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COURT OF APPEAL FOR ONTARIO

CATZMAN, DOHERTY and LASKIN JJ.A.

B E T W E E N :	)	
	)	
R.	)	Lorne H. Wolfson and Andrea Himel
	)	for the appellant
Applicant	)	
(Appellant)	)	
	)	
- and -	)	
	)	Thomas G. Bastedo, Q.C. and Samantha
R.	)	Chousky for the respondent
	)	
Respondent	)	Heard: November 8, 2001
(Respondent in appeal)	)	

On appeal from the judgment of Justice J. Cavarzan dated July 11, 2000, reported at (2000), 10 R.F.L. (5th) 88.

LASKIN J.A.:

A. INTRODUCTION

[1] In 1997, the Federal Government established the Federal Child Support Guidelines (the "Guidelines"), which prescribe the amount of child support a parent must pay on separation or divorce. These Guidelines have achieved a highly desirable measure of fairness, objectivity and consistency in child support orders. With some very limited exceptions, a paying parent with an income of $150,000 or less pays a basic amount of child support equal to the table amount set out in the Schedule to the Guidelines. But if a paying parent's income is over $150,000, the court has a wider discretion in making a child support award. For these high income earners, if the court concludes that the table amount is inappropriate, it has discretion under s. 4 of the Guidelines to substitute an

amount that it considers appropriate. Cases of high income earners have on occasion caused difficulty for the courts. This is one of those cases.

[2] Mr. and Mrs. R. separated after eight years of marriage. They have four young children. After separation, Mr. R.'s income doubled to over $4.1 million annually. At that income, the table amount of child support is over $65,000 monthly. The trial judge, however, ordered only $16,000 monthly, relying on the family's accustomed lifestyle and modest spending pattern. He also ordered $4,000 per month for the children's special expenses and $5,000 per month in spousal support.

[3] Mrs. R. appeals. Her main submission is that the trial judge erred in failing to order the table amount, or at least in failing to order substantially more than $16,000 per month for basic child support. She argues that the trial judge erred by focusing on the family's lifestyle and by ignoring the increase in Mr. R.'s income and her own budget, which reflected that increase. Mrs. R. also submits that the trial judge erred in his order for spousal support. Finally, she submits that the trial judge erred by ordering that Mr. R. maintain only $1,000,000 in life insurance to secure his support obligations.

B. BACKGROUND FACTS

[4] The facts material to the support claims are largely uncontested. I will summarize them briefly.

(a) Marriage and Separation

[5] Mr. and Mrs. R. married in October 1989. She was 28 at the time and he was 29. They have four children, who were 4, 5, 7 and 9 at the time of trial. Mr. and Mrs. R. lived together for just over eight years, separating in January 1998. They remained together in the matrimonial home in Ancaster, Ontario until June 1998, when Mrs. R. left with the children.

[6] After separation, Mr. R. purchased the matrimonial home at a court ordered sale for $791,000. Mrs. R. used her one-half share of the proceeds to purchase another home in Ancaster for herself and the children at a price of $359,000.

(b) The Children

[7] The two older children are girls; the two younger ones are boys. All four are generally healthy, active and thriving, though the five-year-old boy J. has a minor speech impediment for which his mother gives him speech therapy. Each child goes to a private school paid for by Mr. R.

[8] The evidence at trial shows that despite their differences, Mr. and Mrs. R. have been devoted parents and have co-operated in raising their children.

(c) The Parties' Employment, Income, Household Duties and Lifestyle

[9] Mr. R. has a university degree in business administration. In 1988, he joined MFP Financial Services Ltd. MFP arranges financing for government purchases of goods and services and targets contracts in excess of $10,000,000. Mr. R. is a high level commission salesman for the company and one of its vice-presidents. His commissions range from 15% to 35% of MFP's profit on a transaction.

[10] Mr. R. has done very well financially with MFP. His annual income – which the trial judge found was fairly reflected in his tax returns – rose steadily during the course of the marriage. In the last five years the parties lived together, his annual income averaged $1.4 million. In 1997 and 1998, the year the parties separated, Mr. R. earned over $2 million annually. Significantly, however, for this appeal, Mr. R.'s income rose in 1999 to over $4.1 million. The following table sets out Mr. R.'s annual income since the marriage:

1989	$505,130	1994	$1,438,345
1990	$411,349	1995	$ 817,001
1991	$361,372	1996	$1,601,900
1992	$207,489	1997	$2,063,490
1993	$967,859	1998	$2,373,887
		1999	$4,143,186

[11] The trial judge used the 1999 amount as Mr. R.'s annual income to determine his obligation to pay child support under the Guidelines. Neither party seriously challenged this figure on appeal. Mr. R. acknowledges that with an annual income of over $4.1 million he has the ability to pay the table amount of child support.

[12] Before her marriage, Mrs. R. did clerical work at McMaster University. She quit her job just before the wedding. During the marriage, she stayed home to raise the children, manage the household and take care of the family's finances. Mr. R. supported his wife's decision to quit her job and stay home. Mrs. R. assumed most of the child care responsibilities during the marriage. She was actively involved in the children's schooling, including helping them with their homework.

[13] The trial judge found that Mr. and Mrs. R. lived a "comfortable but not extravagant" family lifestyle. He accepted Mr. R.'s evidence that "[t]he children have done as well as they have because we have maintained their lifestyle" and that "good parenting does not involve throwing money at your children".

[14] The trial judge held that the evidence of both parties reflected a conservative and moderate pattern of expenditures throughout the marriage despite Mr. R.'s substantial earnings. For example, the family vacationed together in Muskoka and Florida but never outside North America. Cavarzan J. concluded that the parties did not spend the disposable income available to them. In her evidence, Mrs. R. agreed that the family's spending did not even approach Mr. R.'s level of income in 1995, which was the lowest

amount in the last five years of their marriage. She said, however, that this was because Mr. R. was adamant that they not assume his high level of earnings would continue. Still, she acknowledged that Mr. R. did not impose limits on her spending and said instead that she was not an extravagant or acquisitive person.

(d) Post-Separation Matters

[15] After separation, a series of interim orders gave Mr. R. joint custody of the children, equal time with them during the summer, and access three weekends out of four and Tuesday evenings during the school year. Since separation, Mr. R. has spent much more time with his children. Still, they continue to live with their mother and she remains their primary caregiver.

[16] Mr. R. paid interim support under an order dated December 8, 1998, but made effective July 1, 1998. Under that order, he paid spousal support of $3,500 per month; child support of $8,241 per month, which was the table amount under the Guidelines for an income of $500,000 annually; plus approximately $2,000 per month to cover the children's private school tuition fees and related expenses.

[17] Before trial, Mr. and Mrs. R. consented to a division of their net family property. That division left Mr. R. with a net worth of $3,868,935 and Mrs. R. with a net worth of $1.3 million. Her net worth consisted mainly of about $800,000 in liquid assets and the value of the home she owned. Apart from support, her sole source of income was the income she earns from investing her liquid assets. She estimates that income at $35,000 annually. Mr. R. disputes her estimate and puts the figure at $70,000 annually. The trial judge did not resolve this dispute.

(e) The Parties' Budgets

[18] Mrs. R. prepared three budgets for the children: one in July 1998, a second in November 1999, when the parties had been separated for almost two years, and a third in April 2000, a few months before trial.

[19] When she prepared her first budget, Mrs. R. was aware that her husband had earned about $2 million in 1997. She listed an actual budget of $12,109.50 monthly (including $1,963 for private school costs) and a proposed budget of $19,329 monthly (including $11,515 for basic expenses and $3,000 for private school fees).

[20] When Mrs. R. prepared the second budget, she knew that her husband had earned over $2 million for the second year in a row. The figures in her second budget were roughly the same as those in her first budget: $12,519.50 for actual monthly expenses and $20,379 for proposed monthly expenses.

[21] By the time Mrs. R. prepared her third and last budget, she knew that Mr. R.'s income had increased from over $2 million to over $4 million dollars annually. She

proposed a budget of $80,749 per month. She admitted that she tried to match her budget to the table amount under the Guidelines and that the increase in her proposed expenses was geared to the increase in Mr. R.'s income. The April 2000 budget included $6,000 per month for vacation and approximately $53,000 in what Mrs. R. termed "options", items that she had not listed in previous budgets including a cottage in Muskoka, a ski chalet in Ellicottville, N.Y., a sailboat and membership at the Hamilton Yacht Club, membership in the Hamilton Golf Club, a home and golf club membership in Florida, and two horses and fees for boarding them. Mrs. R. testified that the children were lucky to have a father who earned a high income and that they should experience everything they can in life.

[22] Mr. R. prepared only one budget for the children, in May 2000. His budget listed monthly expenses of $10,604.85.

C. THE TRIAL JUDGE'S REASONS

[23] The trial judge first addressed the main issue in the case, the amount of child support. He found that the fairest determination of Mr. R.'s income was his total income reported on his 1999 tax return, $4,143,186. At that income, the table amount of child support for four children was $65,803 per month or $16,451 monthly for each child.

[24] The trial judge, however, concluded that the table amount was inappropriate. As I have said, he accepted Mr. R.'s description of the family lifestyle as "comfortable but not extravagant" and he found that the family's expenditures were "conservative and modest". In evaluating the appropriateness of the table amount under s. 4, the trial judge held that "the children's condition and needs are governed by a pattern of expenditure established over a period of many years". He gave no effect to Mrs. R.'s April 2000 budget because it included expenses never before contemplated by the family and bore "no relation to past patterns of expenditure or even to current expenditures". Instead, he found that "[t]he children would have continued to enjoy a comfortable but not extravagant lifestyle had there been no separation". This "comfortable but not extravagant lifestyle" constituted for the trial judge "clear and compelling evidence" that the table amount was inappropriate.

[25] The trial judge then considered what amount of child support was appropriate. Relying on Mrs. R.'s July 1998 and November 1999 budgets, he accepted Mr. R.'s position that the children's basic monthly expenses would not exceed $12,000. In the light of this court's decision in *Tauber v. Tauber* (2000), 48 O.R. (3d) 577, he added $4,000 per month for reasonable discretionary expenses and therefore awarded $16,000 for child support for the four children under s. 4 of the Guidelines.

[26] He added a further $4,000 per month in special or extraordinary expenses under s. 7 of the Guidelines to cover the cost of the children's private schooling and extra-curricular activities. The order under s. 7 is not in issue in this appeal.

[27] On spousal support, the trial judge again accepted Mr. R.'s position and ordered him to pay Mrs. R. $5,000 per month. This amount was intended to eliminate her actual monthly deficit of $2,500, taking into account that she was in a 50% tax bracket. The trial judge also noted that she would benefit indirectly from the order for child support. Both parties agreed that the child and spousal support awards were to be payable from July 1, 1998, with Mr. R. being credited for amounts already paid. Pre-judgment interest was ordered on the unpaid amounts at 5% per annum.

[28] To secure Mr. R.'s support obligations, the trial judge ordered him to continue his existing life insurance coverage of $1,000,000 and to designate Mrs. R. irrevocable beneficiary in trust for her and the children as long as he was required to pay support. Finally, the trial judge awarded Mrs. R. her party and party costs of litigating the issue of child support.

D. DISCUSSION

1. Child Support

(a) Introduction

[29] This is the fourth case in which this court has been called on to review a trial judge's discretion in ordering or declining to order a high income earner to pay the table amount of child support under the Guidelines. The three previous cases were *Francis v. Baker* (1998), 38 O.R. (3d) 481, aff'd on other grounds, [1999] 3 S.C.R. 250 (S.C.C.), *Simon v. Simon* (1999), 46 O.R. (3d) 349 and *Tauber, supra*.

[30] In *Francis v. Baker*, the parties had two children, aged 13 and 11 at the time of trial, and Mr. Baker's annual income was $945,538. The trial judge ordered the table amount of $10,034 per month. Her order was upheld in this court and in the Supreme Court of Canada. In *Simon v. Simon*, the parties had one child, who was nearly three years old at the time of trial. Mr. Simon, a professional hockey player with the Washington Capitals, had just signed a contract paying him $1 million U.S. per year. The table amount of child support was $9,215 monthly but the trial judge awarded only $5,000 monthly. This court, however, allowed Mrs. Simon's appeal and ordered the table amount. In *Tauber*, the parties had a one and one-half year old child and Mr. Tauber's annual income was $2.5 million. The trial judge ordered the table amount of $17,000 per month but said he would have reduced that amount had he the discretion to do so. He did not have the discretion to do so because of this court's decision in *Francis v. Baker*, which was then binding on him. By the time *Tauber* came to this court, the Supreme Court in *Francis v. Baker* had said a trial judge has discretion to reduce the table amount if that amount is inappropriate. This court in *Tauber* held that the table amount was inappropriate and ordered a new trial.

[31] The numbers in those three previous cases may seem exceptionally high but even they pale in comparison to the numbers in this case. Mr. R.'s annual income for

determining child support is over $4.1 million. For his four children, that annual income yields a table amount of support of $65,803 monthly or $16,451 per child. The trial judge considered the table amount to be inappropriate and exercised his discretion by ordering $16,000 monthly under s. 4. His order thus effectively reduced the table amount by 75%. The principal question on this appeal is whether he committed a reviewable error in the exercise of his discretion, either when he declined to order the table amount or when he ordered $16,000 monthly.

[32] A trial judge's discretion in determining an appropriate child support order under s. 4 of the Guidelines is entitled to "significant deference" from an appellate court. An appellate court should intervene only if the trial judge has exercised his or her discretion unreasonably. As L'Heureux-Dubé J. wrote in *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12, "though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently".

[33] Although I would not interfere with the trial judge's discretion in determining that the table amount was inappropriate, I would interfere with the order he did make. In my view, he committed two material and therefore reviewable errors in determining that an appropriate amount of support under s. 4 was $16,000 monthly. First, he based his order entirely on the parties' lifestyle and pattern of expenditure while they lived together. By doing so, the trial judge failed to adequately take into account the large increase in Mr. R.'s income after he and his wife separated. Second, the trial judge erred in failing to consider whether the options proposed by Mrs. R. in her April 2000 budget were reasonable in the light of the increase in Mr. R.'s income. Because of these two errors, I do not think that this order of $16,000 per month can stand.

(b) <u>The Guidelines Regime</u>

[34] The starting point for determining the amount of child support payable by high income earners is the legislative regime, the Guidelines – especially ss. 1, 3(1) and 4 – and s. 26.1(2) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

[35] Section 1 of the Guidelines sets out their objectives of fairness, predictability, objectivity, efficiency and consistency:

> **Objectives**
>
> **1.** The objectives of these Guidelines are
>
> (*a*) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

(*b*) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

(*c*) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(*d*) to ensure consistent treatment of spouses and children who are in similar circumstances.

[36] Section 3(1) establishes the presumptive rule in favour of the table amount:

Presumptive rule

3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

(*a*) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and

(*b*) the amount, if any, determined under section 7.

[37] Where, however, the income of the payor is over $150,000, s. 4 permits the court to deviate from the table amount if it considers that amount inappropriate, and instead to order an amount it considers appropriate, "having regard to the condition, means, needs and other circumstances of the children" and the financial ability of each spouse to contribute to the children's support.

Incomes over $150,000

4. Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is

(*a*) the amount determined under section 3; or

(*b*) if the court considers that amount to be inappropriate,

(i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table

for the number of children under the age of majority to whom the order relates;

(ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

(iii) the amount, if any, determined under section 7.

[38] Section 26.1(2) of the *Divorce Act* affirms that "[t]he guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation".

[39] Against that legislative regime, the Supreme Court's decision in *Francis v. Baker* provides further guidance in determining how much high income parents should pay in child support. *Francis v. Baker* established the following general principles:

- Trial judges have discretion either to increase or decrease the table amount if they consider that amount inappropriate and instead to order an amount that they consider appropriate.

- The table amount, however, is presumed to be the appropriate amount. A parent seeking an order different from the table amount bears the onus of rebutting the presumption in s. 3 of the Guidelines and must do so by "clear and compelling evidence". The sheer size of the table amount is not by itself an "articulable reason" for departing from it.

- Although the considerations relevant to an appropriate child support order will differ from case to case, the courts must at least have regard to the objectives of the *Divorce Act* and the Guidelines, and to the factors expressly listed in s. 4(b)(ii) of the Guidelines. The legislative objectives are intended to ensure "that a divorce will affect the children as little as possible" and the factors in s. 4(b)(ii) further that intent by emphasizing "the centrality of the actual situation of the children".

- Child support should meet a child's reasonable needs. For children of wealthy parents, reasonable needs include reasonable discretionary expenses. A paying

> parent who claims the table amount is inappropriate must, therefore, demonstrate that budgeted child expenses are so high that they "exceed the generous ambit within which reasonable disagreement is possible", in short that the budgeted expenses are unreasonable. Table amounts that so far exceed a child's reasonable needs that they become a transfer of wealth between the parents or spousal support under the guise of child support will be inappropriate.

(c) The Court's Discretion under s. 4 of the Guidelines

[40] The legislative regime and the principles that emerge from *Francis v. Baker* provide the framework for determining child support under s. 4. But in any given case a number of specific considerations will be relevant to structuring the court's discretion. These considerations may well vary from case to case. In a case like the present one where the payer's ability to pay is not in question, a trial judge should focus on the considerations relevant to determining the amount of support required to meet the children's reasonable needs.

[41] Here, the trial judge decided that the governing considerations – indeed effectively the sole considerations – structuring his discretion under s. 4 were the family's accustomed lifestyle and pattern of expenditure. These considerations accounted for his decision to depart from the table amount and for $12,000 of his $16,000 child support award under s. 4. The remaining $4,000 reflects the trial judge's attempt to comply with this court's decision in *Tauber*, *supra*, which affirmed that the reasonable needs of children of wealthy parents include reasonable discretionary expenses.

[42] Mrs. R. argues that the trial judge erred in the exercise of his discretion in three main ways. First, she submits that the trial judge erred in basing his order on the lifestyle and pattern of expenditure the family enjoyed while living together. Mrs. R. takes the position that those considerations are irrelevant in determining the appropriateness of support under s. 4. Second, she submits that the trial judge erred when he failed to take into account the substantial increase in Mr. R.'s income after separation. Third, she argues that the trial judge erred in failing to consider the reasonableness of Mrs. R.'s April 2000 budget, especially in the light of the increase in Mr. R.'s income. She contends that the trial judge should have ordered the table amount or at least an amount considerably higher than $16,000 monthly.

[43] I do not agree that the family's lifestyle and pattern of expenditure were irrelevant. In my view, they were relevant and important considerations in determining appropriateness under s. 4. Indeed, I conclude that these considerations justified the trial judge's decision to depart from the table amount. But I do agree with Mrs. R. that in arriving at an amount of support under s. 4, the trial judge erred by not adequately taking into account the increase in Mr. R.'s income and by failing to consider the reasonableness of Mrs. R.'s April 2000 budget in light of that increase.

(d) The Family's Lifestyle and Pattern of Expenditure

[44] In submitting that the family's accustomed lifestyle was irrelevant, Mrs. R. relies on the express inclusion of the words "the family's spending pattern prior to the separation" as a factor in s. 7 of the Guidelines and their omission in s. 4; on this court's decision in *Simon, supra;* and on the British Columbia Court of Appeal's decision in *Hollenbach v. Hollenbach* (2000), 10 R.F.L. (5th) 280.

[45] Section 4 does not expressly refer to the family's spending pattern while living together. But in a case like this one, where the parties established over many years a lifestyle and spending pattern that met the children's reasonable needs, these considerations are surely relevant to the children's "condition, means, needs and other circumstances" under s. 4(b)(ii).

[46] To say that they are irrelevant is to ignore the objectives of the Guidelines regime, the wording of s. 4(b)(ii) and the reasoning of Bastarache J. in *Francis v. Baker*. The *Divorce Act* states the principle underlying the Guidelines regime: parents have a joint responsibility to "maintain" their children. In *Francis v. Baker*, Bastarache J. observed that the overriding purpose of the Guidelines is to ensure "that a divorce will affect the children as little as possible". Therefore s. 4(b)(ii) of the Guidelines, which focuses on the children's needs, "emphasizes the centrality of the actual situation of the children".

[47] Ordinarily, therefore, where the parties have established a family lifestyle and pattern of expenditure, these will be relevant considerations under s. 4. And, in my view, they will be relevant both in determining whether the table amount is inappropriate and, if so, what amount is appropriate having regard to the children's condition and needs. Their weight in individual cases will be for trial judges to determine in the exercise of their discretion.

[48] In *Simon*, MacPherson J.A. concluded that the son's needs and Mr. Simon's income and ability to pay were the only considerations relevant under s. 4. As my colleague put it, "Mr. Simon's current lifestyle is irrelevant". But *Simon* was an unusual case and a very different case from the one before us. The parties separated when Mrs. Simon was three months pregnant. They never established a family lifestyle or pattern of expenditure for the children. And my colleague properly rejected Mr. Simon's own post-separation lifestyle as a factor relevant to his child support obligations. *Simon* does not apply here.

[49] In *Hollenbach*, the British Columbia Court of Appeal decided that the paying father could not prove the table amount was inappropriate by showing that the mother's proposed lifestyle with the children exceeded the family's lifestyle when they lived together. In the words of Donald J.A., "the burden on the father … was to show that the table amount could not have been useful to the children having regard to the standard of

living of other children of very wealthy parents". Mrs. R. relies on this passage to support her argument that the accustomed family lifestyle is irrelevant and instead the court should look at the lifestyles enjoyed by children of similarly placed families. According to Mrs. R., *Hollenbach* establishes that a paying parent who seeks to show that the table amount is inappropriate must lead evidence of the lifestyles of similarly wealthy families. Because Mr. R. did not do so, Mrs. R. submits that the trial judge erred in departing from the table amount.

[50] I do not accept these broad propositions. I can, however, readily understand why in a case like *Hollenbach* the family's accustomed lifestyle should have very little weight. In *Hollenbach*, the court found that the father was extremely frugal, even parsimonious, before separation. Implicit in this finding is that he effectively hoarded his money, depriving the children of a level of support to meet their reasonable needs. Some evidence that he did so was his more lavish lifestyle after separation. This case is very different. Even Mrs. R. does not suggest that the family maintained a modest lifestyle at the children's expense.

[51] But if *Hollenbach* is taken to mean that a court should determine children's needs under s. 4 by looking only at the lifestyles of children of similarly wealthy families, then I must respectfully disagree with it. If the children's reasonable needs, including reasonable discretionary expenditures, are being met by the parties' pre-separation lifestyle – even if that lifestyle is comparatively modest – and the paying parent's income does not increase after separation, I do not think it is for the court to award child support that reflects a different, more lavish lifestyle. The Guidelines are meant to ensure fair levels of support, but to repeat Bastarache J.'s words in *Francis v. Baker*, also to ensure "that a divorce will affect the children as little as possible".

[52] In *Hollenbach*, the court relied on s. 1(d) of the Guidelines, which prescribes as one of the regime's objectives "to ensure consistent treatment of spouses and children who are in similar circumstances". That objective, however, cannot be looked at in isolation from the other objectives in the Guidelines and the *Divorce Act* or in isolation from the factors listed in s. 4(b)(ii).

[53] Moreover, I do not think s. 1(d) of the Guidelines requires that the parties, or more likely the paying parent, lead evidence about the lifestyle and spending patterns of other families in similar circumstances to show that the table amount is inappropriate. To hold that a payor must lead this evidence to show inappropriateness would mean that either the table amount will always be appropriate or the court will always have to hear extensive, time consuming and perhaps unseemly evidence about how other wealthy families live. I do not think that was what was intended by the Guidelines. Instead, in many cases, the court can give effect to s. 1(d) by applying some common sense and by permitting

reasonable, even generous, discretionary expenses as income rises. I now turn to the trial judge's findings in this case.

(e) The Table Amount was Inappropriate in this case

[54] *Francis v. Baker* affirms that the considerations in s. 4(b)(ii) of the Guidelines are relevant both in determining whether the table amount is inappropriate, and if so, in determining what other amount is appropriate. These considerations include the children's needs and the payer's financial ability. Thus, the increase in Mr. R.'s income and the reasonableness of the additional discretionary expenses in Mrs. R.'s last budget – expenses designed to reflect Mr. R.'s increased income – were relevant in determining whether to depart from the table amount. The trial judge, however, did not consider them in concluding that the table amount was inappropriate. Although he did not do so, in my view, his conclusion on inappropriateness should stand.

[55] The evidence before the trial judge showed two things. First, the evidence showed that the family's expenditures were relatively modest and that Mr. and Mrs. R. did not spend all of their disposable income when Mr. R.'s income was under $900,000, much less when it soared to over $2 million. Significantly, when Mr. R.'s income reached $2 million annually, the family's expenditures on the children were far less than the table amount of approximately $30,000 monthly. Second, the evidence showed that at Mr. R.'s level of income, the family's comparatively modest spending pattern met the children's reasonable needs while the family was together. This evidence of an established comfortable but not extravagant lifestyle was strong, and common sense tells us that the table amount of over $65,000 monthly would support a lifestyle grossly in excess of that established lifestyle. Although the trial judge should have considered Mr. R.'s post-separation increase in income and Mrs. R.'s proposed discretionary expenses, I am not persuaded that he erred when he concluded that the family lifestyle evidence alone constituted "clear and compelling evidence" of the inappropriateness of the table amount. His conclusion is entitled to deference from this court and I would not interfere with it.

(f) $16,000 Monthly Child Support was Inappropriate

[56] But the trial judge could not ignore the increase in Mr. R.'s income when he came to fix an appropriate amount of support under s. 4. Thus, my disagreement with the trial judge's decision is not that he exercised his discretion to depart from the table amount but that in ordering $16,000 monthly as the appropriate amount of child support, he failed to adequately take into account the increase in Mr. R.'s income and then failed to consider the reasonableness of Mrs. R.'s proposed budget in the light of that increase in income. Instead, the trial judge concluded that the amount of child support was "governed" by the family's pattern of expenditure while living together despite Mr. R.'s increased income. And he therefore concluded that Mrs. R.'s April 2000 budget was irrelevant.

[57] This case is unusual because the paying parent's income increased substantially after separation. For the last five years the parties lived together, Mr. R.'s annual income averaged $1.4 million. By 1999, after the parties had been separated for a year, his income nearly tripled to over $4.1 million. Even compared with 1997, the last year the parties lived together, Mr. R.'s 1999 income was more than double. The children are entitled to benefit from that increase in income. That they are entitled to do so is implicit in the words "continue to benefit from the financial means of both spouses after separation" in s. 1(a) of the Guidelines. Spending patterns, be they characterized as modest or lavish, are necessarily related to levels of income. The trial judge was entitled to award child support that reflected in some measure the family's accustomed modest pattern of expenditure. That modest pattern of expenditure justified his decision to order less than the table amount. He was not, however, entitled to award child support based solely on the family's pre-separation pattern of expenditure when Mr. R.'s income increased so substantially after separation.

[58] Moreover, s. 1(a) of the Guidelines prescribes a "fair standard of support". It is one thing for the family to live modestly and save money while together; it is quite another, and seemingly unfair, for the paying parent to hold his children to the family's pre-separation lifestyle while saving the increase in his post-separation income, but now for his benefit alone. The trial judge's failure to give any effect to the increase in Mr. R.'s income was a material error. Related to that error was his failure to consider the reasonableness of Mrs. R.'s proposed budget.

[59] In *Tauber*, this court elaborated on what the Supreme Court said in *Francis v. Baker*: the reasonable needs of children of wealthy parents include both expenses for basic needs and reasonable discretionary expenses. Rosenberg J.A., who wrote for the court, said that where the payor's income is very high, child support should "include a large element of discretionary spending".

[60] In April 2000, Mrs. R. prepared a budget that included a large element of discretionary spending, which she termed "options". These options were included to match her budget with the table amount under the Guidelines. The trial judge simply dismissed this budget because it included items never before contemplated by the parties. Instead, he added an arbitrary amount of $4,000 for discretionary expenses without any explanation of why that was a reasonable figure. In my view, he took the wrong approach.

[61] Given the increase in Mr. R.'s income, I see nothing wrong with Mrs. R. having included in her proposed budget items not previously acquired or even contemplated by the parties. Instead of dismissing Mrs. R.'s April 2000 budget out of hand, the trial judge should have considered whether Mrs. R.'s options were reasonable having regard to the substantial increase in Mr. R.'s income. Only by determining the reasonableness of these

discretionary items could he determine an appropriate amount of child support under s. 4(b)(ii) of the Guidelines.

(g) The Appropriate Remedy

[62] Because of these two errors, which are related, I would set aside the order for child support. I am then left with deciding the appropriate remedy. The two choices are ordering a new trial and fixing an appropriate amount of support. The scant evidence on the discretionary items in Mrs. R.'s April 2000 budget and the absence of any findings on the reasonableness of these items or on the effect of the increase in Mr. R.'s income favour ordering a new trial. What favours fixing support is finality.

[63] In this case I think it is better to fix support. Although either Mr. or Mrs. R. may seek to vary child support, fixing the amount of support now will at least end the current dispute between the parties. Thus, fixing support may avoid another costly, time consuming and no doubt emotionally draining trial for the parties. Moreover, the appropriate amount of support falls within a reasonably narrow range: considerably more than the amount required for the children's basic needs, found by the trial judge to be $12,000 monthly, and considerably less than the table amount of $65,000 monthly, found by the trial judge to be inappropriate.

[64] Neither party seriously challenges the trial judge's figure of $12,000 monthly for the children's basic needs. The appropriate level of child support, however, depends on a reasonable amount for discretionary expenses, having regard to Mr. R.'s annual income of over $4.1 million.

[65] In her April 2000 budget, Mrs. R. proposed an increase in vacation expenses from $1,200 to $6,000 monthly, an added $1,400 per month for the children's recreational and other activities and the following list of optional monthly expenses: $10,000 for savings for the future, $10,800 for a cottage in Muskoka, $7,400 for a ski chalet in Ellicottville, New York, $740 for the Holi-Mont Ski Club, $2,100 for a sailboat and membership in the Hamilton Yacht Club, $1,200 for membership in the Hamilton Golf Club, $16,600 for a Florida residence and membership in a golf club, $1,250 for two horses and fees for a boarding stable, and $2,500 for world travel. Unfortunately, Mrs. R. gave no evidence about how she arrived at these figures and, more specifically, no evidence about whether she had investigated cottage prices in Muskoka, ski chalet prices in Ellicottville or condominium prices in Florida. This lack of evidence means that my figures will at best be general estimates of what appears reasonable.

[66] Not all of the items in Mrs. R.'s April 2000 budget can be considered reasonable discretionary expenses. For example, I would not allow the proposed expense for a Florida residence and membership in a golf club, an expense that seems to me to be excessive. I would, however, include an amount for a cottage in Muskoka. The children have vacationed there frequently, and Mrs. R. testified that she and her husband had

discussed buying a family cottage there. I would allow $6,000 monthly for this item. Skiing and golf expenses are reasonable for children of such a wealthy parent. The children have skied in the past and wish to take up golf. I would allow $3,000 monthly for these two activities. According to Mrs. R., the children are interested in travel and I think an additional $1,000 monthly for vacation and travel is justified. I would also allow $8,000 monthly for future savings for the children. I especially have in mind investing in their future education through a registered education savings plan or similar fund. Finally, I would allow $2,000 per month for miscellaneous expenses for the children including recreational and other activities.

[67] Therefore, an appropriate amount of child support should include discretionary expenses of $20,000 monthly. The basic monthly expenses for the children are $12,000 monthly. I would therefore order child support of $32,000 per month under s. 4 of the Guidelines. The order of $4,000 per month under s. 7 stands. Thus, I would order total monthly child support of $36,000.

2. <u>Spousal Support</u>

[68] Mrs. R.'s entitlement to spousal support is not in issue on this appeal. Only the amount is in question. Mrs. R. submits that in ordering $5,000 per month, the trial judge failed to consider either the objectives of spousal support or the factors to be considered in fixing an appropriate amount. Mrs. R. also submits that the trial judge failed to consider the economic disadvantage she suffered because of the marriage and failed to compensate her for her contributions to the marriage and her husband's career. She submits that an appropriate amount of support is $10,000 per month.

[69] I do not accept these submissions. The trial judge expressly considered the objectives of spousal support under the *Divorce Act* and the factors relevant to a spousal support order in this case. The property division provides Mrs. R. with a substantial base to generate investment income. She acknowledges that she will benefit from the order for child support, a benefit that will be substantially increased by my proposed increased child support order. Overall I am not persuaded that the trial judge erred in the exercise of his discretion by ordering spousal support of $5,000 per month.

3. <u>Life Insurance</u>

[70] The trial judge ordered Mr. R. to maintain his existing life insurance coverage of $1 million to secure his support obligations. Mrs. R. submits that the trial judge should have ordered that Mr. R. maintain $4 million in life insurance.

[71] I am not persuaded that the trial judge erred given the amount of child support he had ordered. Mr. R. has a substantial net worth. He is young and in good health. No evidence was led to suggest that he had not adequately provided for his children.

[72] I take from the trial judge's reasons, however, that had he ordered more in child support, he would have increased the insurance coverage. Consistent with his reasons, I would therefore order Mr. R. to maintain life insurance of $2 million on the same terms as ordered by the trial judge.

E. DISPOSITION

[73] I would allow the appeal by varying the monthly order for child support in paragraph 1 of the order of Cavarzan J. dated July 11, 2000 from $20,000 to $36,000 and by varying the order for life insurance coverage in paragraph 4 from $1 million to $2 million. I would dismiss the appeal from the trial judge's spousal support order.

[74] Mrs. R. succeeded on the principal issue in this appeal, child support. I would therefore award her costs of the appeal. Unless either party's Rule 49 offer becomes relevant because of my proposed disposition of the appeal, I would not disturb the costs order made by the trial judge.

"J.I. Laskin J.A."
"I agree: M.A. Catzman J.A."
"I agree: Doherty J.A."

Released: March 25, 2002