


Family Law News

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Retroactive Child Support: "You can run but you can't hide/or can you?"

Simone v. Herres, 2011 ONSC 1788
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Simone v. Herres is a recent local judgment of Taliano J. which addresses the issue of retroactive child support against an 'absentee' payor.

Briefly, by original child support order (2004) the father was ordered to pay child support for two children of the marriage based upon an annual income of approximately $30,000.00. Shortly thereafter the father's income increased to approximately $40,000.00 per year, and he did not inform the mother of the increased income level, nor did he on his own volition increase his child support payments to correspond with this change. The father had virtually no contact with the mother or the children and abruptly left Ontario in 2008. He did not send postcards, and the mother was unaware of his whereabouts. In January 2010 the father commenced a motion to terminate child support for the oldest child of the marriage, who as of February 2010 was 18 years of age and living independently from her mother. The mother replied to the motion in or around February 2010, and sought retroactive child support in accordance with the father's increased income level.

Appropriateness of Retroactive Award:

In determining whether the mother's claim for retroactive child support was appropriate, the court relied upon the four factors enunciated by the SCC case of *S.(D.B.) v. G.(S.R.)*:

1. Reasonable explanation on the part of the recipient for delay in seeking support;

2. Blameworthy conduct on the part of the payor;

3. Circumstances of the child or children;

4. Hardship occasioned on the payor by the retroactive award.

Justice Taliano held that the mother's claim for retroactive support should be granted because she was effectively stripped of her ability to make any demand for support as a result of the father's own misconduct. The father deliberately absconded from the area and purposely evaded his financial responsibilities. He therefore could not now claim that a retroactive award would impose an undue hardship on him. The court went one step further and indicated that the father's rejection of his family obligations as a parent were unconscionable and deserved disapproval of the court; "this can best be conveyed to him by an order that requires him to meet the obligations he has so callously disregarded over the years". However...

Commencement Date:

The SCC (*supra*) has held that it is generally only appropriate to grant retroactive support for 3 years predating the date of the request for child support/increased child support (the formal notice). However, misconduct on the part of the payor spouse may justify going back further to the date at which increased support first became payable.

On this issue our recipient mother was less successful. The court held that because the mother did not make any demand for increased support between 2004 (the date of the original order) and the father's exodus from the country in 2008, she was limited to retroactivity from three years prior to the date of the formal application for same. In short, she could have sought updated financial information and increased support from the father, and did not.

Jurisdiction

An interesting technicality presents itself in this case, which should not go unnoticed. Technically speaking, by reason of the oldest child losing her "child of the marriage" status under the Divorce Act prior to the recipient's claim for retroactive child support, the court could have been pre-

cluded from making any retroactive support award pertaining to this child at all.

The SCC (*supra*) has taken the view that the 'material time' for analysis of retroactive child support awards, and classification as "children of the marriage" is the time of application. This means that a retroactive child support award may only be available so long as the child in question is a "child of the marriage" when the application is made. Under this analysis, our recipient mother would normally have been out of luck, as her oldest child was now over the age of 18 and living independently.

However, the court ably navigated this issue in two ways: (1) although the mother's request for retroactive variation was not made while the child was dependent, the father's motion to vary itself fell within the material time, thus triggering a review, and requiring consideration of both perspectives (i.e. the full benefit of evidence from both sides), and (2) the father's deliberate deception and conscious efforts to thwart the mother's ability to contact him effectively prevented her from raising the issue of increased support. This court would not allow the father to rely upon his own misconduct to defeat a claim against him.

Discussion:

This case serves as a helpful little reminder to counsel on the technical issue of the timing of a retroactivity claim. Many child support recipients cannot be bothered to chase payor spouses for updated income disclosure and do not make claims for increased support, except in response to the payor's own motion to vary. A carefully crafted closing letter to clients might assist in preserving a support recipient's claim for the payment of *accurate* levels of child support over the course of the lifespan of a child support obligation. For example:

> "Please be advised that although the child support payor has an obligation to make payments to you in accordance with the applicable *Guidelines*, you would be well served to make a formal written request for updated financial disclosure, including full Income Tax Returns and Notices of Assessment, each year on the anniversary date of your Order. You should keep a copy of your request for updated information in a safe location for future reference. Furthermore, if you receive no response to your requests for updated financial information, you should consult with counsel within three years of your first request, so as to preserve any retroactive amount that may rightfully be owed to you. In addition to the above, if you wish to formally review your child support entitlement, be sure to do so *prior* to your child's 18th birthday or the cessation of his or her full-time studies."

It is with tongue in cheek that we suggest such a clause, as the (rather cynical) viewpoint of these writers is that (a) if you are aware that you have a child, (b) you are aware that you have a child support obligation, (c) you are in the best position to know your own income, and therefore (d) you are in the best position to determine whether or not you are paying the appropriate amount in accordance with the *Guidelines*. To suggest that a

recipient who does not harass a payor for financial disclosure each and every year, or engage in revolving door litigation for the enforcement of this right, should be less entitled to the correct amount of support is somewhat offensive.

In our opinion, even though this case follows the Supreme Court of Canada's guiding principles on retroactive child support perfectly, we can't help feeling a little bit unsatisfied. We would like to see the SCC review its position on the general presumption that it is usually inappropriate to make a support award retroactive to a date more than three years before formal notice was given to a payor parent.[1] We believe the assumption should be that a payor cannot avoid the proper quantum of child support simply by laying low, thereby rewarding the silent evader rather than the conscientious support payor. The 'hardship' element of a retroactive award could be addressed simply by way of the payment terms, spread out over any number of years in an amount that is manageable, but reflective of the *actual* amount of child support owing. It is our opinion that this approach will better serve the four objectives of the *Child Support Guidelines*, reducing the number of motions needed to effect compliance with financial disclosure and increased payments, ensuring consistent treatment of recipients both *with* and *without* the financial means to return to court to enforce their rights, and more effectively sending the message to evasive payors that "you can run but you can't hide".

[1]We limit this opinion to cases wherein there is an existing child support order or domestic contract in place. ■

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