Retrospective and Prospective Views of the Principles Regarding Retroactive Child Support

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Where are we at now, how did we get here, and where are we going?

The ongoing dialogue between the Alberta Court of Appeal and the Supreme Court of Canada regarding retroactive child support, illustrated by the cases of ***DBS v. SRG,*** 2005 ABCA 2*;* ***DBS v. SRG,*** 2006 SCC 37*;* ***Michel v. Graydon,*** 2020 SCC 24 and ***Henderson v. Micetich,*** 2021 ABCA 103; has now been resolved by the Supreme Court of Canada in the June 4, 2021 decision of ***Colucci v. Colucci***, 2021 SCC 24, at least for the time being. Sheilah Martin J, the author of the ***Colucci*** judgment, writing for the full court, indicates in the decision that the SCC may be open to further movement in this area.

This dialogue between the Alberta Court of Appeal and the SCC opened with Madam Justice Paperny's progressive decision in ***DBS v. SRG,*** 2005 ABCA 2, which I think time has shown is at least 20 years ahead of its time in terms of judicial thinking. In this judgment Paperny J:

- decries the introduction of arbitrary limitation rules regarding the date of retroactivity through her castigation of the then entrenched common law 1 year rule applicable to the recovery of arrears in child support;
- states that in a post *Guideline* world the focus should be on the increase in income of the payor and not the payor's blameworthy conduct;
- states that the date of increase in income of the payor should be the presumptive starting point for the date of retroactivity, unless the payor has satisfied the additional financial obligation in some other manner;
- states that a notice of intention to pursue child support should not be required;
- states that a child need not be a "child of the marriage" at the time the retroactive child support order is made; and

- suggests a liberal attitude towards the reasons for delay by the recipient in applying for retroactive child support, as there can be many reasonable explanations for the delay.

The majority of the SCC per Bastarache J in ***DBS v. SRG,*** 2006 SCC 37 did not follow this progressive approach, and to an extent married the pre-existing needs-based law with the new approach of the *Guidelines*. In substance, the SCC:

- confirms that a retroactive increase of child support is "not truly retroactive", rather, it enforces an obligation that should have been fulfilled already (per ***Colucci*** at para 37)

- concludes that a court ordering child support clearly has jurisdiction to order retroactive child support-the question is whether the court should exercise its discretion to do so;

- states that the payor parent's interest in certainty must be balanced with the need for fairness to the child and for flexibility;

- stipulates the four contextual factors that come into play in the exercise of discretion as to whether the court should order retroactive child support as: (1) the reason for the recipient parent's delay in seeking child support, (2) the conduct of the payor parent, (3) the past and present circumstances of the child, including the child's needs at the time the support should have been paid, and (4) whether the retroactive award might entail hardship for the payor.

- emphasizes the need for reasonableness in delay as one of the four contextual factors, suggesting that reasonable excuses may be fear of the reaction of the payor parent when met with an application for retroactive child support, a lack of financial or emotional resources to bring an application, or inadequate legal advice;

- emphasizes blameworthy conduct as a contextual factor in the exercise of discretion: "[E]ach parent's behavior should be considered in determining the appropriate balance between certainty and flexibility in a given case (para 105)" "I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support" (para 106). ["Blameworthy

conduct" as the concept has been developed in post ***DBS*** cases extends to mere passivity and "taking the path of least resistance" (per ***Colucci*** at para 41)];

•continues to incorporate a needs based analysis is assessing the contextual factor of past and present circumstances of the child;

•creates the presumption of the "3 year rule" in determining the date to which the award should be made retroactive – the "3 year rule" is a presumption that a retroactive increase in support should extend to no more than 3 years before the recipient gave formal notice of the application to vary under s. 17 of the *Divorce Act* (per ***Colucci*** at para 20). The 3 year rule was established by the majority in ***DBS*** to incentivize recipients seeking a retroactive variation to move discussions forward and to protect the payor's certainty interests (***DBS*** para 123, ***Colucci*** para 91);

•stipulates that, once the court determines that a retroactive child support award should be ordered, the award should as a general rule be retroactive to the date of effective notice by the recipient parent that child support should be paid or increased. Effective notice does not require the recipient parent to take legal action; all that is required is that the topic be broached (para 121). Even if effective notice is given, "it will usually be inappropriate to delve too far into the past" (para 123) - therefore it is usually inappropriate to make a support award retroactive to a date more than 3 years before formal notice (para 123);

•however, where the payor parent has engaged in blameworthy conduct, such as intimidation, lying or withholding information, including regarding an increase in income, the date when the "circumstances changed materially" will be the presumptive start date of the award, which can take the date of retroactivity back to the date of increase in the payor's income (para 124);

•in assessing the amount of the retroactive child support award, "blind adherence" to the Guideline tables is not required nor recommended (para 128).

Madam Justice Abella, in dissent, was more of the view of Paperny J, and decried the majority's introduction of the "arbitrary 3 year judicial limitation period" as an unnecessary fettering of judicial discretion (para 175). There should be no role for "blameworthy conduct" in determining the date of retroactivity as the right to support belongs to the child regardless of how his or her parents behave (para 169). Further, caution should be exercised before penalizing a child for their parent's delay (para 172).

In 2020 the SCC revisited the matter in ***Michel v. Graydon,*** 2020 SCC 24, and a broad reading of this decision taken by the Alberta Court of Appeal in ***Henderson v. Micetich,*** 2021 ABCA 103 interpreted ***Michel*** as standing for these principles:

- child support is the right of the child, which right can not be bargained away by the parents;
- child support owed will vary based upon the income of the payor parent;
- retroactive child support is not exceptional relief;
- retroactive child support awards will commonly be appropriate where payor parents fail to disclose increases in their income;
- retroactive child support simply holds payor parents to their existing (and unfulfilled) legal obligations.

These broad principles are in addition to the narrow *ratio* in ***Michel*** that retroactive child support is also available to children who are no longer "children of the marriage".

Madam Justice Sheilah Martin wrote a passionate concurring judgment in ***Michel***, emphasizing the interconnected nature of issues of child support, child poverty, and the consequent feminization of poverty (para 100). She underscored that a child support obligation was in the nature of a debt (para 78), and that child support is a continuing obligation owed independent of any statute or court order (para 79).

With respect to delay, in her view, there is a growing body of jurisprudence and social science findings demonstrating that, sometimes, parents delay their application for child support to protect their children from harm or because making an application is impracticable or inaccessible in their circumstances. The focus should be on whether the reason provided is understandable rather than whether there is a reasonable excuse (para 111). She had earlier listed understandable reasons for delay to include: fear of reprisal/violence from the payor parent; prohibitive costs of litigation or fear of protracted litigation; lack of information or misinformation over the payor parent's income; fear of counterapplication for custody; the payor leaving the jurisdiction or recipient unable to contact payor; illness/disability of a child or the custodian; lack of emotional means; wanting the child and the payor to maintain a positive relationship or avoid the child's involvement; ongoing discussions in view of reconciliation, settlement negotiations, or mediation; and the deliberate delay of the application or the trial by the payor (para 85).

In June 2021 Sheilah Martin J had the opportunity to write the judgment for the court in ***Colucci v. Colucci***, 2021 SCC 24. In ***Colucci*** Martin J retrenched and refined the principles of ***DBS***.

Quoting from an article I wrote with Christine Silverberg that was published in The Lawyer's Daily, with modifications:

The major takeaway from the ***Colucci*** decision, building on the tenets of the previous decision in ***Michel v. Graydon***, ["Failure to disclose material information is the cancer of family law litigation" (per Brown J in ***Michel*** at para 33)] is that: "[T]he linchpin holding the child support regime together is financial disclosure" (per Martin J 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 Martin J has retrenched and refined the principles of ***DBS v. SRG***, 2006 SCC 37 so as to give a road map of a "presumption-based approach" to retroactive child support applications (***Colucci*** at paras 6, 58, 73). The import of this

is that the ***DBS*** four contextual factors will only be relevant to consideration of the presumptive date of retroactivity, assuming a material change in circumstance is made out.

Martin J states that for cases involving the variation of child support and the rescission of arrears, three interests must be balanced: the child's interest in receiving the appropriate amount of support to which they are entitled; the interest of the parties and the child in certainty and predictability; and the need for flexibility to ensure a just result in light of fluctuations in the payor's income. The child's interest in a fair standard of support commensurate with income is the core interest to which all rules and principles must yield. (para 46)

Martin J states: "The enactment of the *Guidelines* in 1997 marked a paradigm shift in Canadian child support law away from a need-based approach to one which clearly established the child's entitlement to support commensurate with the payor's income" (para 34). She further described the *Guidelines* as a "sea change" (para 36).

In summary, 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 (paras 62, 113);
- 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"). This presumption is triggered as soon as a past material change in circumstances is established – it is no longer necessary to first ask whether retroactive relief is generally appropriate before moving to the question of how far back retroactive relief should be extended. Similarly, where the recipient seeks a retroactive increase in child support, once a past material change in income is established, a presumption is triggered in favour of retroactively increasing support to a certain date, with the four contextual factors set out in DBS guiding the court's exercise of discretion in deciding whether to depart from the presumptive date of retroactivity only (paras 6, 71, 72, 73).

- In the decrease context, effective notice requires clear communication of the change in financial circumstances, accompanied by the disclosure of any available documentation necessary to substantiate the change and allow the recipient parent to meaningfully assess the situation (para 88). 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.

- 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 as well 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 (para 113).

- 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* (para 113).

- A payor whose income was originally imputed because of an initial lack of disclosure cannot later claim that a change in circumstances occurs when he or she subsequently produces proper documentation showing the imputation was higher than the table amount for their actual income. The payor cannot rely on their own late disclosure as a change in circumstances to ground a variation order (para 63).

- Further, there is a presumption against rescission of arrears – rescission of arrears is a last resort in exceptional cases (para 141). Such circumstances may arise where full disclosure of the payor's financial circumstances shows that the payor is unable to pay the arrears and will be unable to pay in the future, even with a flexible payment plan (paras 8, 138). Thus there is a presumption against rescission of arrears unless the payor shows current and future inability to pay. The court should first consider whether hardship can be mitigated by ordering a temporary suspension, periodic payments, or other creative payment options (para 140).

Martin J 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. Martin J 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); (as was articulated somewhat similarly by Bastarache J in ***DBS*** at para 106). Several of the panelists 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 as a matter of course.

It is the view of the authors that, notwithstanding the welcome clarity Martin J has brought to this area, it is, on balance, a conservative judgment, and Martin J has, to some extent, resiled from her concurring judgment in ***Michel***. Further, Martin J'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.

The view of Martin J'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 3 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). [The *Guidelines* came into force May 1, 1997.] Thus it would seem that the Alberta Court of Appeal, as currently constituted, is not on the same page as the views of Martin J expressed in ***Colucci***.

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

> [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.

Thus, in conclusion on the discussion of ***Colucci***, with Martin J foreshadowing that the SCC is open to further movement in this area, I anticipate future changes will move:

> •away from the 3 year rule – the "arbitrary 3 year judicial limitation period" (per Abella J in dissent in ***DBS***) - in determining the date to which the award of child support should be made retroactive, and towards a presumptive date of retroactivity at the date of increase of the payor's income; and
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> •towards a continued diminishment of the importance of the ***DBS*** contextual factor of delay by the recipient in applying for retroactive child support, recognizing that there may be many understandable reasons for the delay, including, among other things, informational asymmetry, health or access to justice problems, an unwillingness to disrupt a fragile parent-child relationship, lack of financial or emotional resources, and/or safety concerns arising from a history of family violence.

General Themes Arising in the Post-***Colucci*** Cases

1. The duty of full and honest financial disclosure

As noted, the need for full and honest financial disclosure in an application regarding child support is the key takeaway from ***Colucci***. M.J. Lema J of the Alberta Court of Queen's Bench has applied this principle post ***Colucci*** in a creative way in ***Heuft v. Bramwell***, 2021 ABQB 642 (judgment date August 12, 2021).

In ***Heuft v. Bramwell*** the mother applied to increase child support, as well as for retroactive child support going back three years. An order made in 2004, when the parties' child was six months old, required the father to pay $200 per month in child support. This was based on an imputed guideline income of the father of $22,600 and the mother's guideline income was $4,824. The father largely stayed current with his $200 per month child support obligation over the years.

At the time of the application the child was 17. Although properly served, the father did not respond to the application or meet his family docket court order disclosure requirements. The mother had on three previous occasions sought disclosure from the father, and as far back as 2012 there had been court orders obliging disclosure by the father.

Lema J applied ***Colucci*** as follows:

> **42** Financial disclosure is at the heart of the child-support regime. Per the Supreme Court of Canada in ***Colucci v Colucci***, *2021 SCC 24*:
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> > ... courts have increasingly recognized that **the payor's duty to disclose income information is a corollary of the legal obligation to pay support commensurate with income** (*Brear*, at paras. 19 and 69, per Pentelechuk J.A.; *Roseberry v. Roseberry*, *2015 ABQB 75*, *13 Alta. L.R. (6th) 215*, at para. 63; *Cunningham v. Seveny*, *2017 ABCA 4*, *88 R.F.L. (7th) 1*, at paras. 21 and 26). As explained by Brown J., speaking for the full Court in *Michel*, **payor parents "are subject to a duty of full and honest disclosure** -- a duty comparable to that arising in matrimonial negotiations" (para. 33, referencing *Rick v. Brandsema*, *2009 SCC 10*, *[2009] 1 S.C.R. 295*, at paras. 47-49). **Courts and legislatures have also implemented various mechanisms to incentivize and even require regular ongoing disclosure of updated income information by the payor, along with tools to move proceedings forward in the face of non-disclosure. Those mechanisms include imputing income to payors who have failed to make adequate disclosure, striking pleadings, drawing adverse [inferences], and awarding costs**. By encouraging timely disclosure, these tools reduce the

> likelihood that the recipient will be forced to apply to court multiple times to secure disclosure. [para 52] [emphasis added]

Lema J declined to impute income in the absence of evidence of the father's income, and invoked a "pre-disclosure support order":

> **64** While I am not in a position to impute income to Mr. Bramwell on the basis of evidence on the record (given his disclosure failures and Ms. Heuft having no particular window into his income-generating activities), I can vary support on a pre-disclosure basis i.e. set support on a temporary basis, with Mr. Bramwell having an opportunity (albeit time-limited) to provide his long-outstanding disclosure and, as applicable, to argue that the temporary support exceeds his ability to pay support.

Noting that "support payors should not assume that radio silence will be rewarded" (para 70), Lema J drew a provisional adverse inference that the father's actual current income was commensurate with a child support order of $800 per month, and so ordered. The father was given a short period of time to make disclosure. The mother's application for retroactive child support was to be considered after that date, whether the father made disclosure or not.

2. The Presumptive Date of Retroactivity

The Ontario Court of Appeal has recently underscored the duty of full and honest disclosure in ***McMaster-Pereira v. Pereira***, 2021 ONCA 547 (judgment date July 29, 2021). In this case the father was not only not providing full and honest disclosure, he was found to have been actively concealing his income. The trial judge imputed income, determined the quantum of ongoing child support, awarded retroactive child support and, in light of the father's efforts to avoid paying support, imposed a charging order against his home and his interests in companies of which he was a shareholder. This was all upheld on appeal.

The parties were married in 2001, separated in 2011 and divorced in 2013. They had four children aged 9 to 20. In 2013 the parties' agreement was incorporated into a court order whereby the father paid $3000 per month in child support based on an imputed income of

$109,000. In July 2017 the mother applied for a retroactive increase in child support based on the much greater income that the father actually earned operating a trucking business.

> **8** The trial judge found that the father's income for the years between 2014 and 2019 was $454,037, $322,940, $478,562, $442,337, $345,848, and $457,631 respectively. For the purposes of calculating child support, the trial judge used a three-year average to soften the dramatic fluctuations in the father's income. At the outset, the trial judge noted that the mother was credible and reliable, but that he had concerns with the father's evidence, and accordingly ascribed more weight to the mother's evidence unless there was reliable evidence to support the father's position. The father had not only failed to disclose his true income to the mother, but he had gone to considerable lengths to conceal the true amount of the income that he had that was actually available for the support purposes.
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> **12** The trial judge also allowed the mother's claim for retroactive child support. The father was required to pay retroactive child support for the period from August 2016 to June 2020 in the amount of $222,484 at the rate of at least $3,708 per month.

The appellate court per A.L. Harvison Young JA summarizes the principles of ***Colucci*** in a nutshell as follows:

> **23** In summary, the revised approach in *Colucci* requires first that the recipient establish a past material change in circumstances. Once that has been 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. Effective notice requires only that the recipient broached the subject of a potential increase with the payor. If there was no effective notice, child support should generally be increased back to the date of formal notice. Due to the presumption that is triggered by establishing a past material change in circumstances, the factors in *D.B.S. v. S.R.G.*, *2006 SCC 37*, *[2006] 2 S.C.R. 231* are no longer necessary in determining whether child support should be retroactively increased. However, they are still relevant in guiding the court's exercise of discretion to depart from the presumptive date of retroactivity where the result would be otherwise unfair. Finally, once the court has determined that support should be retroactively increased to a particular date, the increase must be quantified in accordance with the CSG: *Colucci*, at paras. 6, 71-73 and 114.
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> **24** One of the principles underpinning this approach to the variation of child support is adequate, accurate, and timely financial disclosure: *Colucci*, at paras. 32, 48-54. The child support regime is a system that creates informational asymmetry and is tied to the payor's income, and it would be unfair and contrary to the child's best interests to require

the recipient to police the payor's ongoing compliance with their obligations: at para. 49.
. . .

Of significance in ***Colucci*** is that it states 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. Martin J 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 panelists 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 as a matter of routine.

What is of particular interest in ***McMaster-Pereira v. Pereira*** is that the Ontario Court of Appeal did not hesitate to apply the 3 year rule in determining the date of retroactivity, notwithstanding the egregious conduct of the father in actively concealing his income, and did not suggest awarding retroactive child support going back to the date of increase of income of the father. A retroactive child support award was given as of the date of effective notice. (This may be because the appellant did not challenge this position.)

30 Second, as a material change in circumstances is established, the presumption to retroactively increase child support to the date the recipient gave the payor effective notice is triggered. The mother first made her request for financial disclosure in July 2016, which was within three years of the mother giving formal notice of an application to vary in July 2017. The trial judge concluded that the appropriate date of retroactivity was August 1, 2016, the first day of the first month following notice to the father. The appellant does not appeal the finding on the appropriate date of retroactivity and agrees that this conclusion is supported in light of *Colucci*.

Colucci was also applied by the Ontario Court of Appeal as follows:

> **32** As the appellant points out, *Colucci* does support the use of creative payment options in the context of a request for rescission of arrears and proven payor hardship. The point, however, is that payment over time is preferable to rescission, not that there is any automatic entitlement to any particular terms of payment. I see no basis to justify interfering with the trial judge's discretion in setting the terms of payment at $3,708 per month, especially in light of his findings that the father's claims of hardship lacked the support of credible and reliable evidence on his financial circumstances and that the father's income was consistent with a payor of substantial means who could afford the payment terms as ordered.

Similarly, the date of retroactivity was not brought back to the date of increase in income of the payor notwithstanding blameworthy conduct in ***Davies v. Maynard***, 2021 ONSC 4776 (judgment date July 9, 2021), a decision of R.S. Jain J of the Ontario Superior Court of Justice. The parties had a child in 1999 and came to an agreement regarding child support wherein the father paid $305 per month. In 2007 the mother applied for increased child support and for retroactive child support from 2008 to the date of application. Jain J stated:

> **13** The court agrees that the respondent should not be "punished" for paying the court ordered amount of child support. However, child support is the right of the child. The court has a duty and responsibility to the child to ensure that the *Child Support Guidelines* are followed. Although the respondent paid the court ordered amount, the respondent knew his annual income was higher than $45,315 for most years following the final 2007 Order. He further knew that child support was/is based upon his income. He never paid a dime more than the court ordered amount. He never disclosed anything about his income until the applicant broached the subject.

The court found that there was delay on the part of the applicant and blameworthy conduct on the part of the respondent.

> **30** Therefore, I am using my discretion to choose what in my view is a fair retroactive date for the increase in child support payable by the respondent to the applicant. I will not order an increase in the child support retroactive to 2008; however, I will order it to be retroactive to three years prior to the applicant's effective notice, which in this case is three years prior to 2017 (when the applicant's lawyer wrote her first letter to the respondent).

3. Late Disclosure and Imputation of Income

In ***Colucci*** at para 63 it is stated:

> Of course, a payor whose income was originally imputed because of an initial lack of disclosure cannot later claim that a change in circumstances occurs when he or she subsequently produces proper documentation showing the imputation was higher than the table amount for their actual income. The payor cannot rely on their own late disclosure as a change in circumstances to ground a variation order ... This would "defeat the purpose of imputing income in the first place" and act as "a disincentive for payors to participate in the initial court process" ...

This principle was recently applied by the British Columbia Supreme Court in ***Kelly v. Somwe***, 2021 BCSC 1389 (judgment date June 11, 2021). The father asked the British Columbia court to approve two provisional orders of an Alberta court decreasing the amount of child support owing. The parties had two children, who were residing with their mother in Cranbrook, BC, while the father resided in Calgary. The father worked as an electrician in the oil and gas industry. Based on an imputed income of $150,000 to the father, the British Columbia court ordered him to pay $2,104 monthly in child support. In 2017 the father applied to have his child support varied retroactively on the basis that he had in fact earned much less than $150,000 per year. He was unsuccessful in the British Columbia court. In 2019 he made a similar application to the Alberta court, without advising the Alberta court of the 2017 order from British Columbia. He was successful in Alberta and two provisional orders were made.

J.M. Gropper J of the British Columbia Supreme Court declined to confirm the provisional orders of Alberta. Gropper J applied ***Colucci*** extensively, and stated:

> **39** Mr. Somwe asks that I confirm the provisional variation orders of the Alberta court that determined that his income for 2017 was $90,203 and, for 2018, $74,160 and adjust his child support payments accordingly. For the reasons that follow, I will not confirm the provisional variation orders nor will I vary the amount of child support reflected in the 2015 order. I also decline to grant rescission of the arrears.
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> **40** My first reason relates to Mr. Somwe's failure to make full disclosure about his financial circumstances to the court in 2015 and 2017. As noted in *Colucci*, a payor cannot rely on his own non-disclosure as a basis for his claim of change in circumstances. In his application to the Alberta court, Mr. Somwe was more forthcoming in his disclosure of his financial circumstances including his income tax returns and assessments. In doing so,

he did exactly what *Colucci* warns against. His income was originally imputed because of his initial lack of disclosure. In the Alberta court and here, he is now claiming that a change in circumstances has occurred because he has subsequently produced documentation showing that the imputation was higher than the table amount for his actual income. He is relying on his own late disclosure as a change in circumstances as a ground for supporting a variation in child support. As noted in *Colucci*, this defeats the purpose of imputing income in the first place and acts as a disincentive for payors to participate in the initial court process.

4. The presumption that arrears should not be rescinded

In ***Colucci*** Martin J raises a presumption that arrears of child support will not be rescinded, as follows:

> [138] Accordingly, in this third category of cases, the payor must overcome a presumption against rescinding any part of the arrears. The presumption will only be rebutted where the payor parent establishes on a balance of probabilities that -- even with a flexible payment plan -- they cannot and will not ever be able to pay the arrears (Earle, at para. 26; Corcios, at para. 55; Gray, at para. 58). Present inability to pay does not, in itself, foreclose the prospect of future ability to pay, although it may justify a temporary suspension of arrears (Haisman, at para. 26). This presumption ensures rescission is a last resort available only where suspension or other creative payment options are inadequate to address the prejudice to the payor. It also encourages payors to keep up with their support obligations rather than allowing arrears to accumulate in the hopes that the courts will grant relief if the amount becomes sufficiently large. Arrears are a "valid debt that must be paid, similar to any other financial obligation", regardless of whether the quantum is significant (Bakht et al., at p. 550).
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> [140] The court has a range of available options when faced with proven payor hardship. A court's refusal to rescind arrears does not mean the payor must pay the entire amount immediately (Earle, at para. 24). If the court concludes that the payor's financial circumstances will give rise to difficulties paying down arrears, the court ought to first consider whether hardship can be mitigated by ordering a temporary suspension, periodic payments, or other creative payment options . . . After all, blood cannot be drawn from a stone -- where the payor is truly unable to make payments toward the arrears, "any enforcement options available to the support recipient and the court are of no practical benefit" (Brown, at para. 44).
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> [141] While the presumption in favour of enforcing arrears may be rebutted in "unusual circumstances" (Gray, at para. 53), the standard should remain a stringent one. Rescission of arrears based solely on current financial incapacity should not be ordered lightly. It is a last resort in exceptional cases, such as where the payor suffers a

> "catastrophic injury" (Gray, at para. 53, citing Tremblay v. Daley, *2012 ONCA 780*, *23 R.F.L. (7th) 91*). I agree with Ms. Colucci that the availability of rescission would otherwise become an "open invitation to intentionally avoid one's legal obligations" (Haisman (Q.B.), at para. 18, citing Schmidt v. Schmidt *(1985), 46 R.F.L. (2d) 71* (Man. Q.B.), at p. 73; R.F., at para. 57). Simply stated, how many payors would pay in full when the amounts come due if they can expect to pay less later? The rule should not allow or encourage debtors to wait out their obligations or subvert statutory enforcement regimes that recognize child support arrears as debts to be taken seriously.

Post ***Colucci*** cases for the most part seem willing to apply uphold this presumption and deny a rescission of arrears. This is illustrated by the British Columbia Supreme Court in ***Stark v. Tweedale***, 2021 BCSC 1133 *(*judgment date June 10, 2021). In this case the father was a practising lawyer who lost his license when convicted of assaulting the wife and the two oldest children, and sentenced to imprisonment. Income of $70,000 was imputed to him and his child support obligation reduced. Child support arrears accrued in excess of $90,000. W.A. Baker J applied ***Colucci*** for the principle that a rescission of child support should only be ordered in rare circumstances (at para 73). Baker J further stated: "Recipients are entitled to receive support payments properly owing while the payor was incarcerated, even if their receipt of such payments is delayed into the future." Baker J concluded:

> **93** Mr. Tweedale's actions since December 2017 do not demonstrate a good faith willingness to support his children or his wife. I am not prepared to make any orders suspending payment of support or the outstanding arrears. Mr. Tweedale must engage with the Family Maintenance Enforcement Program to establish a payment plan to address his outstanding and ongoing support obligations.

See also the New Brunswick Court of Appeal decision of ***A.F. v. R.R***., 2021 NBCA 37.

Stark v. Tweedale stands in contrast to a recent decision of the Alberta Court of Queen's Bench. Quoting from an article Christine Silverberg and I published in The Lawyer's Daily, with modifications: In the recent Alberta judgment of ***TM v. ZK***, 2021 ABQB 588, Bonnie L. Bokenfohr J applied ***Colucci v. Colucci***, 2021 SCC 24, and in doing so observed and underscored two fundamental principles – first that lawyers have an obligation to put all material facts to the presiding Justice; and secondly that the dichotomy that results from conjoined cases demands

government intervention to address. In this case, the connection between the family law and criminal justices systems had tragic implications for the family.

In ***TM v. ZK***, the mother and father began living together in 2001 and married in 2006. They had three children. The mother also brought three stepchildren into the marriage, including a then six-year-old girl. When his stepdaughter was 15 years old the father began sexually abusing her, and this abuse continued for over three years. The stepfather also supplied his stepdaughter with crack cocaine. The stepdaughter became pregnant and gave the child up for adoption. The father was callous to his stepdaughter regarding the pregnancy and adoption and continued to sexually abuse her after the birth of the child.

The mother and father separated in 2012 and in 2013 the stepdaughter disclosed her years of sexual abuse. The father was charged with and pleaded guilty to sexual exploitation and was sentenced to seven years incarceration. He began his incarceration on February 18, 2016. Three months later, the mother made application to the court for child and spousal support, identifying the father's guideline income as being his pre-incarceration income.

Without disclosing to the court the criminal charges against and resulting incarceration of the father, the mother received a Divorce Judgment and Corollary Relief Order with child and spousal support based on his former income as a carpenter of $83,229.11. Bokenfohr J noted that at the very least the mother was aware of the criminal charges against the father and his guilty plea. She referenced the Law Society of Alberta *Code of Conduct* which creates an obligation on a lawyer to prevent a manifestly unjust result by disclosing all material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision (*Code of Conduct* Commentary 5:1-1 at para 8).

While the father was incarcerated arrears of $146,420 accumulated. Upon his release from prison the father applied to reduce these arrears, relying on the recent Supreme Court of Canada case of ***Colucci v. Colucci***, 2021 SCC 24. In the result, Bokenfohr J retroactively reduced the arrears owing to his date of incarceration. In view of the lack of disclosure of the mother, Bokenfohr J found it fair in the circumstances to extend the date of retroactivity beyond three years to the date of incarceration of the father. As the mother was aware of the circumstances

of the impending loss of income of the father due to his incarceration, Bokenfohr J found that she was able to plan for the reduction in support.

At the outset, Bokenfohr J specifically rejected the argument of the mother and the Director of Maintenance Enforcement that a payor who is incarcerated is the author of their own misfortune and the accumulation of arrears is a natural consequence of their criminal conduct. Bokenfohr J stated:

> Where a payor has established a material change in circumstances through a reduction in income due to incarceration the Colucci framework presumptively results in a retroactive reduction of arrears based on the payor's Guideline income. The only determination for the court after the change in circumstances has been established is the date of effective notice and whether the presumption of three years is appropriate. There is no overriding discretion for a court, in my opinion, to decide that for public policy reasons the retroactive reduction should be denied because the payor was incarcerated or because of the nature of the crime that resulted in incarceration. (para 58)

Bokenfohr J emphasized that the boundaries between the criminal justice system and the family law child support regime must remain clear. The income-based child support regime is not punitive or retributive. It is the purpose of the criminal justice system to determine guilt and the appropriate punishment. "Respect for the role of a sentencing judge and their responsibility to impose a fit sentence demands that the public's reprobation of a particular offence not extend to blurring the lines between a payor's sentence and child support obligations" (para 61).

Further, if a sentencing judge determines that a sentence is proportionate, that sentence plus significant arrears may be too harsh and not be proportionate. Substantial child support arrears may also create a significant barrier to the payor's re-entry to society and increase the risk of recidivism. Excessive arrears may also discourage voluntary support payments and could drive the payor from legitimate employment "into the underground economy" (para 71).

Bokenfohr J underscored the dilemma for the sexually abused child. Child victims of abuse may be reluctant to come forward if doing so will be financially devasting for the family. This was true for this mother and her children, who were forced to rely on government aid and

foodbanks after the incarceration of the father. Thus, in the view of the authors, the dilemma in ***TM v. ZK*** is based on a tragedy in search of a just solution.

The implications of inaction in public policy, whether as a result of apathy or indecision, often has profound effects. The facts in ***TM v ZK*** revealed horrific child abuse – to which the criminal justice system responded by conviction and incarceration, but out of which evolved a social policy crisis for the family left behind. As Bokenfohr J said:

> This case highlights a significant public policy issue. Child victims of abuse, whether it be sexual, physical, or otherwise, may be reluctant to come forward if doing so will be financially devastating for their family. Children should not be placed in a position of having to choose between their safety and their financial well being and that of their family. Children should not have to worry about the financial consequences of reporting abuse. This is an issue that demands government attention and action (para 5).

These seem to be the major themes arising in the judicial consideration of ***Colucci***.

END