesced to some extent to that arrangement and the fact remains that the payments were made to the son for legitimate living expenses that would otherwise have to be paid by the mother. The father is entitled to credit for the rent payments made, as well as the costs of tuition he has paid for the son for university, once an analysis is complete that sets out his contribution as well as that of the mother and the son to the son's support while in attendance at university in Lethbridge.

Conclusion

41 The appeal is allowed. Under the terms of the Divorce Judgment, the father's income is to be adjusted in February of each year based on the tax return filed the previous April. The claim for retroactive support will go back to August 1st, 2007. By that date the daughter was no longer a child of the marriage, so no adjustment is required to the child support payable for her.

42 Failing agreement between the parties, the matter of retroactive support from August 1, 2007 forward for the parties' son will need to go back for a new hearing with reference to Section 3(2)(b) of the Guidelines to determine the contribution to be made by each parent and the child to those costs.

Appeal allowed.

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