
DIGEST

FAMILY LAW

CHILD SUPPORT – The appellate court erred in awarding retroactive child support to the mother.

Appeal by the mother and cross-appeal by the father from a decision setting the amount of child support the father was required to pay for two children. The parties separated in 1999 after a 21-year marriage. The father originally paid \$1,500 per month in child support. A consent variation order was entered into between the parties in 2003, which increased child support to \$6,000 per month. That amount was increased to \$13,776 per month after the mother discovered that the father's income between 2002 and 2005 exceeded \$1 million. In 2007, the mother again applied to vary support retroactively because of an increase in the father's income. The judge chose to average the father's income for 2005 through 2007 because the highest income figure was completely out of line with his earnings in all other years and was attributable to the sale of business assets. The father was required to pay retroactive support of \$115,334 for 2005, \$161,480 for 2006, and he was entitled to set off an overpayment of \$57,480 for 2007. The judge reduced the father's ongoing support obligation to \$8,986 per month.

HELD: Appeal dismissed. Cross-appeal allowed in part. The judge was correct in finding the father's actual income for the years 2005 through 2007 was not the best way to determine his support obligation for each year, given the exceptional fluctuation in his income caused by the non-recurring gains he received when he sold off the assets of his business. The judge was entitled to use the method he considered fairest to determine the father's support obligations for those years. The judge erred in applying the *Guidelines* amount for support where the father provided evidence the support he was paying was not needed by or being used for the children. The father's support obligation for the years 2005 through 2007 was set at \$13,776, which amount the mother had received. The father

therefore owed no retroactive support.

Ewing v. Ewing, [2009] A.J. No. 712, Alta. C.A., per Conrad J.A. (Brooker J.A. and Erb J. (ad hoc) concurring), June 30/09. Digest No. 2913-012 (Approx. 17 pp.)