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

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SCC Watch

Issues: Federal — Child Support

In the January 23, 2023 (2023-03) edition of *TWFL*, we discussed *Auer v. Auer* (2022), 81 R.F.L. (8th) 338 (Alta. C.A.), where the Alberta Court of Appeal rejected Mr. Auer's argument that the *Federal Child Support Guidelines*, SOR/97-175 (the "*Guidelines*") were *ultra vires* because they went beyond the scope of authority granted to the Governor in Council (i.e. the Governor General acting on advice of Cabinet).

According to Mr. Auer's argument, the *Guidelines* are *ultra vires* because:

> • Subsections 26.1(1) and (2) of the *Divorce Act* authorize the Governor in Council to enact child support guidelines "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." [emphasis added]
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> • The *Guidelines* went beyond the scope of authority that had been delegated to the Governor in Council because they required non-custodial parents to cover a disproportionate share of their children's costs, as opposed to requiring both parents to contribute "in accordance with their relative abilities" as required by s. 26.1(2).

In the January 23, 2023 (2023-03) edition of *TWFL*, we ended our comment by saying "[g]iven the tenacity shown by Mr. Auer in the past, this may not be the end . . . "

It would seem we were right, although with the assistance of some folks in Ottawa.

The Supreme Court of Canada granted Mr. Auer leave to appeal in late 2023, primarily on the issue of what standard of review applies to an application for judicial review from a decision of the Governor in Council.

The Supreme Court heard oral arguments on April 25, 2024. Although the court reserved its decision, and although we won't begin to guess where the court will land on the standard of review question, based on the individual comments from the Bench, we would suggest that there is about a 0% chance that the court will find that the *Guidelines* are *ultra vires*. In fact, that may be overstating the chances.

That being said, given that the operation of the *Guidelines* was a central part of the case, there is a good chance that the court will make statements or comments in its reasons that might impact our understanding of the *Guidelines*. We will be sure to let you know.

The Evolution of "Need" re Retroactive Child Support — Need We Consider "Need"?

Giesbrecht v. Giesbrecht, 2024 CarswellAlta 389 (C.A.) — Crighton, Pentelechuk and Kirker JJ.A.

Issues: Alberta — Child Support — Retroactive Child Support — Circumstances of the Child

The trial judge dismissed the wife's/Appellant's claim for retroactive child support. And, well . . . them's fightin' words. The wife appealed. The husband/Respondent, to maximize his chances of success, did not file any materials on the appeal.

Following separation, the husband voluntarily paid $2,000 per month in child support. At some point, that amount was reduced, and by September 2018, no child support was being paid. There was never a child support order before trial.

The parties agreed that ongoing child support should be paid for the children, then 16 and 18 years old (the older son being in first year University).

Referring to the Supreme Court of Canada's decision in *DBS v. SRG* (2006), 31 R.F.L. (6th) 1 (S.C.C.) ("*DBS*"), the trial judge considered the four factors therein outlined in assessing the retroactive child support claim.

In considering the children's circumstances past and present, the trial judge was satisfied that the children had enjoyed "all the advantages they would have received had proper child support payments been made." The trial judge was satisfied that given the husband's somewhat modest income "a retroactive award will pose some undefined hardship" — and the claim for retroactive child support was dismissed.

The wife alleged that the trial judge overly (or improperly) focussed on the fact that the children did not "need" a retroactive award and that any such award would cause hardship to the husband.

Unfortunately, the trial decision does not seem to be available, so we must rely on the appellate decision to understand what the trial judge relied on.

By way of reminder, in *DBS* a majority of the Supreme Court of Canada set out four factors to help determine when an award for retroactive child support is appropriate:

- the recipient parent's reason(s) for delaying their application for child support;
- the conduct of the payor parent;
- the circumstances of the child; and
- the hardship the award creates for the payor parent.

No one factor is decisive.

With respect to the third factor — the circumstances of the child — the Supreme Court said as follows in *DBS*:

> Circumstances of the Child
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> [110] A retroactive award is a poor substitute for an obligation that was unfulfilled at an earlier time. Parents must endeavour to ensure that their children receive the support they deserve when they need it most. But because this will not always be the case with a retroactive award, **courts should consider the present circumstances of the child — as well as the past circumstances of the child — in deciding whether such an award is justified**.
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> [111] **A child who is currently enjoying a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need**. As I mentioned earlier, it is a core principle of child support that, after separation, a child's standard of living should approximate as much as possible the standard (s)he enjoyed while his/her parents were together. **Yet, this kind of entitlement is impossible to bestow retroactively**. Accordingly, it becomes

necessary to consider other factors in order to assess the propriety of a retroactive award. Put differently, because the child must always be the focus of a child support analysis, **I see no reason to abstract from his/her present situation in determining if a retroactive award is appropriate**.

[112] Consideration of the child's present circumstances remains consistent with the statutory scheme. While Parliament has moved away from a need-based perspective in child support, it has still generally retained need as a relevant consideration in circumstances where a court's discretion is being exercised: see ss. 3(2)(b), 4(b)(ii) and 9(c) of the *Guidelines*. Some provinces, like Quebec, even provide courts with discretion to alter default child support arrangements, within defined limits, on the basis of need: see art. 587.1 of the *Civil Code of Québec*, S.Q. 1991, c. 64. **Unless the applicable regime eliminates need as a consideration in discretionary child support awards altogether, I believe it remains useful to retain this factor when courts consider retroactive awards.**

[113] Because the awards contemplated are retroactive, **it is also worth considering the child's needs at the time the support should have been paid. A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her**: see *S. (L.)*. **This is not to suggest that the payor parent's obligation will disappear where his/her children do not "need" his/her financial support. Nor do I believe trial judges should delve into the past to remedy all old familial injustices through child support awards; for instance, hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child**. I offer these comments only to state that the hardship suffered by children can affect the determination of whether the unfulfilled obligation should be enforced for their benefit. [**emphasis** added]

Therefore, according to the Supreme Court in *DBS*, the past and present circumstances of the children that are/were entitled to support must be considered because, "the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages s(he) would have received had both parents been supporting him/her" and because "hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child."

Some years later, again with respect to the third factor, the Supreme Court offered this in *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.):

Circumstances of the Child

[120] Although the *Guidelines* heralded a shift from the conception of need as the primary motivator for child support to an understanding of support as the child's entitlement, **a child's needs may still be relevant in awarding and calculating retroactive child support. If there has been hardship present during their childhood, or if the child needs funds at the time of the hearing, this weighs in favour not only of an award but also of extending the temporal reach of the award. This factor may play a particular role in applications for historical child support.**

[121] **Where the child has suffered deprivation, this factor is a significant consideration in favour of relief**. There is some suggestion in the commentary that courts have been subordinating this factor to others, such as delay (see Gordon (2012), at p. 74). But as I have discussed, the neglect or refusal to pay child support is strongly linked to child poverty and female poverty. As L'Heureux-Dubé J. pointed out in *Willick*:

> . . . the financial burden of divorce should not be borne primarily by children and their custodial parents. Children are our country's most important resource, our future. Their needs cannot be minimized on account of their parents' divorce. They are entitled to be looked after properly both before and after divorce. I do not mean to imply that they must live in luxury. I strenuously object, however, to situations in which children live at or near the poverty level despite the fact that the means of the non-custodial parent are sufficient to meet their needs. [p. 718]

> [122] At the same time, **this does not mean that any kind of need or hardship is a necessary antecedent to an award for retroactive child support**. Indeed, *S. (D.B.)* explicitly indicated at para. 113 that **a payor parent's obligation will not "disappear where [their] children do not 'need' [their] financial support"** (see also *Swiderski* (S.C.), at paras. 93-95). In *R. (C.A.) v. R. (G.F.)*., 2006 BCSC 1407 (B.C. S.C.), the court held that "if this factor were to tip the balance against making a retroactive award, then, in essence, the [payor] will have profited from 'holding off' on paying increased child support" (para. 48 (CanLII)).
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> [123] Additionally, there are plenty of **circumstances where a parent will absorb the hardship that accompanies a dearth of child support so as to prioritize their child's wellbeing** (see *Richardson*, at p. 869; *Willick*, at pp. 724-25; see also *Buckingham*, at para. 51). There is absolutely **no principled reason why this parent should receive less support as a result of choices that protect their child** (see *S (D.B.)*, at para. 170, per Abella J. (concurring); *Colucci*, at para. 26). Indeed, it has been recognized that "[t]he fact that the respondent will indirectly benefit is not a reason to refuse to make the award of support" (*Debora v. Debora* (2006), 218 O.A.C. 237 (Ont. C.A.), at para. 70; *Innes*, at para. 11). **Thus, the fact that a child did not have to suffer hardship because of their custodial parents' sacrifice is not one that weighs against awarding retroactive or historical child support. Rather, a recipient parent's hardship, like that of a child, weighs in favour of the award of retroactive child support and an enlarged temporal scope**. [**emphasis** added]

Now let's continue on our journey down the retroactive child support highway.

As we noted, we do not know what cases the trial judge may have considered. But we do know (because the Court of Appeal says so) the trial judge did not consider the latest case on the issue from the Alberta Court of Appeal — *Henderson v. Micetich* (2021), 54 R.F.L. (8th) 295 (Alta. C.A.) ("*Henderson*") — which the Court of Appeal suggests "provides a complete answer to this ground of appeal":

> [16] The trial judge **fell into error by first, finding that the children had no need**, and second, by finding that a retroactive award would present undue hardship to the [husband], despite the absence of a hardship argument being advanced. Concerns about a large retroactive award could and should have been managed through adjustment to the quantum of the award or through a payment schedule. [**emphasis** added]

For a full discussion of *Henderson*, see the May 10, 2021 (2021-18) edition of *TWFL*. In *Henderson*, the Alberta Court of Appeal seems to have almost entirely closed the door on any suggestion that the circumstances of the children matter; that "lack of need" during the retroactive period matters; or that hardship faced by others is irrelevant:

> Circumstances of the child
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> [58] Given that child support is the right of the child and the children should be the proper focus of any inquiry on retroactive support, it is interesting that this factor appears third on the list, after the payee's delay and the payor's conduct are considered. **The purpose of the inquiry is to determine how the failure to pay adequate child support has affected the children.** This Court has noted, in *Goulding* and *Brear*, that the right to support is the right of the child and parents cannot bargain it away. The court must address support from a child-centred approach, recognizing that it is the child's right.
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> [59] The chambers judge noted that "the right of a child to support outweighs any 'right' of a parent to rely on an agreement that does not ensure adequate payment of child support". **Nevertheless, she concluded that the children had no need for retroactive child support from their father, because their mother's husband had more than compensated for any support their father did not pay. She concluded, "a reasonable inference is that KM's household enjoyed a privileged standard of living well above the vast majority of households in Alberta. In this highly unusual set of circumstances I conclude that what KM seeks, a retroactive payment of $18,603.00, will provide no benefit to the children.** What it will do is produce a hardship for Dad."
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> [60] **This analysis is in error.** It must again be emphasized that child support remains the right of the child. As was noted by this Court in *Goulding* at para 51, there is no requirement to prove any need on the part of the children for them to receive

as retroactive support amounts that have not been paid as required, and **a payor parent cannot avoid a retroactive award by arguing that the recipient parent was able to sufficiently care for the child on his or her own**. Circumstances can change quickly. The current good fortune of the recipient parent is no guarantee that it will continue. In *Michel*, the Supreme Court recognized that children remain entitled to payment of retroactive child support after they become adults; Martin J emphasized that child support obligations arise upon separation, and retroactive awards provide a means "to enforce such pre-existing, free-standing obligations and to recover monies owed but yet unpaid": para 41.

[61] There is no basis on which to disregard these principles in this case. **Because one parent has married a high-income earner, does not make this an exceptional situation. Treating it as such is not the law, nor is it good policy. It has the reverse effect, namely undermining the goals and purpose of the *Guidelines*. It effectively absolves a payor parent of statutorily prescribed legal obligations. Where a recipient parent finds a partner who is generous, and willing to support the payor's children, that generosity is not a substitute for the other parent's financial obligations to his or her children**. As mentioned earlier, this is the kind of relative wealth, needs and means analysis that dominated the law of child support before the enactment of the *Guidelines*. The policy choice of Parliament and the provinces was to move to a different, more predictable approach — the amount of child support payable is dependent on the *Guideline* income of the payor and the relevant table amounts.

[62] **A loss of benefit is presumed** where the payor parent fails to pay the amount of support required under the *Guidelines*: *Goulding* at para 52. Fundamentally, regardless of the financial position of the recipient parent or the recipient parent's spouse, children are entitled to expect and receive child support from both their parents. **It is not enough to say, as the chambers judge did here, that an award of retroactive support should not be granted because the children do not need it**. This fails to recognize that the third party, who has been assisting in the support of the children, has no legal obligation to do so, and has the effect of undermining the underlying philosophy of the child support regime. It would be a most unusual circumstance to say that a child will not benefit from the provision of monies to which they are entitled, and which were previously withheld.

[63] Additional considerations ought to have informed the consideration of the circumstances of the children in this case. For example, there is no evidence of a commitment to ensure the children will benefit from the current financial ability and generosity of the mother's husband. Neither his future generosity nor financial ability is assured. **Moreover, it is surely a benefit to the children that they know their father is assuming financial responsibility for them, for both the past and the future.**

[64] **The 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, Goulding and Brear*. [**emphasis** added]

See the progression?

DBS (SCC 2006): Hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are "irrelevant" in determining whether there is a retroactive child support obligation.

Michel (SCC 2020): There are circumstances where a parent will absorb the hardship that accompanies a dearth of child support so as to prioritize their child's wellbeing. There is "absolutely no principled reason" why this parent should receive less support as a result of choices that protect their child. The fact that a child did not have to suffer hardship because of their custodial parent's sacrifice is not one that weighs against awarding retroactive or historical child support. Rather, "a recipient parent's hardship . . . weighs in favour of the award of retroactive child support and an enlarged temporal scope."

Henderson (ABCA 2021): Don't talk to us about the circumstances of the children now or then. Don't tell us that the children's needs were met in some other way. A payor parent cannot avoid a retroactive award by arguing that the recipient parent was able to sufficiently care for the child on his or her own — even with help from others.

Interesting. We're not entirely sure what to do with this. In *Michel*, the Supreme Court of Canada certainly did not overrule this consideration from *DBS*. And in *Henderson*, the Alberta Court of Appeal certainly grabbed the *Michel* "circumstances of the child" football and ran it into the end zone, essentially eliminating "circumstances of the children" as any material consideration.

But this leaves us with one lingering question about a stated consideration that now seems to be wholly irrelevant.

What do we think? Well, in terms of *stare decisis*, the circumstances of the children are part of the test. And something that is "part of the test" must mean *something*. However, we also agree that a recalcitrant and/or uncooperative and/or non-disclosing payor should not be void of any retroactive child support obligation. But what about payors that are not "one of *those*?" What of payors that honestly and legitimately think they have an agreement regarding child support and can actually see that their children want for nothing — for whatever reason — and where they have never been asked to provide disclosure. Surely the past and present circumstances of the children must matter in that sort of situation. Were a payor to have to pay a significant retroactive child support award in such circumstances — how exactly would the child benefit — especially if the "children" are now adults?

Back to the case at hand, here both parties asked the Court of Appeal to quantify the child support owing rather than remit the matter back to the Court of King's Bench. The Court of Appeal obliged.

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