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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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COVID-19 Update

Droit de la famille - 212444, 2021 QCCS 5387 (C.S.) — Vaillancourt J.C.S.

Long, long ago, we decided that we were not going to devote more "newsletter space" to COVID-19 issues (for fear that COVID cases would become the focus of the newsletter). And we certainly hope that all such cases will, before much longer, fade into the past. That said, every once in a while, a COVID case comes along that is important to the extent that it may be relevant to situations beyond COVID. This case, from the Quebec Superior Court, is important because of what it says about COVID and parenting and in that it may possibly be used by analogy in the future.

The parties were the parents of a 12-1/2 year old child.

The mother had physical custody of the child since August 2021, and the father had access, including every other weekend and various holidays.

By way of motion, the father sought specific parenting time over the Christmas holidays.

In response, the mother asked to suspend the father's parenting time, because she learned that the father was not vaccinated against COVID-19. She claimed he was an "anti-vaxxer."

The child had received two doses of the COVID-19 vaccine, but the father had not received any. He denied being a full-fledged "anti-vaxxer", but admitted that he had "reservations" about the vaccine. That said, some of the father's social media posts suggested he was, in fact, very opposed to vaccination. Based on the father's posts, the Court further openly questioned the father's commitment to respecting other health measures.

The Court, therefore, was squarely faced with the question as to whether it was in the child's best interests to have parenting time with the unvaccinated father.

Justice Vaillancourt (appropriately in our view) took judicial notice of the fact that vaccination is a preventive measure strongly encouraged by national and global health authorities. However, as the child was vaccinated, was this sufficient to allow the father to have parenting time? Justice Vaillancourt thought not since the child's vaccinations did not offer "complete" protection, especially in the face of the highly-contagious Omicron variant that was quickly spreading through Quebec.

While it would normally be in the best interests of the child to have contact with the father, in the words of Justice Vaillancourt, "it is not in his best interest to have contact with him if he is not vaccinated and is opposed to health measures in the current epidemiological context."

The Court also noted that the mother was living with her spouse and their two young children who were too young to be vaccinated, and that it had to consider the best interests of those young children.

However, while Justice Vaillancourt thought a suspension of the father's parenting time was best for the child, the suspension was only to be for a short duration given the rapidly-changing situation with Omicron. Therefore, access was suspended until February 8, at which point the matter would return to court. Justice Vaillancourt also noted that the situation could be reassessed if the father followed the recommendations of health authorities and got vaccinated against COVID.

There are already numerous cases where parenting time is severely curtailed, restricted or subject to conditions on account of an access parent being unvaccinated [see, for example, *A.G. v. M.A.*, 2021 CarswellOnt 15230 (C.J.); *B.C.J.B. v. E.-R.R.R.* (2020), 47 R.F.L. (8th) 165 (Ont. C.J.), aff'd (2021), 63 R.F.L. (8th) 207 (Ont. S.C.J.); *L.S. v. M.A.F.*, 2021 CarswellOnt 15493 (C.J.); *S.W.-S. v. R.S.*, 2021 CarswellOnt 18515 (C.J.)]. There are also already numerous cases where in-person parenting time has been suspended as a result of a parent refusing to follow COVID-19 protocols [see, for example, *A.T. v. V.S.* (2020), 43 R.F.L. (8th) 94 (Ont. S.C.J.)].

But from what we can tell, this is the rare case where parenting time was suspended completely for a material length of time as a result of a parent not being vaccinated.

Retroactive Child Support

Colucci v. Colucci (2021), 56 R.F.L. (8th) 1 (S.C.C.)

For anyone that happens to have been living under a rock in a cave, this unanimous decision written by Justice Martin dealt with the test for a payor trying to retroactively reduce child support based on a material change in circumstances. Although separate in time, it is really the companion case to *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.). We only did a short summary as a "Breaking News" item the week it was released (see the June 7, 2021 [2021-22] edition of *TWFL*), and had promised a full summary . . . so here it is. At this point, it should just be a refresher to all.

The parties were married in 1983 and divorced in 1996. The mother had sole custody (as it then was) of the parties' two children, and the father was required to pay child support of $115 per week. In 1998, the father asked the mother to consent to a reduction in his child support, as he claimed that his income had gone down. However, the father provided no income information, and the parties were not able to come to an agreement.

Both children ceased to be "children of the marriage" by 2012.

From 1998 to 2016, the father made no voluntary child support payments. A limited amount of money was collected by the FRO. The father did not contact the children during this period and his whereabouts were unknown.

In 2016, the father applied to retroactively reduce child support and to rescind his accumulated arrears of approximately $170,000. The motion judge retroactively decreased support based on a drop in the father's income over the period and to bring the child support amounts in line with the *Federal Child Support Guidelines*. The result was to reduce the arrears to $41,642. The Ontario Court of Appeal overturned the decision and ordered that the father pay the full amount of arrears owing.

The Supreme Court of Canada upheld the Court of Appeal's decision, and in doing so, Justice Martin set out a framework for considering retroactive adjustments of child support — particularly claims for retroactive decreases.

Justice Martin stated that courts have, and need, a wide discretion to vary child support orders to ensure the correct amount of support is being paid. Child support orders need to address the incredible variety of circumstances that families may face.

When considering a retroactive variation of child support and a reduction (or elimination) of arrears, three interests have to be balanced by a court to achieve a fair result:

1. The child's interest in receiving the appropriate amount of support to which they are entitled;

2. The interest of the parties and the child in certainty and predictability; and

3. The need for flexibility to ensure a just result in light of fluctuations in the payor's income.

Justice Martin set out that the child's interest in a fair standard of support commensurate with the income of the payor parent is the "core interest" to which all "rules and principles must yield." In order to protect that "core interest", a fair result will sometimes lean towards preserving certainty and other times lean towards flexibility.

The framework must also take into account the usual informational asymmetry between the parties and the resulting need for full and frank disclosure. Unlike the recipient, the payor parent knows and understands their income. A recipient parent can only obtain this information through full and frank disclosure from the payor. The Supreme Court stated clearly that full and frank disclosure of income information by the payor "lies at the foundation of the child support regime" and is "**also a precondition to good faith negotiation**" [emphasis added].

The Court emphasized the importance of disclosure by stating that the duty to disclose income information is a "corollary of the legal obligation to pay support commensurate with income." Justice Martin made this point plain by stating "[p]roactive disclosure of changes in income is the first step to ensuring that child support obligations are tied to payor income as it fluctuates."

The first step for a payor seeking to retroactively reduce child support is to establish a material change in circumstances. Usually, this will consist of the payor providing sufficient disclosure to demonstrate that their income materially decreased. The payor must provide enough "reliable evidence" to show when and by how much their income decreased; that the change in income was significant; that the change was long continuing or long lasting; and that the change was not one of choice or self-imposed. Justice Martin also stated that a payor whose income was originally imputed because of their own lack of disclosure cannot rely on their own late disclosure as a change in circumstances to ground a variation order.

Once a material change has been established, a presumption arises in favour of retroactively decreasing child support to the date the recipient received effective notice, up to three years before formal notice of the application to vary. Effective notice requires a clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change and to allow the recipient to meaningfully assess the situation. Unlike in the case of retroactive increases, it is not enough for a payor to merely "broach" the subject of a reduction of support with the recipient. The standards are *not* reciprocal.

Even where the payor has given proper effective notice, the period of retroactivity is presumed to extend no further than three years before the date of formal notice. The Supreme Court stated that the presumptive three-year limit allows the parties to negotiate but, at the same time, recognizes that the payor *must* commence proceedings in a timely manner if negotiations fail in order to protect the certainty interests of the child and recipient.

Evidentiary concerns further underpin the three-year limit as the best evidence of income or the ability to earn income is generally more readily available closer to the time that the income is earned. But here, again, the standards are not reciprocal between claims for retroactive increases and decreases.

Justice Martin set out that courts retain discretion to depart from the presumptive date of retroactivity where the result would be otherwise unfair in the circumstances of the particular case. In exercising this discretion, a court should be guided by the four factors set out in *D.B.S v. S.R.G.* (2006), 31 R.F.L. (6th) 1 (S.C.C.), though adapted to suit the retroactive decrease context:

1. Whether the payor has an understandable reason (not a "reasonable excuse") for the delay in giving effective notice or seeking relief in the courts. Where the payor has such a reason, fairness may lean in favour of extending the date

of retroactivity to a date *before* the date of effective notice or not applying the three-year limit. Importantly Justice Martin also stated that the recipient's delay in enforcing arrears is **irrelevant to the analysis**.

2. The conduct of the payor. The payor's efforts to disclose and communicate will often be prominent considerations. Genuine efforts to continue paying as much as the payor can will show good faith and a willingness to support the child.

3. The circumstances of the child. If the child has experienced hardship or is currently in need, this factor militates in favour of a shorter period of retroactivity. Another consideration under this factor is whether or not the decrease would require the recipient to repay support. The Supreme Court stated that it will "rarely" be appropriate, given the recipient's absence of knowledge, to order a repayment of support. (Notably, this actually favours payors that allow for support arrears to accumulate, and actually works against the considerations in 2.)

4. The final factor is hardship to the payor if the period of retroactivity is not lengthened beyond the presumptive date. The payor must adduce evidence to establish "real facts" that support a finding of hardship. A showing of hardship will not automatically justify a departure from the presumed date of retroactivity. Justice Martin stated that hardship carries much less weight where it was brought on by a payor's failure to provide appropriate disclosure and give proper notice to the recipient. In addition, the payor's hardship must be considered in the context of hardship to the recipient and the child if the court were to extend the period of the retroactive decrease.

Once a court determines that support should be retroactively decreased to a particular date, the decrease has to be quantified. The court must determine the payor's income for each year and apply the *Guidelines* to determine how much should have been paid in each period as compared to how much was actually paid. If the payor fails to provide sufficient evidence for their income in each year, the court may draw an adverse inference. The payor must also provide complete disclosure of their current financial circumstances if seeking a periodic payment plan or temporary suspension on hardship grounds.

In situations where the payor is looking to wipe away or suspend their arrears based on a *current* inability to pay, but the amounts for previous years are correct based on their income at that time, the only consideration is the payor's ongoing financial capacity.

The payor must provide sufficient reliable evidence for the court to assess their current and prospective financial circumstances. There is a presumption against rescinding any part of the arrears. This presumption can only be rebutted where the payor establishes, on a balance of probabilities, that even with a flexible payment plan, they cannot and will not ever be able to pay the arrears. This is a "stringent" standard according to Justice Martin.

The presumption in favour of enforcing arrears may only be rebutted in "unusual circumstances." Rescission of arrears is a "last resort" reserved for "exceptional cases." If a payor will have difficulties paying down arrears, then other remedies such as a temporary support suspension, periodic payments or other creative payment options should be used before a rescission.

Here are the key paragraphs from the decision:

[113] To summarize, **where the payor applies under s. 17 of the *Divorce Act* to retroactively decrease child support, the following analysis applies:**

(1) **The payor must meet the threshold of establishing a past material change in circumstances**. The onus is on the payor to show a material decrease in income that has some degree of continuity, and that is real and not one of choice.

(2) Once a material change in circumstances is established, **a presumption arises in favour of retroactively decreasing child support to the date the payor gave the recipient effective notice, up to three years before formal notice of the application to vary. In the decrease context, effective notice requires clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change** and allow the recipient parent to meaningfully assess the situation.

(3) **Where no effective notice is given by the payor parent, child support should generally be varied back to the date of formal notice**, or a later date where the payor has delayed making complete disclosure in the course of the proceedings.

(4) **The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *D.B.S.* factors (adapted to the decrease context) guide this exercise of discretion**. Those factors are: (i) whether the payor had an understandable reason for the delay in seeking a decrease; (ii) the payor's conduct; (iii) the child's circumstances; and (iv) hardship to the payor if support is not decreased (viewed in context of hardship to the child and recipient if support is decreased). **The payor's efforts to pay what they can and to communicate and disclose income information on an ongoing basis will often be a key consideration under the factor of payor conduct.**

(5) Finally, **once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified**. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the *Guidelines*.

[114] It is also helpful to summarize the **principles which now apply to cases in which the recipient applies under s. 17 to retroactively increase child support**:

a) **The recipient must meet the threshold of establishing a past material change in circumstances**. While the onus is on the recipient to show a material increase in income, any failure by the payor to disclose relevant financial information allows the court to impute income, strike pleadings, draw adverse inferences, and award costs. There is no need for the recipient to make multiple court applications for disclosure before a court has these powers.

b) Once a material change in circumstances is established, **a presumption arises in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the application to vary. In the increase context, because of informational asymmetry, effective notice requires only that the recipient broached the subject of an increase with the payor**.

c) **Where no effective notice is given by the recipient parent, child support should generally be increased back to the date of formal notice.**

d) **The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *D.B.S.* factors continue to guide this exercise of discretion, as described in *Michel.*** If the payor has failed to disclose a material increase in income, that failure qualifies as blameworthy conduct and the date of retroactivity will generally be the date of the increase in income.

e) **Once the court has determined that support should be retroactively increased to a particular date, the increase must be quantified**. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the *Guidelines*.

. . . . .

[138] Accordingly, in this third category of cases [where the prior order corresponds with the payor's income], **the payor must overcome a presumption against rescinding any part of the arrears. The presumption will only be rebutted where the payor parent establishes on a balance of probabilities that — even with a flexible payment plan — they cannot and will not ever be able to pay the arrears** (*Earle*, at para. 26; *Corcios*, at para. 55; *Gray*, at para. 58). **Present inability to pay does not, in itself, foreclose the prospect of future ability to pay, although it may justify a temporary suspension of arrears** (*Haisman*, at para. 26). This presumption ensures rescission is a last resort available only where suspension or other creative payment options are inadequate to address the prejudice to the payor. It also encourages payors

> to keep up with their support obligations rather than allowing arrears to accumulate in the hopes that the courts will grant relief if the amount becomes sufficiently large. Arrears are a "valid debt that must be paid, similar to any other financial obligation", regardless of whether the quantum is significant (Bakht et al., at p. 550).
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> [141] While the presumption in favour of enforcing arrears may be rebutted in "unusual circumstances" (*Gray*, at para. 53), **the standard should remain a stringent one. Rescission of arrears based solely on current financial incapacity should not be ordered lightly. It is a last resort in exceptional cases**, such as where the payor suffers a "catastrophic injury" (*Gray*, at para. 53, citing *Tremblay v. Daley*, 2012 ONCA 780, 23 R.F.L. (7th) 91). I agree with Ms. Colucci that the availability of rescission would otherwise become an "open invitation to intentionally avoid one's legal obligations" (*Haisman* (Q.B.), at para. 18, citing *Schmidt v. Schmidt* (1985), 46 R.F.L. (2d) 71 (Man. Q.B.), at p. 73; R.F., at para. 57). Simply stated, how many payors would pay in full when the amounts come due if they can expect to pay less later? The rule should not allow or encourage debtors to wait out their obligations or subvert statutory enforcement regimes that recognize child support arrears as debts to be taken seriously. [emphasis added]

In the case at bar, the Court determined that the coming into force of the *Guidelines* was a change in circumstances. While this "opened the door" at the threshold step, it did not remove the need for evidence of the father's income in the years since the *Guidelines* came into force. The father's failure to communicate and inadequate disclosure were "fatal" to his application. It was not enough for the father to advise the mother that his income had fallen without taking further steps. Since he did not provide reasonable proof to allow the mother to meaningfully assess his claim, his request to reduce support did not constitute "effective notice." As the father failed to give effective *or* formal notice before the arrears stopped accumulating in 2012, he was not entitled to any retroactive decrease in his child support obligations.

Now all go forth and claim your arrears.

But I Was Going to Talk Really Fast!

Ishkanian v. Ishkanian, 2021 CarswellOnt 19136 (S.C.J.) — Kurz J.

Think again before trying to "squeeze" a long motion onto a short motions list.

We've all seen this before. A motion is served as a "short" or "regular" motion. But the moving party requests a dozen heads of relief. The motion record comprises hundreds of pages, and both parties file lengthy factums.

Responding counsel is in a bind. Will the motion proceed? Will it be bumped to a long motion? Does counsel prepare — just in case?

In the Central West Region of Ontario (and in many other jurisdictions in Ontario and elsewhere), a regular or short motion is one that will take less than 60 minutes to argue.

In this case, it was apparent to Justice Kurz that the motion, confirmed for "59 minutes" could not possibly be heard in under an hour. Justice Kurz found this wholly unacceptable — so much so that he penned a short endorsement even though the motion settled. As noted by His Honour, it is not always better to ask for forgiveness than to seek permission, and because the motion was scheduled for 59 minutes, at least one and likely more other "proper regular" motions could not be scheduled.

To try to force an obvious long motion onto a short motion list was an abuse of the system, and it was unfair to all. The "court's resources are not unlimited," especially in these trying times:

> 6. When parties (and the moving party here is not the first), elbow their way into the queue, demanding audience on a regular motion list when they know or should know that they should be placed on a long motion list, they harm all of the other parties seeking the same audience. Ultimately, they harm the administration of justice.

7. The practice of scheduling long motions by claiming that they will take "59 minutes" must end. If a party finds itself confronted with such a motion, they should consider requesting a conference call with a judge of this court to raise the issue, and resolve it before time, money and the ability of other parties to properly use them time are wasted or lost.

8. In the future, the court should consider whether costs consequences are an appropriate remedy, even for a winning party who brings such a "59-minute" motion, under r. 24(4).

While Justice Kurz is absolutely right, we add this comment. If this is a rule that is going to be enforced (and it should be) — it must be enforced uniformly — against and in favour of all and by all judges of all courts. It is not fair to parties or counsel that *some* courts bend the rules when others do not. That only forces counsel to prepare for a motion that only *probably* is going to be adjourned to a long motion.

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