THE LAWYER'S DAILY

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Family

What are implications of recent affirmation that child support is right of the child?

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(May 31, 2021, 10:53 AM EDT) -- We previously discussed a series of important cases in which the Alberta Court of Appeal and the Supreme Court of Canada engaged in a dialectic on retroactive child support, illustrated by the decisions of *Michel v. Graydon* 2020 SCC 24 and *Henderson v. Micetich* 2021 ABCA 103. Henderson interpreted *Michel* as a "judicial refresh" of the governing principles regarding retroactive child support and confirmed the sea change in the law foreshadowed in *Michel* (see "Alberta court interprets 'judicial refresh' of principles governing retroactive child support'" (part one) and "More on 'judicial refresh' of principles governing retroactive child support" (part two)).

As stated in the seminal decision of *DBS v. SRG* 2006 SCC 37: "No child support analysis should ever lose sight of the fact that support is the right of the child" (para. 60). This was affirmed by the Supreme Court in *Michel*, 2020: "Child support is the right of *the child*, which right cannot be bargained away by the parents, and survives the breakdown of the relationship of the child's parents. ..." (at para. 10, emphasis in original).

We have looked into whether there has been further consideration of the *Michel* affirmation of the principle that child support is the right of the child. Must any award of retroactive child support be payable to the parent, or can the principle that child support is the right of the child be interpreted to make the support payable to the child alone?

With some fact-specific exceptions, it has long been a general legal principle that a payor of child support could not pay the money directly to the child but must pay the money to the recipient parent. Thus, in the seminal case of *Haisman v. Haisman* 1994 ABCA 249, applied in *W(SE) v. W(SC)* 2016 BCPC 32, the Alberta Court of Appeal stated:

> When a mother has custody of a child and a court orders the father to make payments to the mother for the maintenance of that child, it is not open to him to make payments to the child instead. Nor is it open to him to buy things for the child and to claim that the amounts which he spends in this way should be deducted from the maintenance payments which he was ordered to make to the mother. In neither case has he complied with the order of the court. Further, the mother, as the custodial parent, is entitled to decide how maintenance payments for the child will be spent (para. 84).

In a new Alberta decision, *Hinz v. Hinz* 2021 ABQB 385, however, Justice George R. Fraser of the Court of Queen's Bench expressly orders that some of the retroactive child support owing, which should have been paid to the mother to benefit the now adult children, be paid directly to the adult children in two lump sum payments. The mother applied for retroactive child support and was granted $112,166, assessed as owing back to 2010.

There were four children of the marriage, and Justice Fraser found that the older two were no longer "children of the marriage" as of specified dates. The father suggested that, as the children were now adults, they could no longer benefit from retroactive child support. Justice Fraser referred to *Michel* in rejecting this argument and ordered the father to make a lump sum payment of $10,000 to the

mother, with lump sum payments of $3,000 to each of the two adult children. Equivalent lump sum payments were payable the next year.

Thus, without expressly referring to the legal principle that child support is the right of the child, Justice Fraser, after referencing *DBS* and *Michel*, has given effect to this principle by departing from established authority and ordering payments of retroactive child support directly to the adult children.

Two recently released decisions from British Columbia are noteworthy: *MLG v. KGG* 2021 BCSC 682 and *SKG v. TCM* 2021 BCPC 120. In part, these cases rest on provisions in the B.C. *Family Law Act* wherein an application for child support may be made by a child (s. 149(2)).

This section of the B.C. Act was considered in the Supreme Court case, *Michel*. The mother in *Michel* brought the application for retroactive child support, although the child was 23 and no longer a child of the marriage. The mother ultimately succeeded in her application and there was no suggestion that the application should have been brought by the 23-year-old child, as permitted by the B.C. Act, or paid directly to the 23-year-old.

In *MLG*, Justice Gary P. Weatherill, after also referencing *DBS* and *Michel*, ordered that, if the father's retroactive child support obligation exceeded that of the mother, the amount should be held in trust by the father to benefit the children, for post-secondary education expenses.

In *SKG*, the implication is that, for older children, an application to enforce child support rights is properly brought by the child, and not the parent, either by being added as parties to the litigation between the parents or under their own application for child support:

> [W]e also recognize and respect people over age 19 as autonomous adults, with the right and responsibility to manage their own affairs. So, at age 19, the right to commence, continue or compromise a claim for child support ceases to be vested in the person's (former) guardians, and can be exercised only by the "child" to whom the right belongs (para. 11).

In *SKG*, the mother applied to vary a Consent Order that would have ended the father's child support obligations for his two children, then aged 24 and 21. The children had plans for post-secondary education, however, and hoped to be financially supported by their father. Judge Ted Gouge noted the recent affirmation in *Michel* that child support is the right of the child.

The application of the mother was dismissed, and the children were invited to apply to set aside or vary the Consent Order. Potential challenges to such an application were also flagged by the judge, including an estoppel argument whereby the children, having accepted the benefits under the Consent Order, would continue to be bound by its terms.

Thus, as can be seen in *Hinz*, *MLG* and *SKG*, an order for the direct payment of retroactive or ongoing child support to adult children, or for their benefit under a trust, rather than an order to pay the child support directly to the recipient parent, recognizes not only that child support is the right of the child but supports the reality that upon reaching the age of "adulthood," children can be considered independent, responsible to manage their own affairs.

As we noted in our earlier articles, these recent cases signal a paradigm shift towards a more holistic and less obsolete consideration of retroactive child support, rightly considering the whole of the circumstances leading to claims for retroactive child support and ensuring that arising court orders reflect those circumstances in a broader social context.

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