

RETRO IS BACK!



Gordon Morton

A few weeks ago I attended "The Advanced Roundtable in Family Law" at the Milton Courthouse. I would like to share with you the article by Mary-Ann Krill and the discussion that followed. I will also refer to some annotations made by the late Professor McLeod to recent cases in the Ontario Court of Appeal.

The former state of the law on retroactive child support was fairly straightforward and understood by most of us. Generally speaking a retroactive order would not be made by an Ontario court unless one or more of the following factors were present:

1. Whether the recipient had incurred debt or depleted capital in order to meet the needs of the children. (This factor would be strengthened in the event that the payor's financial circumstances and increased during the period of "underpayment").

2. Whether there had been some "blame worthy" conduct on the part of the payor spouse, e.g., refusal to make financial disclosure or the making false and misleading disclosure.
3. Whether the payor spouse had received a request for increased support.
4. Whether there was a delay by the recipient spouse in seeking to adjust child support and whether there was a reasonable explanation for the delay.
5. Whether the proceeding was a variation (where the payor may be reasonable in presuming that the existing order or agreement is correct until changed) or proceeding in the first instance.
6. The making of a lump sum order would amount to windfall for the recipient or a redistribution of capital (particularly in the event that the child at issue is no longer a child of the marriage).
7. Whether the making of a lump sum order would cause financial hardship to the payor, particularly in the event that it would interfere with ongoing support obligations.
8. The need on the part of the child and the ability to pay on the part of the payor.

These factors have been referred to as "structuring factors".

All these factors were cited approvingly by Madam Justice Weiler in *Marinangeli v. Marinangeli* (2003) 38R.F.L.(5th) 307 (OCA). In this case, the court held the payor had an implied obligation to disclose improvements in his financial situation by virtue of the material change of circumstance clause contained in his separation agreement. The court implied the duty to disclose by virtue of the existence of a clause *itself* and not the express language of the contract. At trial, Justice Paisley found that the husband's breach of the implied duty to disclose was blameworthy conduct which justified the making of an exceptional order of retroactive support. The Court of Appeal affirmed the lower court decision in all respects but one (applying guideline table to income earned prior to May 1997 the date upon which the guidelines came into effect).

The Court of Appeal reiterated that "the decision to award retroactive support is one to be exercised sparingly." However, Justice Weiler went on to say that "in relation to child support the term retroactive maybe somewhat of a misnomer since the obligation to pay support arises immediately upon the birth of the child and continues regardless of whether or when the payee spouse brings action for support."

In his annotation to *Chertow v. Chertow* 13 R.F.L.(6th)106 Professor James McLeod commented that the fact that the parties got as far in their litigation as they did spoke volumes about the confusion that exists anything resembling retroactive child support in Ontario. Referring to the structuring factors, used in the past by the Ontario Courts, he points out:

"The seemingly simple rule that previously applied, whereby a court would order retroactive support only if the payor had misled the court or the payee about his ability to pay or the payee had to draw down capital or incurred debt to provide a reasonable lifestyle for the children during the period of time when the payor had the ability to pay but ignored his or her obligation, has given way to mass confusion.

Various panels of the Court of Appeal have distinguished or ignored decisions of other panels because they did not agree with the underlying child support philosophy adopted in the case. The law set out in Marinangeli bares little substantive resemblance to that in Walsh v. Walsh 46 R.F.L. (5th) 455 (OCA) which marginalized Marinangeli but was itself limited tightly in Horner v. Horner 6 R.F.L. (6th) 140 (OCA), which was ignored in Park v. Thompson 2005 CarswellOnt 1632 (OCA).

Justice Gouge in his reasons in *Chertow* appeared determined to distance his reasons from the confusion in the emerging disagreement over retroactive child support. The facts in this case are rather complicated (reference maybe had to case for the details) but it would appear from this case and others that the *Federal Child Support Guidelines* were set up on the assumption that parents would review support on an

ongoing basis. Parliament however did not include an express provision to this effect. Even if there were convincing policy reasons for an automatic annual recalculation of child support, the legislators have not incorporated one into the Guidelines and the court should not create such a right indirectly by routinely adjusting support retroactively when the payor did not pay that Guidelines amount of support. While payees have a right to an annual disclosure of the payor's income, whether they exercise that right and what they do with the information is up to them. (*Walsh v Walsh*)

It would follow that in the absence of an agreement or order to make annual disclosure, if the payor was paying what he or she had agreed to pay or had been ordered to pay, the payor should not be ordered to pay increased support for a past period of time when he or she paid less than a Guidelines amount unless he or she somehow discouraged the payee from seeking increased support or stood by while the payee drew down capital or incurred debt to provide for the children.

As lawyers, it is incumbent upon us to routinely request a provision in orders or agreements to put a positive duty on the payor to provide annual financial disclosure. Failure to disclose would then amount to blameworthy conduct which would probably be sufficient to justify retroactive increase support according to *Marinangeli* and maybe even *Walsh*.

In Alberta, the approach has been radically different. In January 2005 the Alberta Court of Appeal released three decisions :(*D.B.)v.G.(S.R.)7 R.F.L.(6th)373*; *W.(L.J.) v. R(T.A.)*; and *Henry v. Henry 7 R.F.L.(6th)275*. These cases stand for the proposition that the new presumptive commencement date for child support orders is the date of the increase in income (the material change). The Alberta Court reviewed all the factors with which the Ontario courts have struggled over the years and found that, for the most part, they have been rendered irrelevant by the guidelines. All three of these decisions and another one have been appealed to the Supreme Court of Canada and

are presently wending their way through the appeal process although as yet they have not been argued.

From these Alberta cases the following principles can be drawn:

- They apply equally to the Divorce Act or provincial legislation and apply equally to temporary or final proceedings.
- The awarding of retroactive support remains discretionary.
- The fundamental principles of retroactive child support are:
 - i. Parents have a statutory duty to support their children and that relationship is fiduciary in nature;
 - ii. child support is the right of the child and cannot be bartered away by a parent;
 - iii. The court is unfettered in its ability to intervene and determine the appropriate amount of retroactive support; and
 - iv. The fact that the custodial parent may benefit incidentally by the amount of retroactive support cannot be relied upon to decrease quantum.
- There is no "one-year rule" which applies to limit the ordering of retroactive support.
- The obligation to support does not depend upon the commencement of action or the giving of notice. The obligation to support a child arises on its birth.
- The Guidelines favor a child focused (not a parent focused) approach. Child support is a right of the child.
- Under the Guidelines, need is assumed and replaced with entitlement. The ability to pay has been replaced with the presumptive table amounts.
- It is not misconduct which triggers the award but an increase in income of the payor.

- The custodial parent's necessity to encroach on capital or incurred debt to meet child rearing expenses is an outdated concept as been replaced by a presumption that nonpayment equals deprivation. There is no longer in need to prove an encroachment on capital or incurring debt.
- Notice to pursue child support is no longer prerequisite to ordering retroactive support.
- An unreasonable or unfair burden on the payor remains a relevant consideration but this onus must be satisfied by the payor. Hardship is not assumed; rather consideration should be given to different methods of discharging the obligation (over time etc.).
- Wealth transfer is inevitable and does not undermine the recipient's right to be compensated for the period of time during which they have carried the heavier burden of child support.
- "No longer a child of the marriage" is no longer a factor and does not undermine recipient's right to be properly compensated.
- Delay is still a factor and a relevant consideration, provided there has been full and fair disclosure and no reasonable excuse for delay in requesting an increase.

To my knowledge, the Alberta approach is not being applied in Ontario at the trial level nor has it been approved by our Court of Appeal.

What we are left with in Ontario as follows:

1. The normal commencement date for the final order is the date of commencement of the preceding or the date notice was given (request for increased support or financial disclosure).
2. There is jurisdiction in the Ontario Court to order support to commence in an earlier day. This order is referred to as "retroactive". There is no inherent jurisdiction to recalculate support in accordance with the Guidelines without

- consideration of the discretion “structuring factors”. An increase in payor's income alone is not sufficient.
3. The jurisdiction to make a retroactive order should be used sparingly.
 4. The "structuring factors" referred to above must still be considered in Ontario. However the Ontario cases now reflect that it is not an essential prerequisite that blameworthy conduct be found and unexplained delay is not as fatal as child support is the right of the child.
 5. There is no express obligation on the payor to disclose increases in income. However, a payor is deemed to know the law and assume that a child's need for support increases as does the income of the payor.
 6. The support obligation commences on the birth of the child and the relationship between parent and child is fiduciary in nature requiring that the child's interests be placed ahead of the parent's.

I suspect given the present makeup of the Supreme Court of Canada that the Alberta approach eventually may become the law of Canada.

Stay tuned for further developments!

D.G.F. Morton Q. C. is a Certified Specialist in family law in Hamilton and may be reached at:

1 King St W. Suite 701

Hamilton ON L8P 1A4

Telephone: 905-522-8147

Fax: 905-522-9548

dgmorton@bellnet.ca