Child Support Variation in Alberta: What a General Practitioner Needs to Know

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I. INTRODUCTION:

The purpose of this paper is to give general practitioners an overview of the elements to be considered to effectively apply for or defend against a child support variation application. This presentation has in mind lawyers who do not specialize in family law and who may be retained from time to time to advise on and apply to vary child support. Many LESA papers and presenters have treated various aspects of this topic in much greater detail. This paper will firstly review the statutory jurisdiction of the court to vary child support, secondly point out some procedural requirements to apply for or defend against an application to vary child support and thirdly, to briefly summarize how courts in Alberta are currently treating applications to change child support. The term "variation" and "change" will be used interchangeably. The term "court" will refer primarily to the Court of Queen's Bench as most recorded cases arise from that court, though the statutory law of child support variation in the *Family Law Act* is applied in both the Court of Queen's Bench and the Provincial Court.

II. THE STATUTORY JURISDICTION OF THE COURT TO VARY CHILD SUPPORT

The general jurisdiction of the court to grant and by extension, to change child support is a creature of statute. The Court of Queen's Bench has jurisdiction to vary child support under s.17 of the *Divorce Act* and s.77 of the *Family Law Act*. The Provincial Court takes its jurisdiction to change child support only under s.77 of the *Family Law Act*. ***Schedule 'A'*** attached sets out the referenced statutory provisions.

A. The *Divorce Act*, s.17

S.17 allows the court not only to change or to vary a support order (child or spousal) but also to "rescind" or "suspend" a support order whether "prospectively" or "retroactively". In the writer's experience, practitioners are well familiar with the power of the court to change child support whether "prospectively" or on a go-forward basis or retroactively but it is less common to see applications to suspend the payment of child support. This is perhaps because it has become axiomatic that child support is the "right of the child": ***DBS v. SRG; LJW v. TAR; Henry v. Henry; Hiemstra v. Hiemstra***, 2006 SCC 37. Child support is for example, paid out when there is entitlement to it. When entitlement ceases, support is terminated such as, typically, where a child has withdrawn from the charge of his or her parents after turning 18, or is working and not pursuing full-time post-secondary studies. [1] Counsel should consider applying to "suspend" child support in appropriate circumstances. A discussion of the various circumstances when child support may be

suspended is beyond the scope of this paper. One such circumstance may be in the case of children over the age of maturity who are pursuing full-time post-secondary studies which may be interrupted for one reason or another. For example, it may be arguable that s.3 child support or s.7 expenses for post-secondary education may be suspended if that child takes a year off from studies pending that child's resumption of studies at a later date.

In the writer's view, the s.17(3) "terms and conditions" section gives latitude to the creativity of counsel to have the court specify circumstances when support (child or spousal) should be paid or when it may be reconsidered or even terminated. This provision allows a court to specify circumstances that make up either a material change in circumstances or when support may be reviewed even without a material change in circumstances. The writer discussed this subject in the context of variation of spousal support in a recent paper for the LESA Child and Spousal Support 2017 program. [2] It is possible for counsel to agree or to obtain a court order specifying a pre-determined future event upon which the child support may either be varied or reviewed. It is also possible to specify if quantum, duration or both may be varied or reviewed. Such a term may be included in an interim order as well as a corollary relief order in a divorce judgment as a cost-effective means to achieve resolution. In that way, the cost and long delay of a family Law Special Chambers hearing may be avoided. After the specified event arises, the lower cost and far shorter delay of a subsequent family application in regular Family Chambers represents a significant savings of time and cost to the client.

S.17(6.2) gives the court the ability to award a child support amount that is different than the applicable Guideline amount if the court is satisfied that "special provisions" in an order, judgment, or agreement have been made for the benefit of the child and that using the applicable Guideline amount would produce a result that is unfair or inequitable given those special provisions. The writer submits that this gives counsel and the court wide latitude to present circumstances that support departures from the Guidelines if, fundamentally, the court is satisfied that the special provisions or arrangements "directly or indirectly" benefit the child.

S.17(6.4) allows parties through their counsel to craft a consent order that may fix an amount of child support different than the applicable Guidelines if the court is satisfied that "reasonable arrangements have been made for the support of the child".

B. *Family Law Act,*

S.77(2) reflects s.17(1) of the *Divorce Act* and allows the court to vary, suspend or terminate a support order either retroactively or on a go-forward basis. However, s.77(3) by reference to s.50(1),