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— Franks & Zalev - This Week in Family Law

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Sport Grants as Income and an Excellent Review of Retroactive Child Support

***John v. Laing* (2025), 21 R.F.L. (9th) 202 (Ont. C.J.) — Sherr J.**

In this lengthy decision, Justice Sherr deals with retroactive child support, imputation of income and the treatment of certain non-taxable government grants. While the amounts might be lower than some cases relating to these issues, Justice Sherr's analysis is characteristically excellent.

The parties were not married and had one child together. They each also had a child from a previous relationship.

The father was a former Paralympic athlete. He was a "Senior Carded Athlete" through Sports Canada prior to 2025. As a result, the Father received a "Sports Grant" from Sports Canada.

The Father claimed that the parties cohabited from January 1, 2012 to September 25, 2023. The Mother swore that the parties had never actually cohabited. Justice Sherr accepted the Mother's version of events for reasons that will become clear.

The child had always lived with the Mother.

The Father was charged with assaulting the Mother on September 25, 2023. The charges were resolved by way of a peace bond.

The Father commenced his Application on January 3, 2024. He amended his Application on March 28, 2024. The Father was seeking parenting related orders.

The Mother filed her Answer on January 12, 2024. She was self-represented and did not seek child support. She sought a restraining order and parenting orders. Subsequently, she obtained counsel and amended her Answer to claim child support on May 6, 2024.

On April 25, 2024, the parties agreed to an interim child support amount.

On October 7, 2024, on consent, the parties resolved all of the issues except for holiday parenting time and child support. The Mother remained the child's primary parent and was given decision-making responsibility for the child.

On March 17, 2025, the Father was ordered to provide the Mother with specific financial disclosure. He failed to do so. He did not attend court on June 9, 2025. The Mother was given leave to bring a motion to strike the Father's Application.

The Mother brought her motion to strike on July 2, 2025. The Father's Application was struck and an uncontested hearing was scheduled to proceed before Justice Sherr on September 29, 2025. The Father was permitted some limited rights of participation. He was allowed to make submissions at the hearing and to serve and file:

1. An updated financial statement — he did not do this;

2. His financial disclosure previously ordered — he did not do this either;

3. His record of employment — nada; and

4. Any medical reports he wished to rely on — take a guess . . .

The Mother filed two Affidavits and a Statement of Arrears prepared by the Family Responsibility Office. The Father was in arrears of the interim child support order and many of the payments he did make had not been made voluntarily.

The Mother sought child support retroactive to January 1, 2021, and asked that income be imputed to the Father.

The Father argued that the court should dismiss the Mother's claim for retroactive child support and that he pay child support of $100 per month starting October 1, 2025.

An important point, which is sometimes not fully appreciated by counsel, is that retroactive support only applies to the period *prior* to the filing of a claim (in this case the Wife's Answer). Support subsequent to the date of the claim is not "retroactive" and is presumptively payable: *MacKinnon v. MacKinnon* (2005), 13 R.F.L. (6th) 221 (Ont. C.A.); *Wharry v. Wharry* (2016), 89 R.F.L. (7th) 61 (Ont. C.A.); *Cassidy v. McNeil*, 2010 CarswellOnt 1637 (C.A.); and *Dickson v. Dickson* (2011), 93 R.F.L. (6th) 241 (Man. C.A.).

Justice Sherr then set out the framework for ordering retroactive child support — a useful reminder for all:

> [24] The court's authority to make retroactive support orders is contained in clause 34 (1) (f) of the *Family Law Act*. This clause reads as follows:
>
> **Powers of court**
>
> (1) In an application under section 33, the court may make an interim or final order,
>
> . . . (f) requiring that support be paid in respect of any period before the date of the order;
>
> [25] In *Colucci v. Colucci*, 2021 SCC 24 (*Colucci*), the court set out the framework that should be applied for applications to retroactively increase support in paragraph 114 as follows:
>
> 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.

[26] This framework in *Colucci* addressed a request to retroactively increase the support contained in an order or an agreement. Courts have found that this framework should also be applied, with necessary modifications, for an original request for retroactive support.

[27] In an original application for retroactive support, there will be no need to meet the threshold requirement of establishing a material change in circumstances, as required in *Colucci*. The first step will be to determine the presumptive date of retroactivity as described in *Colucci*. The second step will be to determine if the court should depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *D.B.S.* factors will guide the exercise of that discretion, as described in *Michel v. Graydon*, 2020 SCC 25. The third step will be to quantify the proper amount of support for each year since the date of retroactivity, calculated in accordance with the guidelines. See: *L.S. v. M.A.F.,* 2021 ONCJ 554; *M.A. v. M.E.*, 2021 ONCJ 555; *A.E. v. A.E.,* 2021 ONSC 8189; *Mohamoud v. Farah*, 2023 ONCJ 103.

[28] Retroactive child support simply holds payors to their existing (and unfulfilled) support obligations. See: *Michel v. Graydon*, 2020 SCC 24, at par. 25.

[29] Retroactive child support is a debt; by default, there is no reason why it should not be awarded unless there are strong reasons not to do so. See: *Michel* — par. 132.

[30] Retroactive awards are not exceptional. They can always be avoided by proper payment. See: *D.B.S.* — par. 97.

[31] In *Michel*, at paragraph 121, the Supreme Court of Canada emphasized the importance of support payors meeting their support obligations and commented that the neglect or underpayment of support is strongly connected to child poverty and female poverty.

With that framework in place, Justice Sherr considered the first *Colucci* question: What was the presumptive date to change support?

To determine the presumptive date, the court must look at the dates of effective and formal notice. Effective notice is defined as any indication by the recipient parent that child support should be paid, or if it already is being paid, that the amount needs to be renegotiated. All that is required is for the subject to be "broached." Once that it is done, the payor can no longer assume that the *status quo* is appropriate: *D.B.S. v. S.R.G* (2006), 31 R.F.L. (6th) 1 (S.C.C.) at para. 121.

The Mother had clear evidence as to when she first sought support from the Father. It was on the child's first birthday, November 30, 2018. This was the date of effective notice.

Although effective notice can be as little as broaching the topic in conversation, *formal notice* requires something more. Justice Sherr states that usually this takes the form of written correspondence from the recipient or counsel or the commencement of legal proceedings.

Here, the Mother gave the Father formal notice she was seeking child support in her Case Conference brief dated April 17, 2024. This was before her Amended Answer which was filed three weeks later on May 6, 2024.

As set out in *Colucci*, absent blameworthy conduct, the presumptive start date generally cannot be more than three years before formal notice. Consequently, the furthest back the presumptive start date could be was April 17, 2021.

With the presumptive start date established, the next step under *Colucci* is to determine if the court should *depart* from the presumptive start date. In making such a determination, the court will consider delay, conduct, the circumstances of the child and hardship.

Reason for Delay

Justice Sherr set out the analysis for this step under *Colucci* as follows:

> [40] In considering delay, courts should look at whether the reason for delay is understandable, not whether there was a reasonable excuse for the delay. The latter consideration works to implicitly attribute blame onto parents who delay applications for child support. See: *Michel*, par. 121.
>
> [41] A delay, in itself, is not inherently unreasonable and the mere fact of a delay does not prejudice an application, as not all factors need to be present for a retroactive award to be granted. See: *Michel,* par. 113.
>
> [42] Rather, a delay will be prejudicial only if it is deemed to be unreasonable, taking into account a generous appreciation of the social context in which the claimant's decision to seek child support was made. See: *Michel*, par. 86.
>
> [43] In *Michel*, the court, at paragraph 86, set out what might be understandable reasons for delay in a support recipient coming to court as follows:
>
> a. Fear of reprisal/violence from the other parent.
>
> b. Prohibitive costs of litigation or fear of protracted litigation.
>
> c. Lack of information or misinformation over the payor parent's income.
>
> d. Fear of counter-application for custody.
>
> e. The payor leaving the jurisdiction or the recipient unable to contact the payor parent.
>
> f. Illness/disability of a child or the custodian.
>
> g. Lack of emotional means.
>
> h. Wanting the child and the payor to maintain a positive relationship or avoid the child's involvement.
>
> i. Ongoing discussions in view of reconciliation, settlement negotiations or mediation.
>
> j. The deliberate delay of the application or the trial by the payor.

Justice Sherr determined that the mother had *partially* provided understandable reasons for her delay in coming to court, including:

> 1. She had a lack of information about the Father's income, although his income was not much more than she suspected he was earning;
>
> 2. The Father convinced her he did not have the ability to pay much support. She knew that he owed support for his older child; and
>
> 3. The Mother was the victim of intimate partner violence.

Justice Sherr balanced this off against the fact that the Mother had made a choice *not* to pursue child support until the Father brought this matter to court. She did not seek child support in her initial Answer. While she testified that she had wanted to

"give him the chance" to pay more support, as he assured he would, at a certain point she "should have realized that was not going to happen."

Blameworthy Conduct

Blameworthy conduct is anything that privileges the payor parent's own interests over his or her children's right to an appropriate amount of support. If a payor fails 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: *Colucci* at para. 114. The failure of a payor to disclose actual income, a fact within their knowledge, is blameworthy conduct that eliminates any need to protect the payor's interest in certainty.

In this case, the Father had engaged in blameworthy conduct:

1. He did not provide the Mother with any income information until the case started;

2. He failed to pay child support payments in amounts close to what he should have been paying. He knew, or ought to have known, that he was underpaying child support;

3. He failed to comply with court orders to provide financial disclosure; and

4. He had been a "reluctant" payor during the case. The FRO had to take enforcement action against him. He had paid some arrears in January of 2025 only after there was an order compelling him to do so — or have his pleadings struck. His pleadings were then subsequently struck for non-disclosure.

Circumstances of the Child

Justice Sherr noted that the child's circumstances had been impacted by the Father's failure to pay proper child support. The Mother testified that she could no longer afford Kumon for the child and that she had to pull him out of other extra-curricular activities.

Hardship

Justice Sherr made the following comments regarding hardship:

> [52] If there is the potential for hardship to the payor, but there is also blameworthy conduct which precipitated or exacerbated the delay, it may be open to the courts to disregard the presence of hardship. In all cases, hardship may be addressed by the form of payment. See: *Michel,* par. 124.
>
> [53] While the focus is on hardship to the payor, that hardship can only be assessed after taking into account the hardship which would be caused to the child and the recipient parent from not ordering the payment of sums owing but unpaid. See: *Michel*, par. 125.

While he acknowledged that the Father would suffer hardship if there was a large retroactive support amount ordered against him - based on the income to be imputed to him by the Mother, this could be addressed through reasonable monthly arrears payments. In addition, the Mother was experiencing hardship because of the Father's failure to pay support and would *continue* to experience hardship if she did not receive retroactive support.

After consideration of the factors, Justice Sherr determined that he would *not* depart from the presumptive start date. Retroactive support would go back to May 1, 2021, which was the first day of the first month after the presumptive start date.

The next step was to quantify support.

The two issues here important for our purposes were the grants the Father received from Sports Canada in 2023 and 2024. The Father took the position that these grants should not be included in his income. The Mother, on the other hand, argued that they should be included in the Father's income and grossed up as they were non-taxable.

Justice Sherr had this to say about imputing income:

> [62] Section 19 of the guidelines permits the court to impute income to a party as it considers appropriate.
>
> [63] Clause 19 (1) (h) of the guidelines permits the court to impute income to a payor when the payor derives a significant portion of income from sources that are tax exempt.
>
> [64] Clause 19 (1) (h) is permissive. The court can include all, some or none of the Sports Canada grants in the father's income.

The grants were available to "carded" athletes. A "carded" athlete is given monetary support to reduce the need for employment during training and can receive tuition support while attending higher education studies. The Father was not required to account for the money he received; he could spend it as he saw fit.

While the Mother's counsel could not point to any cases that dealt with the treatment of athletic grants for support purposes, they did provide the case of *Mwenda v. Madituka*, 2018 CarswellOnt 12295 (C.J.), which dealt with student grants that proved helpful. In that case, Justice Murray treated the student grants as income and grossed them up as they were non-taxable. Justice Murray considered the following factors in coming to her decision:

> a) The grants were not a return of capital.
>
> b) Work was expected of the father — registration and coursework in a post-secondary institution.
>
> c) Payment was recurrent.
>
> d) The funds were used to pay a significant proportion of his living expenses.
>
> e) The funds were not required to pay his educational costs. Student loans covered tuition and books.

The athletic grants in this case were very similar:

> a) They were not a return of capital.
>
> b) Work was expected of the Father. He was required to train and represent Canada at track and field events.
>
> c) Payment of the grants was recurrent.
>
> d) The grants were used to pay a significant portion of the Father's living expenses.
>
> e) The Father had discretion and control over the grant funds.

See also *Regaudie v. Thomas* (2002), 29 R.F.L. (5th) 153 (Ont. S.C.J.) at para. 10; *Hergert v. Hergert*, 2022 CarswellOnt 1069 at paras. 7, 32; *Gallagher v. Gallagher* (2012), 27 R.F.L. (7th) 361 (Ont. S.C.J.) at paras. 31-33; *G.S. v. S.S.*, 2017 CarswellOnt 8966 (C.J.) at paras. 211-212; *Jankowski v. Santos*, 2023 CarswellOnt 15790 (S.C.J.) at para. 110.

Justice Sherr determined that the grants were income and grossed them up. In addition, he suggested that if the grants had been required for a specific purpose related to the Father's training and participation in track and field events, they would *not* have been considered income. Justice Sherr set out specific examples such as if the Father had to use the grant to pay for a coach, for use of training facilitates, for equipment, for travel or for accommodations at events. That (entirely correct) dichotomy may come in useful in the future.

As of 2025, the Father was no longer receiving any grants from Sports Canada. He claimed that he had been in a motor vehicle accident in February of 2025 and could no longer work.

Justice Sherr then summarized the jurisprudence regarding imputation of income in an extremely helpful list:

> a) Imputing income is one method by which the court gives effect to the joint and ongoing obligation of parents to support their children. In order to meet this obligation, the parties must earn what they are capable of earning. If they fail to do so, they will be found to be intentionally under-employed. See: *Drygala v. Pauli* (2002), 29 R.F.L. (5th) 293 (Ont. C.A.).
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> b) The Ontario Court of Appeal in *Kohli v. Thom* (2025), 14 R.F.L. (9th) 249 (Ont. C.A.), affirmed that the following three questions should be answered by a court in considering a request to impute income:
>
> (a) Is the party intentionally under-employed or unemployed?
>
> (b) If so, is the intentional under-employment or unemployment required by virtue of his or her reasonable educational needs, the needs of the child or reasonable health needs?
>
> (c) If not, what income is appropriately imputed?
>
> c) The onus is on the party seeking to impute income to the other party to establish that the other party is intentionally unemployed or under-employed. The person requesting an imputation of income must establish an evidentiary basis upon which this finding can be made. See: *Homsi v. Zaya* (2009), 65 R.F.L. (6th) 17 (Ont. C.A.). However, in *Graham v. Bruto*, 2008 CarswellOnt 1906 (C.A.), the court inferred that the failure of the payor to properly disclose would mitigate the obligation of the recipient to provide an evidentiary basis to impute income.
>
> d) Once a party seeking the imputation of income presents the evidentiary basis suggesting a *prima facie* case, the onus shifts to the individual seeking to defend the income position they are taking. See: *Lo v. Lo* (2011), 15 R.F.L. (7th) 344 (Ont. S.C.J.); *Charron v. Carrière*, 2016 CarswellOnt 11792 (S.C.J.).
>
> e) As a general rule, separated parents have an obligation to financially support their children and they cannot avoid that obligation by a self-induced reduction of income. See: *Thompson v. Gilchrist* (2012), 27 R.F.L. (7th) 83 (Ont. S.C.J.); *DePace v. Michienzi* (2000), 5 R.F.L. (5th) 40 (Ont. S.C.J.).
>
> f) The receipt of social assistance is not sufficient proof of one's inability to work for support purposes. See: *Tyrrell v. Tyrrell*, 2017 CarswellOnt 17132 (S.C.J.). The court cannot take judicial notice of any eligibility requirements for social assistance. Nor can it delegate the important and complex determinations of employability and income earning capacity to unknown bureaucrats applying unknown evidence to unknown criteria. See: *Abumatar v. Hamda*, 2021 CarswellOnt 3972 (S.C.J.); *S.P. v. D.P.*, 2024 CarswellOnt 20135 (C.J.).
>
> g) The court must have regard to the payor's capacity to earn income in light of such factors as employment history, age, education, skills, health, available employment opportunities and the standard of living enjoyed during the parties' relationship. The court looks at the amount of income the party could earn if he or she worked to capacity. See: *Lawson v. Lawson* (2006), 29 R.F.L. (6th) 8 (Ont. C.A.).
>
> h) The court will usually draw an adverse inference against a party for his or her failure to comply with their disclosure obligations as provided for in section 21 of the guidelines and impute income. See: *Smith v. Pellegrini*, 2008 CarswellOnt 5475 (S.C.J.); *Maimone v. Maimone*, 2009 CarswellOnt 2909 (S.C.J.).
>
> i) The payor must prove that any medical excuse for being underemployed is reasonable. See: *Rilli v. Rilli*, 2006 CarswellOnt 6335 (S.C.J.).

j) Cogent medical evidence in the form of detailed medical opinion should be provided by the payor in order to satisfy the court that his/her reasonable health needs justify his/her decision not to work. See: *Cook v. Burton*, 2005 CarswellOnt 178 (S.C.J.) and *Stoangi v. Petersen*, 2006 CarswellOnt 4375 (S.C.J.).

k) In *Davidson v. Patten*, 2021 CarswellOnt 11881 (C.J.), Justice Carole Curtis set out that a party resisting a claim for imputation of their income based on medical reasons should provide a medical report setting out at least the following information:

i. Diagnosis;

ii. Prognosis;

iii. Treatment plan (is there a treatment plan? And what is it?);

iv. Compliance with the treatment plan; and,

v. Specific and detailed information connecting the medical condition to the ability to work (e.g., this person cannot work at the pre-injury job; this person cannot work for three months; this person cannot work at physical labour; this person cannot return to work ever).

l) Support payors must use reasonable efforts to address whatever medical limitations they may have to earn income. This means following up on medical recommendations to address these limitations. See: *Cole v. Freiwald* (2011), 10 R.F.L. (7th) 198 (Ont. C.J.), per Justice Marvin A. Zuker, paragraphs 140 and 141.

Justice Sherr determined that the Father was intentionally unemployed, without a valid excuse, for the following reasons:

a) He provided none of the financial disclosure required by prior court orders.

b) He provided no medical evidence to support his position that he was injured or that his injuries prevent him from working.

c) He provided no evidence that he has a treatment plan or is following a treatment plan.

d) He provided no evidence that he was in a motor vehicle accident.

e) He provided no evidence that he is on social assistance.

f) He provided no evidence that he is attempting to work or retrain.

Justice Sherr imputed income to the Father of at least $35,000 — being a full-time minimum wage income.

The court calculated the Father's arrears, giving credit for amounts paid, and determined that he owed $12,431.26. The court also determined that the Father had very limited financial circumstances and permitted him to make monthly payments against the arrears of $150.00. However, Justice Sherr offered the Father the following caution:

[91] The court recognizes that the father has very limited financial circumstances. It will permit him to pay the arrears at $150 each month. This will give him many years to pay them. However, he must maintain his ongoing child support payments and these arrears payments in good standing if he wishes to continue to receive this indulgence. If he fails to do so, the entire amount of arrears then owing shall immediately become due and payable.

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