

D.B.S. v. S.R.G.; L.J.W. v. T.A.R.;
Henry v. Henry; Hiemstra v. Hiemstra, 2006 SCC 37
Retroactive Child Support Case Commentary
Prepared by S. Christine Montgomery, B.A., LL.B, for DIVORCEmate Software Inc.

On July 31, 2006, the Supreme Court of Canada released its decision, D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra, 2006 SCC 37, wherein the S.C.C. examined and clarified the law with respect to retroactive child support.

While the court divided 4-3 on some of the legal issues, the court was unanimous in its disposition of each of the appeals. In all cases, the court restored or upheld the order of the court at first instance. In two of the cases, retroactive child support was ordered; in the other two cases, it was not.

Essentially, the S.C.C. confirmed the court's power to order a "retroactive" child support award. The S.C.C. emphasized throughout the judgment that a "payor parent always has the obligation to pay – and the dependent child always has the right to receive – child support in an amount that is commensurate to his/her income" (para. 68). The corollary of this obligation is that "a [payor] parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly" (para. 132).

In other words, there appears to be a positive duty on a payor parent to increase child support payments when his/her income increases significantly, failure to do so placing the payor at risk of a retroactive award.

The S.C.C. went on to address a number of points and factors to consider in making a retroactive child support award, summarized as follows:

- The term "retroactive" is really a misnomer. The general concern about applying obligations retroactively does not apply in the case of retroactive child support orders, since it is only the *enforcement* of an unfulfilled obligation, namely child support, that is retroactive, and not the imposition of the obligation itself, which existed all along.
- A retroactive order is not exceptional, nor rare.
- A child support obligation in a court order is presumptively valid, but not absolute. However, as "the circumstances underlying the original award change, the value of that award in defining parents' obligations necessarily diminishes" (para. 74).
- A child support obligation in an agreement (not endorsed by the court) while not considered presumptively valid, will be given considerable weight provided, of course, it is reasonable. "However, as is the case with court orders, where circumstances have changed (or were never as they first appeared) and the actual support obligations of the payor parent have not been met, courts may order a retroactive award so long as the applicable statutory regime permits it" (para. 78).

- Where there is no existing payment of child support, “absent special circumstances (e.g., hardship or ad hoc sharing of expenses with the custodial parent), it becomes unreasonable for the non-custodial parent to believe (s)he was acquitting him/herself of his/her obligations towards his/her children” (para. 80), and the court may award retroactive child support.
- A child must be eligible for support at the time of the application. “Child support is for children of the marriage, not adults who used to have that status” (para. 89).
- Pursuant to the Divorce Act, support can be awarded prior to the date of the application for divorce, if the court is properly seized of a child support dispute between divorced parents, failing which provincial law would govern.
- “It will not always be appropriate for a retroactive award to be ordered ...; this will be so where the child would get no discernible benefit from the award” (para. 95).
- A recipient parent’s “[d]elay in seeking child support is not presumptively justifiable,” (para. 101) unless there is a reasonable excuse (i.e. recipient’s justifiable fear that the payor parent would react vindictively to the detriment of the family; recipient’s lack of financial or emotional means to bring an application; or inadequate legal advice).
- In considering the propriety of a retroactive award, the court should consider whether the payor parent has engaged in blameworthy conduct, which is characterized expansively as any conduct “that privileges the payor parent’s own interests over his/her children’s right to an appropriate amount of support” (para. 106).
- Blameworthy behaviour on the part of a payor includes: hiding income; intimidating a recipient parent from pursuing child support; misleading a recipient parent into believing that appropriate child support is being paid. However, failing to increase child support automatically will not necessarily qualify as blameworthy; it will ultimately be a question of how reasonable is the payor’s belief that his/her obligations were being met. For example, the closer the amount being paid is to the amount that should have been paid, the more reasonable the payor’s belief; compliance with an order or agreement is reasonable, provided there is no material change in the payor’s circumstances.
- A payor parent’s conduct could militate *against* a retroactive award in some circumstances, such as where a parent has met an increased obligation indirectly.
- The child’s present and past circumstances are relevant. A child enjoying a relatively high standard of living may benefit less from a retroactive award than a child currently in need. Similarly, a retroactive award may compensate a child who underwent hardship in the past.
- The courts should broadly consider hardship occasioned by a retroactive award, particularly where the payor is blameless.

- Awards should be crafted in such a way as to minimize hardship. For example, depending on the statutory regimes, retroactive awards may be paid on a lump sum basis, periodically, or a combination of the two.
- The actual quantum of the award should be determined in accordance with the Child Support Guidelines (if post May 1, 1997), but “[b]lind adherence to the amounts set out in the applicable Tables is not required – nor is it recommended” (para. 128). The court must exercise discretion as set out in the CSG (e.g. undue hardship, older children, income over \$150,000 and shared custody).
- The quantum of the award must fit the circumstances.
- A court should not make an order it considers unfair in the circumstances.

The major point of contention between the justices arose over the date of retroactivity. Justice Bastarache, writing the majority judgment on behalf of himself and four others, held that the date of retroactivity would be the date of effective notice, defined as the date on which the topic was broached by the recipient parent. Once broached, the recipient’s responsibility is not automatically fulfilled - discussions must move forward or legal action must be contemplated. Justice Bastarache also limited the date of retroactivity to not more than three years before formal notice given to the payor, unless the payor engaged in blameworthy conduct, in which case the date of retroactivity would move back to the time when the payor’s circumstances changed materially.

Justice Abella, writing for herself and two other justices, disagreed with Justice Bastarache on this point, finding no reason to limit the date of retroactivity to three years prior to formal notice, nor to link it to the blameworthiness of the payor. Instead, Justice Abella held that the date on which child support should have increased would be the appropriate date of retroactivity for all cases, subject always to judicial discretion. In all other aspects, Justice Abella agreed with the judgment of Justice Bastarache.

In summary, Justice Bastarache reiterates that a parent who does not increase child support payments when his/her income increases significantly will not have fulfilled his/her obligation to her children, and the court may make a retroactive award enforcing the unfulfilled obligations that have accrued over time. In making a retroactive award, the court must take a holistic approach based on the particular facts of each case, including consideration of the following:

- (1) whether the recipient parent has supplied a reasonable excuse for his/her delay;
- (2) the conduct of the payor parent;
- (3) the past and present circumstances of the child; and
- (4) the hardship the retroactive award might entail.

A retroactive award is generally retroactive to the date when effective notice was given to the payor parent, unless the payor acted in a blameworthy manner, in which case support should be retroactive to the date when the payor’s circumstances changed materially.

In conclusion, the case sets out helpful guidelines and factors to be considered and addressed in the determination of retroactive child support, but ultimately the issue remains one for judicial discretion, based on a holistic approach and a detailed examination of the facts of each particular case.

From a practice perspective, a recipient would be well advised to formally request income information and increased child support information from a payor in writing on a regular basis, and to follow up on any such request. Similarly, a payor would be well advised to voluntarily increase support in accordance with the Child Support Guidelines (amended tables, May 1, 2006) as his/her income increases, to avoid the risk of a retroactive award down the line.

For further information, the full text of the court's decision can be found online at:
scc.lexum.umontreal.ca/en/2006/2006scc37/2006scc37.html