

## Family

# A principled approach to retroactive child support: Colucci v. Colucci

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(June 28, 2021, 2:12 PM EDT) -- Justice Sheilah L. Martin has given us much to be grateful for in her comprehensive decision of *Colucci v. Colucci* 2021 SCC 24. Writing for the Supreme Court of Canada, Justice Martin laid out a principled approach to issues of "retroactive" child support, both (i) with respect to applications for retroactive *increases* in support that should have been paid given revealed increases in the payor's income, and (ii) with respect to retroactive *decreases* in child support paid given the reduction in income of the payor.

The major takeaway from the *Colucci* decision, building on the tenets of the previous decision in *Michel v. Graydon* 2020 SCC 24 ["Failure to disclose material information is the cancer of family law litigation" (per Justice Russell Brown in *Michel* at para. 33)] is that: "[T]he linchpin holding the child support regime together is financial disclosure" (per Justice Martin in *Colucci* at para. 32), and further: "[T]he payor's duty to disclose income information is a corollary of the legal obligation to pay support commensurate with income" (para. 52).

Another significant development of *Colucci*, however, is that Justice Martin has retrenched and refined the principles of *DBS v. SRG* 2006 SCC 37 (*DBS*) so as to give a road map of a "presumption-based approach" to retroactive child support applications (*Colucci* at paras. 6, 58, 73).

Justice Martin summarizes the principles governing the circumstance in which the *payor* applies under s. 17 of the *Divorce Act* to retroactively decrease child support:

- The payor must meet the threshold of establishing a past material change in circumstance, and this material change must have some degree of continuity that is real and not one of choice;
- If a material change in circumstance 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 (the "presumptive date of retroactivity"). In the decrease context, effective notice requires clear communication of the change in circumstance accompanied by the disclosure of any available documentation necessary to substantiate the change and allow the recipient parent to meaningfully assess the situation. This is to be distinguished from an application for a retroactive increase of child support, which, because of "informational asymmetry," merely requires a "broaching" of the subject to establish a date of effective notice.
- 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.
- The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *DBS* 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.

- Once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified in accordance with the Guidelines.

Justice Martin summarizes the new principles which apply to cases of a *recipient* applying under s. 17 to retroactively increase child support, which in many respects mirror the above principles. Of significance is that, if there is blameworthy conduct of the payor, the three-year rule will not apply to limit the date of retroactivity and the retroactive child support may be payable from the date of increase in income of the payor.

Justice Martin takes a broad view of blameworthy conduct and states that conduct is blameworthy if it has the effect of privileging the payor's interests over the child's right to support (para. 101). Several of the panellists at the Canadian Bar Association "Retroactive/Arrears of Child Support After *Colucci*" presentation on June 16, 2021, suggested that this statement may give rise to a "work-around," allowing retroactive increases in child support from the date of the increase in the payor's income.

It is the view of the authors that, notwithstanding the welcome clarity Justice Martin has brought to this area, it is, on balance, a conservative judgment, and Justice Martin has, to some extent, resiled from her concurring judgment in *Michel*. Further, Justice Martin's views in *Colucci* regarding the efficacy of *DBS* and the relative importance of the *DBS* contextual factor of delay stand in stark contrast to the opinions of her former colleagues on the Alberta Court of Appeal on these points, as expressed recently in *Henderson v. Micetich* 2021 ABCA 103.

In her concurring judgment in *Michel*, Martin spoke of delay as having to be appreciated in a broader social context (para. 113), which she had characterized earlier as involving issues of family violence and access to justice. There may be many reasons for delay, including "information asymmetry" regarding the payor's income (as Justice Martin pointed out in *Colucci*), lack of financial resources of the recipient to pursue a legal remedy for retroactive child support, or potential behaviour by the payor to intimidate the recipient from taking legal action.

Justice Martin concludes in *Michel* that delay itself is not always "inherently unreasonable" (para. 113); however, Justice Martin appears to now have stepped back to some extent from this view when she subsequently uncritically adopts delay as a *DBS* contextual factor in *Colucci*.

The view of Justice Martin's former colleagues on the Alberta Court of Appeal as to the continued efficacy of *DBS* and the contextual factor of delay was expressed by the *per curiam* court in *Henderson*, a decision issued just three months before *Colucci*. In their view: "[T]he interpretation of the *Guidelines* by the majority in *DBS* was not entirely compatible with their purpose and ultimate goal. The system was in a period of transition and the judicial thinking around considerations like delay, blameworthy conduct and hardship was shaped by a perceived need to navigate that transition with caution" (*Henderson* para. 31). "*Michel* represents a recognition that the difficult transition of judicial thinking from the pre-*Guideline* regime to the post-*Guideline* system has, after twenty-four years, found purchase" (*Henderson*, para. 39).

Thus it would seem that the Alberta Court of Appeal, as currently constituted, is not on the same page as the views of Justice Martin expressed in *Colucci*.

Justice Martin herself expresses some concerns about the efficacy of *DBS* in *Colucci* and alludes to a potential revisitation of the issue in the future. She suggests that it may be preferable to have retroactive increases payable presumptively as of the date of increase in income, and the issue may need to be revisited:

[45] In light of the existing approach to blameworthy conduct and the pervasiveness of non-disclosure, it may be necessary in a future case to revisit the presumptive date of retroactivity in cases where the recipient seeks a retroactive variation to reflect increases in the payor's income. A presumption in favour of varying support to the date of the increase would better reflect the recipient's informational disadvantage and remove any incentive for payors to withhold disclosure or underpay support in the hopes that the status quo will be maintained.

Such a presumption would accord with other core principles of child support and reinforce that payors share the burden of ensuring the child receives the appropriate amount of support.

On balance, *Colucci v. Colucci* will provide a workable road map for assessing claims to retroactive increases and decreases in child support and give the family law bar much needed clarity in an area where there has been much judicial discord.

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