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Haisman v. Haisman

RHIANNON ANN HAISMAN v. MARTIN DANIEL HAISMAN

ROSALIE KAY FEHR v. BRIAN WESLEY FEHR

Alberta Court of Appeal

Hetherington, McFadyen JJ.A. and McMahon J. (ad hoc)

Judgment: July 14, 1994
Docket: Docs. Calgary Appeal 14005, 13915

Counsel: *Penny L. Pritchett*, for appellant, Martin Daniel Haisman.

Diann P. ***Castle***, for respondent, Rhiannon Ann Haisman.

Karen Tottrup, for Director of Maintenance and Enforcement Program.

David J. Salmon, for appellant and respondent by cross-appeal, Brian Wesley Fehr.

David P. Vallance, for respondent and appellant by cross-appeal, Rosalie Kay Fehr.

Subject: Family; Civil Practice and Procedure

Family Law --- Support — Child support — Duty to contribute — Means of parents.

Family Law --- Support — Child support — Enforcement of award — General.

Limitation of Actions --- Family law proceedings — Support.

Practice --- Judgments and orders — Interest on judgments — Prejudgment interest — General.

Practice --- Judgments and orders — Interest on judgments — Postjudgment interest — General.

Practice --- Costs — Scale and quantum of costs — Quantum of costs — Allowance of increased costs.

Family law — Children — Maintenance — Enforcement — Arrears — Re ferences to variation orders in s. 17 of Divorce Act applying to orders for rescission of arrears — Present inability to pay past arrears of child support not alone justifying variation order — Variation order usually to be considered only where former spouse establishing on balance of probabilities inability to pay arrears presently and in future — Neither one-year rule nor anti-hoarding rule applying to child support cases — Delay by custodial parent in attempting to collect arrears of child support not being relevant on application to vary child support order — Non-custodial parent ordered to make support payments not satisfying obligation by making payments directly to child — Court refusing to deduct amounts expended on child by non-custodial parent from payments ordered.

Family law — Children — Maintenance — Variation — Arrears — Refe rences to variation orders in s. 17 of Divorce Act applying to orders for rescission of arrears — Present inability to pay past arrears of child support not alone justifying variation order — Variation order usually to be considered only where former spouse establishing on balance of probabilities inability to pay arrears presently and in future — Neither one-year rule nor anti-hoarding rule applying to child support cases — Delay by custodial parent in attempting to collect arrears of child support not being relevant on application to vary child support order — Non-custodial parent ordered to make support payments not satisfying obligation by making payments directly to child — Court refusing to deduct amounts expended on child by non-custodial parent from payments ordered.

Family law — Children — Maintenance — Variation — Change in circumstances — References to variation orders in s. 17 of Divorce Act applying to orders for rescission of arrears — Present inability to pay past arrears of child support not alone justifying variation order — Variation order usually to be considered only where former spouse establishing on balance of probabilities inability to pay arrears presently and in future — Neither one-year rule nor anti-hoarding rule applying to child support cases — Delay by custodial parent in attempting to collect arrears of child support not being relevant on application to vary child support order — Non-custodial parent ordered to make support payments not satisfying obligation by making payments directly to child — Court refusing to deduct amounts expended on child by non-custodial parent from payments ordered.

Family law — Maintenance — Enforcement — Arrears — One-year rule not applying to spousal support order.

Family law — Maintenance — Interest on award — Section 15(1) of Judicature Act not applying to awards of maintenance made pursuant to decree of divorce — Interest on arrears of periodic maintenance to be calculated pursuant to Interest Act.

Family law — Children — Maintenance — Variation — Effect of separation agreement — Parties signing agreement to reduce court-ordered child support — Court refusing to give effect to agreement where agreement not providing appropriate level of support and mother signing because of threats made by father.

The parties in the first appeal were divorced and the father was ordered to pay the mother ongoing child support of $200 per month and spousal maintenance of $200 per month for one year. The father made very few payments and seven years after the divorce the mother took steps to enforce the support order. Three years later, the father applied pursuant to s. 17 of the *Divorce Act* for an order cancelling all outstanding maintenance arrears. He alleged that the mother had agreed that he need not continue to make the child support payments. The chambers judge concluded that there had been no change in circumstances justifying a reduction in or rescission of the arrears and refused to grant the order. She ordered interest be paid pursuant to s. 15(1) of the *Judicature Act* and the *Judgment Interest Act*. The father appealed. The parties in the second appeal were also divorced, and the father was ordered to pay $200 per month child support. They subsequently agreed in writing that the monthly payments could be reduced to $100. The father had physically abused the mother during the marriage, and the mother signed the agreement because she was afraid of the father, who threatened to take the child away from her if she did not sign. The father continued to pay $100 per month for the next ten years as well as paying

$6,000 for clothing and other items for the child. The child then moved out of the mother's home to live on the streets. Five months later the child moved into the father's home. He spent $3,000 furnishing an area for her to live in. She lived there for three months and then returned to the mother's home. The father applied for an order rescinding all outstanding arrears and varying the ongoing maintenance obligation. The chambers judge directed the parents to establish a trust fund for the child, or, alternatively, for the father to pay $8,100 against the $14,100 that was outstanding and to increase his monthly support payments to $400. The father appealed, and the mother cross-appealed, seeking full payment of arrears with interest. Because of the common issues, the appeals were heard together.

Held:

Appeals allowed in part; cross-appeal allowed.

On the first appeal, the chambers judge found that the father could have made all of the maintenance payments in question. Her comments on the relative importance of ability to pay in applications to vary or rescind child support orders were obiter dicta; she had not held that the father's inability to pay was not relevant or thereby fallen into error. The portions of s. 17 of the *Divorce Act* which refer to a variation order apply as well to a rescission order. A present inability to pay past arrears does not alone justify a variation order, although it may justify a suspension of enforcement in relation to arrears for a limited time. In the absence of special circumstances a variation order should be considered only where the former spouse has established on a balance of probabilities that he or she cannot pay and will not, in the future, be able to pay the arrears. As the father was at all times able to pay maintenance, any argument based on his inability to pay failed. The father's belief that the mother had agreed that he need not make the payments, even if accepted, would not justify an order varying or rescinding the child support order. Further, it was not in the public interest or the child's interest to excuse the father from paying all or a portion of the arrears by the application of either the one-year rule or the anti-hoarding rule. Neither rule has any application to child support orders and the anti-hoarding rule is inconsistent with s. 17(8)(*a*) of the *Divorce Act*. Delay by the custodial parent in attempting to collect arrears of child support is not otherwise relevant on an application to vary a child support order. Accordingly, the chambers judge did not err in refusing to vary the child support order because the mother had not sought to enforce the order in a timely manner. As to the spousal support order, the one-year rule has no application. Further, given the small amount of spousal support owed by the father, the application of the anti-hoarding rule did not arise on the facts of this case. Finally, interest on arrears of periodic maintenance should be calculated pursuant to the *Interest Act*. The *Judicature Act* does not apply to awards of maintenance made pursuant to a decree of divorce. Further, since the original order granting maintenance was made ten years before the coming into force of the *Judgment Interest Act*, that Act also does not apply. The chambers judge erred in the first appeal with respect to the award of interest, and the judgment should be varied accordingly.

In the second appeal, there was a change in the condition, means, needs and other circumstances of the parties and their child since the decree nisi of divorce which satisfied the requirements of s. 17(4) of the *Divorce Act*. There were no special circumstances, however, which justified an elimination or reduction in the arrears of maintenance. The parties' written agreement regarding support did not qualify as a special circumstance. An agreement between parties, particularly in relation to child support, does not bind the court. However, a judge should give effect to an agreement where it provides for an appropriate level of support. The agreement here did not represent the father's share of the joint financial obligation to support the child, given the parties' relative abilities to contribute. Moreover, given the circumstances under which the mother signed it, the chambers judge could not reasonably have given effect to the agreement. The chambers judge erred in recalculating the arrears of maintenance to take into account amounts spent by the father directly on the child. When a mother has custody of a child and the court orders the father to make support payments, it is not open to the father to make payments directly to the child instead, nor is it open to the father to claim that amounts expended on the child should be deducted from the payments he has already been ordered to make to the mother. In this case the arrears should have been reduced by three months for the period that the child lived with the father. Interest on the arrears was payable as on any other judgment debt and should be calculated pursuant to the *Interest Act*. Finally, the father should continue to pay the monthly support payments of $400 until it was determined that the child was no longer a child of the marriage within the meaning of s. 2(1) of the *Divorce Act*.

Cases considered:

Barnes v. Barnes, [1986] N.W.T.R. 376 (S.C.) — *considered*

Hamelin v. Ladouceur (1985), 46 R.F.L. (2d) 419, 61 A.R. 244 (Q.B.) — *considered*

Holt v. Thomas (1987), 51 Alta. L.R. (2d) 311, 79 A.R. 131, 7 R.F.L. (3d) 396, 38 D.L.R. (4th) 117 (Q.B.) — *considered*

Hubick v. Hubick (1987), 55 Alta. L.R. (2d) 224, [1988] 1 W.W.R. 129, 10 R.F.L. (3d) 196, 82 A.R. 321 (C.A.) — *considered*

Morgan v. Morgan (1989), 94 A.R. 79, 20 R.F.L. (3d) 12 (C.A.) — *considered*

Patton v. Reed, [1972] 6 W.W.R. 208, 8 R.F.L. 350, 30 D.L.R. (3d) 494 (B.C.S.C.) — *considered*

Pelech v. Pelech, [1987] 1 S.C.R. 801, [1987] 4 W.W.R. 481, 14 B.C.L.R. (2d) 145, 17 C.P.C. (2d) 1, 7 R.F.L. (3d) 225, 76 N.R. 81, 38 D.L.R. (4th) 641 — *referred to*

Richardson v. Richardson, [1987] 1 S.C.R. 857, 17 C.P.C. (2d) 104, 7 R.F.L. (3d) 304, 77 N.R. 1, 38 D.L.R. (4th) 699, 22 O.A.C. 1 — *considered*

Zilka v. Zilka (1978), 5 Alta. L.R. (2d) 358, 9 A.R. 27 (C.A.) — *applied*

Statutes considered:

Divorce Act, R.S.C. 1970, c. D-8

s. 11*referred to*

s. 11(2)*considered*

s. 15*referred to*

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

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

s. 17*referred to*

s. 17(1)(a)*considered*

s. 17(4)*considered*

s. 17(6)*considered*

s. 17(7)*considered*

s. 17(8)*considered*

s. 20(3)*referred to*

Interest Act, R.S.C. 1970, c. I-18

s. 13*considered*

s. 14*considered*

s. 15*considered*

Interest Act, R.S.C. 1985, c. I-15

s. 12*considered*

s. 13*considered*

s. 14*considered*

Judgment Interest Act, S.A. 1984, c. J-0.5

s. 1 "judgment"*referred to*

s. 6*considered*

s. 8(4)*considered*

Judicature Act, R.S.A. 1970, c. 193

s. 34(16)*considered*

Judicature Act, R.S.A. 1980, c. J-1

s. 15*considered*

Maintenance Enforcement Act, S.A. 1985, c. M-0.5 — *referred to*

Appeal from decision of Rawlins J. (1993), 7 Alta. L.R. (3d) 157, 137 A.R. 245, dismissing application to cancel arrears of child support; Appeal from decision of Deyell J. varying child support order and rescinding arrears of child support in part.

The judgment of the court was delivered by *Hetherington J.A.*:

1 On the 8th of November, 1982, a judge of the Court of Queen's Bench granted Rhiannon Ann Haisman a decree nisi of divorce from Martin Daniel Haisman. At the same time he ordered Mr. Haisman to pay to Mrs. Haisman:

2 — the sum of $200 each month for the maintenance of their child, and

3 — the sum of $200 each month for one year for her maintenance.

4 In 1992 Mr. Haisman applied to a judge of the court, in chambers, for an order cancelling "all outstanding maintenance arrears with Maintenance Enforcement". This appears to be a reference to maintenance arrears which Mrs. Haisman had tried to collect under the *Maintenance Enforcement Act*, S.A. 1985, c. M-0.5. The chambers judge refused to cancel these arrears ((1993), 7 Alta. L.R. (3d) 157 at 172). She found Mr. Haisman indebted to Mrs. Haisman in the full amount of the arrears of maintenance plus interest, and gave him two choices as to how he could pay this debt (at pp. 173 to 175). Mr. Haisman appealed.

5 On the 11th of December, 1978, a judge of the Court of Queen's Bench granted Rosalie Kay Fehr a decree nisi of divorce from Brian Wesley Fehr. At the same time he ordered Mr. Fehr to pay to Mrs. Fehr the sum of $200 each month for the maintenance of their child. In 1980 Mr. and Mrs. Fehr agreed that these monthly payments would be reduced to $100.

6 In 1991 Mr. Fehr applied to a judge of the court, in chambers, for an order rescinding all arrears of maintenance under the order referred to above, and varying the provisions in it for ongoing maintenance. The chambers judge directed that Mr. and Mrs. Fehr establish a trust fund for their child. If they did not agree to do this, he directed in the alternative that Mr. Fehr pay to Mrs. Fehr the sum of $8,100 on the arrears of maintenance. Since at that time the arrears totalled $14,100, it appears that he reduced the arrears by $6,000. On an ongoing basis he ordered Mr. Fehr to pay to Mrs. Fehr the sum of $400 each month for the maintenance of the child.

7 Mr. Fehr appealed. Mrs. Fehr cross-appealed. In her cross-appeal she asked for an order directing Mr. Fehr to pay the arrears in full with interest.

8 These appeals were heard together because they have some issues in common. I will, however, deal with them separately.

Haisman Appeal

9 The facts in relation to this appeal are set out in the reasons for judgment of the chambers judge at pp. 160 to 163. I will not repeat them here.

10 Mr. Haisman applied for an order cancelling "all outstanding maintenance arrears with Maintenance Enforcement". In technical terms, he asked that the chambers judge rescind or vary the order made against him in 1982, so as to eliminate the arrears with Maintenance Enforcement. During argument counsel advised us that it was not necessary to distinguish between the full arrears and the arrears with Maintenance Enforcement.

11 Mr. Haisman's application was made under s. 17 of the *Divorce Act*, R.S.C. 1985, c. D-3.4. The relevant parts of that section read as follows:

> 17.(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(*a*) a support order or any provision thereof on application by either or both former spouses; or ...

(4) Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration that change ...

(6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

(7) A variation order varying a support order that provides for the support of a former spouse should

(*a*) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(*b*) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the former spouses pursuant to subsection (8);

(*c*) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

(*d*) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

(8) A variation order varying a support order that provides for the support of a child of the marriage should

(*a*) recognize that the former spouses have a joint financial obligation to maintain the child; and

(*b*) apportion that obligation between the former spouses according to their relative abilities to contribute to the performance of the obligation.

I agree with counsel that the subsections of s. 17 which refer to a variation order apply as well to a rescission order. Rescission is, after all, a kind of variation.

12 It is important to note that unless there has been a change in circumstances, a court cannot make a variation order. This is the effect of subs. (4) of s. 17.

13 The chambers judge found that there had been no change in circumstances that would justify a reduction in, or the rescission of, the arrears of maintenance which Mr. Haisman owed to Mrs. Haisman (at p. 172). She said that Mr. Haisman was able to make the payments which he was ordered to make (at p. 173).

14 The chambers judge calculated that Mr. Haisman owed Mrs. Haisman spousal support arrears in the amount of $2,400 and child support arrears in the amount of $20,544 (at p. 173). She ordered him to pay interest on those arrears (at pp. 173, 174). With interest Mr. Haisman then owed Mrs. Haisman $36,763 (at p. 174). As I indicated above, the chambers judge gave him two choices as to how he might pay this debt.

15 Before us counsel for Mr. Haisman argued that the chambers judge erred in not considering Mrs. Haisman's means as well as those of Mr. Haisman. The simple answer to this argument is that the chambers judge

did consider Mrs. Haisman's means at pp. 160, 161 and 162.

16 The remaining arguments of counsel give rise to the following issues:

17 (1) Did the chambers judge err in finding that there had been no change of circumstances which would justify a reduction in, or the rescission of, the arrears of maintenance which Mr. Haisman owed to Mrs. Haisman, when

(a) Mr. Haisman had been unable to make the maintenance payments at times in the past, and

(b) Mr. Haisman believed that Mrs. Haisman had agreed that he need not make the maintenance payments?

18 (2) Did the chambers judge err in refusing to eliminate or reduce the arrears of maintenance because Mrs. Haisman had not sought to enforce the maintenance orders in a timely fashion?

19 (3) Did the chambers judge err in ordering Mr. Haisman to pay interest on the arrears of maintenance? I will deal with each of these issues in turn.

(1)(a) Inability to Pay

20 Counsel for Mr. Haisman argued that the chambers judge erred in holding that his past inability to pay was not relevant to the application before her. The answer to this argument is that the chambers judge did not accept that Mr. Haisman was ever unable to pay (at p. 173). There was evidence to support the finding of the chambers judge that he could have made all of the maintenance payments in question, and we cannot say that it was made in error.

21 This argument cannot, therefore, succeed. However, since the chambers judge discussed at some length the relative importance of ability to pay in applications to vary or rescind orders for child support, I will express my views on this subject as well. They are obiter dicta, as were the comments of the chambers judge. It is important to note that they relate to child support, not spousal support.

22 The decision of this court in *Zilka v. Zilka* (1978), 5 Alta. L.R. (2d) 358 (C.A.), is relevant in this regard. In that case Mr. Justice Sinclair, writing for the majority, allowed the appeal and cancelled the first two years of arrears of payments for the maintenance of Mrs. Zilka and the children of her marriage to Mr. Zilka. He did this for reasons which he expressed as follows at p. 365:

> It seems to me, with respect, that an adjustment ought to be made for a period following the granting of the decree nisi. When the decree was granted the husband's take-home pay was approximately $545 per month. He was repaying a bank loan at $115 a month, and was making monthly payments towards the purchase of an acreage. I can see how the husband could have had considerable difficulty in adjusting his affairs so as to be able to make maintenance payments of $250, satisfy costs, arrange for his own accommodation and so forth. As has already been stated, he lost his job two months after the decree nisi, and was unemployed until the fall of 1971. There is no evidence to the effect that he deliberately refrained from obtaining other employment.

23 Mr. Justice Prowse dissented. His reasons are set out at p. 371:

> I am, however, unable to agree that this is a case in which we should set aside the trial judge's decision not

to reduce the arrears of maintenance. In this regard, there was ample evidence, depending upon the view the trial judge took of the evidence as a whole, to support the following inferences:

(a) That the appellant flagrantly disobeyed the order of the court to pay maintenance.

(b) That he was prepared to lose his job rather than comply with that order.

(c) That, while refusing to comply with the court order, he used his funds to bring his parents to Canada and to contribute towards their support.

(d) That he has assets sufficient to satisfy the arrears.

(e) That any payments made by him were made in anticipation of the present application.

(f) That his past failure to comply with an order of the court does not augur well for the future.

In the circumstances, I am of the view that there are no grounds for setting aside the learned trial judge's decision to refuse to reduce the arrears of maintenance.

24 Neither Mr. Justice Sinclair nor Mr. Justice Prowse said anything of the obligation of Mr. Zilka to contribute to the support of his children. They spoke only of Mr. Zilka's ability to make the maintenance payments which he had not made.

25 It must be remembered, however, that when *Zilka v. Zilka* was decided, the only provision in the *Divorce Act* then in effect (R.S.C. 1970, c. D-8) which related to the variation or rescission of an order for maintenance, was s. 11(2). Among other things, s. 11 authorized a court granting a decree nisi of divorce to make an order requiring a husband or wife to make payments for the maintenance of any children of the marriage. Subsection (2) read as follows:

(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct *of the parties* since the making of the order or any change in the condition, means or other circumstances *of either of them*. (Emphasis added)

This subsection focussed the attention of a judge hearing an application to vary a child support order on the conduct and circumstances of the parties, that is, the former spouses, not on their obligation to their children.

26 The *Divorce Act* with which we are concerned (R.S.C. 1985, c. D-3.4), came into effect on the 1st of June, 1986 (S.I. 86-70). It contains in s. 17 the provisions quoted above relating to the variation of maintenance orders, and others which are not important here. Of particular significance so far as child support orders are concerned is subs. (8). I will repeat it here for convenience.

(8) A variation order varying a support order that provides for the support of a child of the marriage should

(*a*) recognize that the former spouses have a joint financial obligation to maintain the child; and

(*b*) apportion that obligation between the former spouses according to their relative abilities to contribute to the performance of the obligation.

This subsection focusses the attention of a judge hearing an application to vary a child support order on the parties' joint financial obligation to maintain their children. The judge must apportion that obligation between them in accordance with their relative abilities to pay.

27 I do not agree with the chambers judge (at p. 171) that the financial obligation takes precedence over the ability to pay, unless by precedence she means priority in time. Under s. 17(8) a judge must first determine the joint financial obligation of the former spouses to maintain their children. Only then can he or she apportion that obligation between them in accordance with their relative abilities to pay.

28 I do, however, agree with the chambers judge (at p. 171), if I have understood her correctly, to this extent. Where a former spouse has not been able, for relatively *short* periods of time in the *past*, to make child support payments *as they came due*, this circumstance does not justify a variation order which has the effect of reducing or eliminating *arrears* of child support.

29 Where the *past* inability to make child support payments *as they came due* has lasted for a *substantial* period of time, but the former spouse did not apply during that time for a variation order, the situation may be different. On a later application to vary, a judge will have to decide, with the benefit of hindsight, whether it would have been appropriate to suspend enforcement of the support order during the time when the former spouse was unable to pay, or whether at least a temporary reduction in the child support payments would have been in order. A judge should view with considerable skepticism any claim that a reduction in the support payments, temporary or indefinite, would have been proper. However, if he or she decides that it would, the judge may for this reason reduce accordingly the arrears of child support which have built up. In my view this is a special circumstance.

30 I wish to emphasize that the mere accumulation of arrears, without evidence of a past inability to pay, is neither a change under s. 17(4) of the *Divorce Act*, nor a special circumstance.

31 A *present* inability to pay *arrears* of child support does not by itself justify a variation order. It may justify a suspension of enforcement in relation to the arrears for a limited time, or an order providing for periodic payments on the arrears. However, in the absence of some special circumstance, a variation order should only be considered where the former spouse has established on a balance of probabilities that he or she cannot pay and will not in the future be able to pay the arrears.

32 In short, in the absence of some special circumstance, a judge should not vary or rescind an order for the payment of child support so as to reduce or eliminate arrears unless he or she is satisfied on a balance of probabilities that the former spouse or judgment debtor cannot then pay, and will not at any time in the future be able to pay, the arrears.

33 In any event, the chambers judge found that Mr. Haisman was at all times able to make the maintenance payments in question. The argument of his counsel based on his inability to pay must, therefore, fail.

(1)(b) Belief in Agreement Dispensing with Maintenance Payments

34 The chambers judge found (at p. 163) that there was not at any time an agreement between Mr. and Mrs. Haisman that he did not have to make the child support payments which he was ordered to make. However, she did not say anything of Mr. Haisman's professed belief that Mrs. Haisman had on more than one occasion agreed that he did not have to make these payments.

35 Counsel for Mr. Haisman therefore argued that the chambers judge erred in finding that there had been no change of circumstances which would justify a reduction in, or the rescission of, the arrears of child support, when Mr. Haisman believed that Mrs. Haisman had agreed that he need not make the child support payments.

36 In my view Mr. Haisman's unfounded belief that Mrs. Haisman had agreed that he need not make the child support payments, even if the chambers judge had accepted it, would not have justified an order varying or rescinding the child support order.

(2) Timely Enforcement of Maintenance Orders

37 Did the chambers judge err in refusing to eliminate or reduce the arrears of maintenance because Mrs. Haisman had not sought to enforce the maintenance orders in a timely fashion? In this regard it is important to distinguish between child support orders and spousal support orders. The law has developed differently in relation to the two. I will deal first with child support orders.

38 In her reasons for judgment (at p. 167) the chambers judge referred to what is known as the one-year rule. According to this rule, unless there are special circumstances, a court will not enforce arrears of maintenance for in excess of one year. In *Holt v. Thomas* (1987), 51 Alta. L.R. (2d) 311 (Q.B.), a case concerning child support, Mr. Justice O'Leary discussed the one-year rule at length (at pp. 315 to 318). He said (at p. 322) that he would have applied it, if it were not for special circumstances which are not important here.

39 However, a few months later in *Hubick v. Hubick* (1987), 55 Alta. L.R. (2d) 224 [[1988] 1 W.W.R. 129] (C.A.), speaking for the court (at p. 226), I quoted as summarizing the law the following passage from the judgment of Madam Justice Veit in *Hamelin v. Ladouceur* (1985), 46 R.F.L. (2d) 419 (Alta. Q.B.), at p. 422:

> I think it is tolerably clear, despite the relatively frequent use of a one-year period in Canadian jurisprudence ... that there is no "general rule" of a one-year limitation on the enforcement of arrears in Canadian jurisprudence ... *Gray v. Gray* (1983), 32 R.F.L. (2d) 438 (Ont. H.C.). Rather, as Soubliere L.J.S.C. indicated in the *Gray* case, at p. 441, where courts refuse to enforce the full amount of maintenance arrears, they are exercising, unless specific evidence is brought before them, a practical rule of thumb intended to relieve against hoarding. As has been pointed out by that learned trial judge, *even the rule of thumb had relatively little application in cases of child versus spousal support* because, while it might be accepted that a spouse could implicitly bargain away a right to support through a lack of enforcement, the same cannot be said of children. (Emphasis added)

In *Hubick* the court refused to reduce the arrears of maintenance for the child, even though those arrears were for in excess of one year.

40 In *Morgan v. Morgan* (1989), 20 R.F.L. (3d) 12 (Alta. C.A.), the chambers judge applied the one-year rule in a case involving arrears of maintenance for children. This court allowed the appeal, and refused to cancel or reduce the arrears.

41 In case there should be any remaining doubt, the one-year rule does not apply to arrears of maintenance for children.

42 However, it appears that Mrs. Haisman did not attempt to collect any maintenance arrears until 1989, seven years after the divorce. Mr. Haisman therefore argued before the chambers judge, and to some extent be-

fore us, that to require him to pay all of the arrears of maintenance for his child would be to give Mrs. Haisman an "inequitable hoarding windfall" (at p. 159). This argument refers to the rule against hoarding.

43 In *Patton v. Reed*, [1972] 6 W.W.R. 208 (B.C.S.C.), after reviewing expositions of the rule against hoarding in previous cases, Chief Justice Wilson described the rule as follows at p. 213:

> ... this rule, extraordinary to the law, is based on considerations of public policy, principally the policy of the court to refuse to impose on a delinquent husband a crippling burden to meet a purpose (the maintenance of a wife or child) which has already been met by other means.

44 I agree with the chambers judge (at p. 165) that the rule against hoarding invites a payor spouse to disobey the court order directing him to make maintenance payments. It assures him that if he can avoid making those payments for a sufficient period of time, a court will vary the order for payment so as to reduce or eliminate any arrears. I cannot understand how such a rule can be said to be based on public policy, at least where child support is concerned. How can it be in the public interest to allow a father to avoid what a court has found to be his financial responsibility to his child? If the father does not provide this financial support, someone else must do so. Usually it is the mother. Sometimes she uses money which otherwise she would have saved or used to improve her quality of life. Sometimes she gets help from her family or from friends. Sometimes she finds it necessary to go into debt. Sometimes she has to go on welfare. Why should the father not compensate her or the state? In my view, in the absence of any special circumstance, it is in the public interest to require the father to compensate whomever or whatever body has fulfilled his financial obligation to his child.

45 There may be cases where no one else has provided the financial support which the father has withheld, and the result has been that the quality of life of the child has been diminished. In such cases it may be appropriate to compensate the child. This could be done directly by payments to him or her, or indirectly by payments to the mother for the child. Child maintenance is, after all, the right of the child. (See *Richardson v. Richardson* (1987), 7 R.F.L. (3d) 304 (S.C.C.), at p. 312.)

46 The discussion above obviously assumes that the mother has custody of the child and the father has been ordered to pay child support. The situation would not be different if the father had custody and a court ordered the mother to pay child support. I think that it would then be in the public interest to require the mother to compensate whomever or whatever body had fulfilled her financial obligation to her child.

47 In *Barnes v. Barnes*, [1986] N.W.T.R. 376 (S.C.), Mr. Justice Marshall expressed similar views in the following passage at p. 379:

> In logic, I think one might add that the obligation to pay maintenance should be seen in most cases as any other indebtedness. The spouse caring for the child — in this case she has remarried, but no matter — she and her husband have had to pay both the wife's and the applicant first husband's share of raising the child. If the state had contributed, the husband should be indebted to the state; if, as here, the new family of the wife paid, he owes it to them. They have spent money that otherwise they might have saved, invested, or indeed could have spent on other things.
>
> So it seems to me that in the case at bar it is a simple debt owed here to the second family, like any other debt, and should not without good reason be interfered with.

48 I do not agree with Mr. Justice Marshall that arrears of maintenance constitute a simple or an ordinary

debt. A court cannot relieve a debtor of responsibility for an ordinary debt, as it can for arrears of maintenance under s. 17 of the *Divorce Act*. For the same reason such arrears cannot be said to be a final debt, as suggested by the chambers judge at p. 168. However, arrears of maintenance do constitute a judgment debt, and with this qualification, I agree with Mr. Justice Marshall.

49 In addition, the anti-hoarding rule is inconsistent with s. 17(8)(*a*) of the *Divorce Act*. I will repeat this subsection again for convenience:

> (8) A variation order varying a support order that provides for the support of a child of the marriage should
>
> (*a*) recognize that the former spouses have a joint financial obligation to maintain the child; and ...

A variation order that reduces or eliminates arrears of maintenance for a child because someone else has provided this financial support, does not recognize the financial obligation of the person against whom the order was made to maintain the child. Such a variation order is inconsistent with the *Divorce Act*.

50 In short, on an application to vary a child support order the rule against hoarding should not be applied. It is not in the public interest, and it is inconsistent with the *Divorce Act*.

51 Is delay by the custodial parent in attempting to collect arrears of child support otherwise relevant on an application for a variation of the child support order? In my view it is not. Very often all of the custodial parent's resources — financial, physical and emotional — are used up in caring for the child. I do not think that either parent or child should be penalized because for a period of time no attempt is made to enforce a maintenance order, even if it is a long period of time. Nor do I think that the non-custodial parent can reasonably infer from that failure to enforce that the custodial parent has waived his or her rights under the order. A failure to enforce a child support order without more is not evidence of waiver.

52 I repeat that in the absence of some special circumstance, a judge should not vary or rescind an order for the payment of child support so as to reduce or eliminate arrears unless he or she is satisfied on a balance of probabilities that the former spouse or judgment debtor cannot then pay, and will not at any time in the future be able to pay, the arrears.

53 It follows from the above that the chambers judge did not err in refusing to eliminate or reduce the arrears of child support for the reason that Mrs. Haisman had not sought to enforce the order for child support in a timely fashion.

54 I turn now to spousal support. In my view the one-year rule should not be applied to arrears of spousal support. It does not represent a reasoned response to concerns about hoarding.

55 In this case I need not consider whether the rule against hoarding should be applied on an application to vary a spousal support order. I leave that question for another day. On the facts of this case it could not apply. At the time when the court granted Mrs. Haisman a decree nisi of divorce, it ordered Mr. Haisman to pay her $200 each month for one year for her maintenance. This was clearly to enable Mrs. Haisman to re-establish herself. Mr. Haisman did not make any of these payments. Mrs. Haisman was forced to accept social assistance. She and her child have been supported almost entirely by social assistance and student loans since the divorce. Her student loan debt is approximately $25,000. The arrears of maintenance total only $2,400. There is nothing in the evidence to indicate that this is a "crippling" debt for Mr. Haisman. On the contrary the chambers judge found

(at p. 174) that Mr. Haisman's own evidence showed that he was able to pay all of the arrears of child and spousal support with interest. In these circumstances the rule against hoarding could not apply.

56 Again it follows from the above that the chambers judge did not err in refusing to eliminate or reduce the arrears of spousal support for the reason that Mrs. Haisman had not sought to enforce the order for spousal support in a timely fashion.

(3) Interest

57 The chambers judge ordered Mr. Haisman to pay interest on the arrears of maintenance as follows (at pp. 173, 174):

> ... for the period of spousal and child arrears up to March 31, 1984, I award simple interest at the rate of 11.5% for 1983 and 11% for 1984 which rates represent the average of the bank prime lending rate for the period. My jurisdiction to award such interest is found in s. 15(1) of the *Judicature Act*. For the period April 1, 1984 to November 1, 1992, I award simple interest pursuant to the *Judgment Interest Act* at the rates prescribed by the regulations for each year.

58 Section 15 of the *Judicature Act*, R.S.A. 1980, c. J-1, reads:

> 15(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.
>
> (2) Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

59 Unfortunately in *Zilka v. Zilka*, supra, this court decided that s. 34(16) of the *Judicature Act* then in effect (R.S.A. 1970, c. 193), did not apply to awards of maintenance made pursuant to a decree of divorce. The wording of s. 34(16) was identical to that of s. 15(1) quoted above. In that case Mr. Justice Sinclair, writing for the majority, found that the calculation of interest on arrears of periodic maintenance should be determined under the *Interest Act*, R.S.C. 1970, c. I-18. He said (at p. 366) in relation to s. 34(16):

> With great respect, I do not believe that the subsection applies to awards of maintenance that have been made pursuant to a decree of divorce. An award of interest under s. 34(16) is more in the nature of damages. It seems to me that the calculation of interest on arrears of periodic maintenance falls to be determined under the provisions of ss. 13, 14 and 15 of the Interest Act, R.S.C. 1970, c. I-18. These sections apply to Alberta ...

60 Sections 13, 14 and 15 of the *Interest Act* then read as follows:

> 13. Every judgment debt shall bear interest at the rate of five per cent per annum until it is satisfied.
>
> 14. Unless it is otherwise ordered by the court, such interest shall be calculated from the time of the rendering of the verdict or of the giving of the judgment, as the case may be, notwithstanding that the entry of judgment upon the verdict or upon the giving of the judgment has been suspended by any proceedings either in the same court or in appeal.

> 15. Any sum of money or any costs, charges or expenses made payable by or under any judgment, decree, rule or order of any court whatever in any civil proceeding shall for the purposes of this Act be deemed to be a judgment debt.

These sections continue in force in Alberta in respect of judgments given before the day on which s. 6 of the *Judgment Interest Act* came into force, that is, before the 1st of August, 1992 (S.C. 1992, c. 1, s. 146). They have been re-numbered and are now ss. 12, 13 and 14 of the *Interest Act*, R.S.C. 1985, c. I-15. The only way in which they have changed is that in s. 13 (previously s. 14) the word "upon" has become "on".

61 In *Zilka v. Zilka* Mr. Justice Sinclair ordered (at pp. 367, 368) that interest be calculated on each periodic payment from the date on which it should have been paid until it was paid, at the rate of five per cent, the rate prescribed in s. 13. He said it should be simple interest, not compounded. He was authorized to make such an order under s. 14.

62 Counsel for Mr. Fehr pointed out to us that the enforcement provisions of the *Divorce Act* in effect at the time when *Zilka v. Zilka* was decided (s. 15, R.S.C. 1970, c. D-8), were not the same as those in the present *Divorce Act* (s. 20(3), R.S.C. 1985, c. D-3.4). He argued that for this reason Mr. Justice Sinclair's conclusions on the subject of interest were no longer valid. However, Mr. Justice Sinclair did not rely on any provision of the *Divorce Act* in reaching his conclusions. He considered only s. 34(16) of the *Judicature Act*, now s. 15(1), and ss. 13, 14 and 15 of the *Interest Act*, now ss. 12, 13 and 14. None of these provisions has changed since *Zilka v. Zilka* was decided.

63 The decision of this court in *Zilka v. Zilka* as it relates to interest on arrears of maintenance was binding on the chambers judge. The chambers judge therefore erred in awarding interest under the *Judicature Act*.

64 The chambers judge also awarded interest under the *Judgment Interest Act*, S.A. 1984, c. J-0.5. This Act came into force on the 13th of November, 1984, after *Zilka v. Zilka* was decided.

65 The chambers judge did not say what section of the Act she relied on. However, Mrs. Haisman had not applied for variation of the orders made on the 8th of November, 1982, to provide for interest, nor did the chambers judge say that she was varying those orders. The interest which she awarded under the *Judgment Interest Act* was therefore post-judgment interest. The relevant section of the Act is then s. 6. It reads as follows:

> 6(1) In this section, "judgment debt" means a sum of money or any costs, charges or expenses made payable by or under a judgment in a civil proceeding.
>
> (2) Notwithstanding that the entry of judgment may have been suspended by a proceeding in an action, including an appeal, a judgment debt bears interest from the day on which it is payable by or under the judgment until it is satisfied, at the rate or rates prescribed under section 4(3) for each year during which any part of the judgment debt remains unpaid.

Section 1 provides that in the Act the word judgment includes an order of a court.

66 However, s. 8(4) of the Act says that "Section 6 applies only to a judgment given after section 6 comes into force." Section 6 came into force on the 1st of August, 1992. The judgment in this case was given on the 8th of November, 1982. Section 6 does not apply to it, and the chambers judge erred in awarding interest under the authority of this section.

67 I would therefore allow Mr. Haisman's appeal only in relation to the awards of interest made by the chambers judge. I would set them aside, and direct instead that Mr. Haisman pay interest at the rate of five per cent on each of the periodic payments of maintenance, from the date on which it should have been paid until it is in fact paid or otherwise satisfied. Interest will be simple interest, not compounded. This direction is in accordance with ss. 12 and 13 of the *Interest Act* and the judgment of this court in *Zilka v. Zilka*, supra.

Fehr Appeal

68 Mr. and Mrs. Fehr were married on the 29th of June, 1974. Their daughter Nicole was born on the 20th of June, 1977. While they were married, Mr. Fehr slapped and choked Mrs. Fehr.

69 On the 11th of December, 1978, a judge of the Court of Queen's Bench granted Mrs. Fehr a decree nisi of divorce from Mr. Fehr. At the same time he ordered that Mrs. Fehr was to have custody of Nicole, and that Mr. Fehr was to pay to Mrs. Fehr the sum of $200 each month for Nicole's maintenance. Mr. Fehr made these payments up to and including the month of July, 1980.

70 On the 11th of July, 1980, Mrs. Fehr signed a document in which she agreed to accept $100 each month for the support of Nicole. Mrs. Fehr signed this document because she was afraid of Mr. Fehr, and because he had threatened to take Nicole away from her if she did not. Mr. Fehr acknowledged this threat.

71 Mr. Fehr began paying Mrs. Fehr $100 each month for Nicole's maintenance in August, 1980, and continued up to and including the month of December, 1990. During this time he said that he spent in excess of $6,000 for clothing and other things for Nicole.

72 In December of 1990 Nicole left her mother's home. She lived sometimes on the streets, sometimes with Mrs. Fehr's parents, and sometimes with friends until April of 1991. At that time Mrs. Fehr made arrangements for her to participate in a substance abuse program in Provo, Utah.

73 Nicole returned in August, and went to live with her father. She remained with him until November. During this time he said that he spent approximately $3,000 to refurbish an area to accommodate her, and to buy clothes and other things for her.

74 In November of 1991 Nicole returned to her mother's home. From that time until July of 1992 she resided with Mrs. Fehr or Mrs. Fehr's mother, except for three weeks when she lived with a friend.

75 Mr. Fehr applied to the court for an order

— rescinding all arrears of maintenance under the decree nisi of divorce;

— reducing the payments which he was required to make to Mrs. Fehr for Nicole's maintenance to $100, with the provision that such payments would be made only if Nicole was living with her; and

— requiring Mrs. Fehr to pay him $200 each month for Nicole's maintenance when Nicole was living with him.

The hearing of this application commenced on October 25, 1991, and continued on June 29, 1992.

76 On the 4th of November, 1992, the chambers judge directed that Mr. and Mrs. Fehr establish a trust fund

for their child. If they did not agree to do this, he directed in the alternative that Mr. Fehr pay to Mrs. Fehr the sum of $8,100 on the arrears of maintenance. Since at that time the arrears totalled $14,100, it appears that he reduced the arrears by $6,000. On an ongoing basis he ordered Mr. Fehr to pay to Mrs. Fehr the sum of $400 each month for the maintenance of the child.

77 Mr. Fehr appealed. Mrs. Fehr cross-appealed. In her cross-appeal she asked for an order directing Mr. Fehr to pay the arrears in full with interest. Obviously they did not agree to establish a trust fund for their child.

78 In this case it is not disputed that there had been changes in the condition, means, needs and other circumstances of the former spouses and their daughter since the decree nisi of divorce was granted on the 11th of December, 1978. The requirements of s. 17(4) of the *Divorce Act* were met.

79 Counsel for Mr. Fehr argued first that the chambers judge erred in that he did not consider and give effect to the agreement signed by Mrs. Fehr on the 11th of July, 1980. It is settled law that an agreement between the parties in an action for divorce does not bind the court. (See *Pelech v. Pelech* (1987), 7 R.F.L. (3d) 225 [[1987] 4 W.W.R. 481] (S.C.C.), at p. 252). This is particularly so in relation to maintenance for children. In *Richardson v. Richardson*, supra, at p. 312 Madam Justice Wilson said:

> Child maintenance, like access, is the right of the child ... For this reason, a spouse cannot barter away his or her child's right to support in a settlement agreement. The court is always free to intervene and determine the appropriate level of support for the child ...

The chambers judge was not, therefore, bound to give effect to the agreement signed by Mrs. Fehr on the 11th of July, 1980.

80 However, a judge should consider any agreement between parents, and should give effect to it where the agreement provides for an appropriate level of support for the child. In this case it did not. Mrs. Fehr agreed to accept payments of $100 per month for the support of Nicole. It is not suggested that these payments represented Mr. Fehr's share of their joint financial obligation to maintain their child, having in mind their relative abilities to contribute to the performance of that obligation. Beyond that, Mrs. Fehr said that she signed the agreement because she was afraid of Mr. Fehr, who had been physically abusive in the past, and because he told her that if she did not, he would take Nicole away from her. Mr. Fehr admitted that he had made this threat. In these circumstances the chambers judge could not reasonably have given effect to the agreement.

81 Counsel for Mr. Fehr made a number of other submissions in support of his contention that the arrears of maintenance should be rescinded or reduced. He said that the chambers judge should have taken into consideration:

— that there was no reasonable explanation for Mrs. Fehr's delay in enforcing her rights under the maintenance order;

— that Mr. Fehr complied strictly with the maintenance order until July 11, 1980, and thereafter complied strictly with the agreement signed by Mrs. Fehr;

— that for a period of time Mr. Fehr had "limited ability to pay as a result of low income"; and

— that there was no evidence to suggest that Mrs. Fehr actually needed maintenance.

I have dealt with all of these arguments in connection with the Haisman appeal. Once again, in the absence of some special circumstance, a judge should not vary or rescind an order for the payment of child support so as to reduce or eliminate arrears unless he or she is satisfied on a balance of probabilities that the former spouse or judgment debtor cannot then pay, and will not at any time in the future be able to pay, the arrears. Were it not for the threatening atmosphere surrounding the signing of the agreement by Mrs. Fehr, a judge might have considered it to be a special circumstance.

82 In this case it is not suggested that Mr. Fehr cannot pay the arrears. Counsel for Mrs. Fehr contended, therefore, that the chambers judge erred in reducing the arrears from $14,100 to $8,100. The chambers judge did not say why he did this. However, the fact that he reduced the arrears by $6,000 suggests to me that he accepted Mr. Fehr's evidence that he had spent in excess of that sum on clothes and other things for Nicole. The chambers judge appears to have rejected the suggestion that Mr. Fehr's expenditures in refurbishing his house to accommodate Nicole should also be taken into consideration.

83 In short, it appears that the chambers judge did not reduce the arrears of maintenance. He decided that they had been wrongly calculated in that no allowance had been made for money that Mr. Fehr spent on Nicole. This was an error.

84 When a mother has custody of a child and a court orders the father to make payments to the mother for the maintenance of that child, it is not open to him to make payments to the child instead. Nor is it open to him to buy things for the child and to claim that the amounts which he spends in this way should be deducted from the maintenance payments which he was ordered to make to the mother. In neither case has he complied with the order of the court. Further, the mother, as the custodial parent, is entitled to decide how maintenance payments for the child will be spent.

85 If this were not so, a father could, for example, buy expensive skis for his child, and then reduce his maintenance payments by the cost of the skis. The mother would then be left to find the money to house and feed the child without any help from the father. This cannot be right.

86 The situation would, of course, be the same if the father had custody of the child, and the mother was ordered to make child support payments to him. She could not deduct from those payments amounts of money given to the child or spent on things for the child.

87 It follows that the chambers judge erred in fixing the arrears of maintenance at $8,100. That does not mean, however, that they should be left at $14,100. There is a special circumstance in this case. It is my understanding that, with the consent of Mrs. Fehr, Nicole lived with Mr. Fehr from August to November of 1991, a period of approximately three months. It would not be right for Mr. Fehr to make child support payments to Mrs. Fehr for the time when Nicole was living with him. The sum of $600, representing arrears for three months, should therefore be deducted from the sum of $14,100.

88 I would therefore allow the cross-appeal of Mrs. Fehr, set aside the order of the chambers judge so far as it relates to arrears of maintenance, and direct that Mr. Fehr pay to Mrs. Fehr arrears in the amount of $13,500.

89 Mr. Fehr should pay interest on these arrears as he would on any other judgment debt. I would therefore direct that Mr. Fehr pay interest at the rate of five per cent, in accordance with ss. 12 and 13 of the *Interest Act*, on each of the periodic payments of maintenance which he was required to make, from the date on which it should have been paid until it is in fact paid or otherwise satisfied. Interest will be simple interest, not compoun-

ded. Sections 12 and 13 of the *Interest Act* apply in this case, and s. 6 of the *Judgment Interest Act* does not, because the judgment in question, that is, the decree nisi of divorce, was given on the 11th of December, 1978, before s. 6 came into force on the 1st of August, 1992.

90 The chambers judge directed that Mr. Fehr make monthly payments to Mrs. Fehr for Nicole's maintenance in the amount of $400. These payments were to commence on the 1st of November, 1992, and to continue until Nicole is 18. The amount of these payments is not in dispute. Counsel for Mr. Fehr argued that he should not have to make any child support payments because Nicole was no longer a child of the marriage as that phrase is used in the *Divorce Act*.

91 Section 2(1) of the *Divorce Act* defines the phrase "child of the marriage" as follows:

> 2.(1) In this Act ...
>
> "child of the marriage" means a child of two spouses of former spouses who, at the material time,
>
> (*a*) is under the age of sixteen years, or
>
> (*b*) is sixteen years of age 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 ...

92 We have no way of knowing whether Nicole is now a child of the marriage or not. She is certainly over sixteen. However, she may not be able to withdraw from the charge of her parents. On the 4th of November, 1992, when the chambers judge granted the order under appeal, Nicole was 15 years of age. She was then clearly a child of the marriage. The order of the chambers judge relating to ongoing maintenance should not, therefore, be set aside. If Nicole is no longer a child of the marriage, Mr. Fehr can apply in the Court of Queen's Bench for a variation order.

93 Since Mrs. Fehr has had the greater success both before the chambers judge and on appeal, I would direct that Mr. Fehr pay her costs of the proceedings both in the Court of Queen's Bench and in this court on a party-party basis.

Appeals allowed in part.

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