

Family

More on 'judicial refresh' of principles governing retroactive child support

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(March 30, 2021, 2:57 PM EDT) -- In a series of important cases, the Alberta Court of Appeal and the Supreme Court of Canada have been engaged in a dialectic on the issue of retroactive child support, signalling a paradigm shift towards the more holistic and less anachronistic: *DBS v. SRG* 2005 ABCA 2; *DBS v. SRG* 2006 SCC 37; *Michel v. Graydon* 2020 SCC 24; and *Henderson v. Micetich* 2021 ABCA 103.

The new paradigm shift has been confirmed in the recently released Alberta Court of Appeal decision of *Henderson v. Micetich*, as discussed in part one of this article (see below for link).

By way of illustration of the new paradigm, in recognition that there may be many reasons for delay on the part of the recipient parent for bringing an application for increased child support, *Michel v. Graydon* is interpreted in *Henderson* to hold that "delay will rarely substantially prejudice a payor parent" (para. 42).

[44] Put simply, delay has a very limited role to play in determining the availability and extent of a retroactive child support order. Any delay on the part of a recipient parent must be viewed in light of available information, resources, and social context, including gender, social and economic inequities. Given the structure of the *Guidelines* and the well understood, and now widely accepted, philosophy that child support is an obligation on the part of both parents, the amount of which depends on the payor's income, there will be few cases where delay can be truly seen as unreasonable or a factor that should preclude the award of previously-owed support to children.

This is consistent with the earlier view of Justice Marina Paperny in *DBS v. SRG* 2005 ABCA 2, in which she impugned the "one year rule" for the collection of child support arrears and acknowledged that there are many reasonable explanations which would excuse a payee's delaying a request or action for increased support (para. 121).

This is in contrast to the view of the majority of the Supreme Court in *DBS*, which imposed a three-year limitation period in which retroactive child support could be recovered, in the absence of blameworthy conduct of the payor, and held that unreasonable delay by the recipient parent in seeking an increase in support would militate against a retroactive award. As stated by the majority in *DBS*: "Delay in seeking child support is not presumptively justifiable" (para. 101).

Michel v. Graydon is also interpreted in *Henderson* as rejecting the subjective approach to blameworthy conduct espoused by the majority of the Supreme Court in *DBS*. Rather, blameworthy conduct "in its expansive form" is defined as anything that favours the payor to the detriment of the children (para. 57).

On the facts, *Henderson* rejects the chamber judge's conclusion that retroactive child support was not necessary as the children had been amply cared for by the mother's husband, which more than compensated for any support the father did not pay. This was held to be an error, as there was no requirement to prove any need on the part of the children for them to receive retroactive child

support.

Michel v. Graydon was extrapolated to support the principle that because one parent had subsequently married a high-income earner, circumstances could change quickly and this could not absolve a payor parent of statutorily prescribed legal obligations (paras. 60-62). In the view of *Henderson*, the chamber judge's conclusion that a retroactive award would not benefit the children is premised on a misapprehension of the principles articulated in *DBS*, as refined by *Michel v. Graydon* and other case law (para. 64).

Michel v. Graydon is also interpreted in *Henderson* as expanding the concept of hardship. It is not just the hardship of the payor that is to be considered, as articulated by the majority of the Supreme Court in *DBS* (para. 115) — the assessment must also take into account hardship caused to the recipient parent, the child and the dependents who might be affected (*Henderson*, para. 68).

Further, the hardship must be tangible and supported by evidence, and the hardship must be undue. Although there might be financial difficulty when an immediate lump sum cash payment is awarded, without more, it is neither undue nor unfair (para. 70). Thus, although on the facts in *Henderson* the father was obliged to pay monthly sums towards debts under a Consumer Proposal, this could not take priority over his child support obligations.

Another notable feature of *Henderson* is the appellate court's evident affinity for the philosophical underpinnings justifying a claim for retroactive child support articulated by Justice Sheilah Martin of the Supreme Court in *Michel v. Graydon*. Accordingly, the broader social context is to be taken into account, including considerations of intimate partner violence and access to justice.

In sum, then, *Henderson v. Micetich* is an important addition to the jurisprudence governing retroactive child support and confirms the sea change in the law foreshadowed by the Supreme Court of Canada in *Michel v. Graydon*. It is also very good news for parties in the midst of high-conflict matters where complex issues of parenting and demands for disclosure consume the focus and priorities of parents, often delaying a final determination of child support. The progressive approach in *Michel v. Graydon* and *Henderson v. Micetich* are certain to find a good deal of support — and relief.

This is part two of a two-part series. Part one: Alberta court interprets 'judicial refresh' of principles governing retroactive child support.

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