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A monthly review and discussion of family law in Ontario

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Auer v. Auer: What the Supreme Court had to say in upholding the Federal Child Support Guidelines

Roxanna Cian

Overview

Earlier this month, the Supreme Court delivered its decision in *Auer v. Auer*, 2024 SCC 36, where it engaged in a detailed analysis of the statutory validity of the *Federal Child Support Guidelines*.

Although the case centered on an application for judicial review and challenged the Governor in Council's authority in developing the *Federal Child Support Guidelines*, the Supreme Court took the opportunity to offer important commentary on the foundational family law principles underlying the *Guidelines*.

By considering exactly *why* the *Guidelines* were found to meet the administrative law standard of reasonableness, this article will give insight as to what the SCC had to say about why the *Guidelines* represent a fair, equitable, and reliable approach that is vital to the practice of family law.

Facts and Case Overview

The Supreme Court case came on appeal after the Appellant father's attempt to challenge the *Guidelines* through judicial review was denied by both the Queen's Bench of Alberta and the Alberta Court of Appeal.

The parties married in 2004 and had one child in 2005, before divorcing in 2008. The child resided with the mother.

The father challenged whether the Governor in Council (GIC) operated within the bounds of its authorized powers in developing the *Federal Child Support Guidelines* and sought to have them struck down (at para. 1). He claimed that the GIC exceeded

its delegated authority conferred by s. 26.1(2) of the *Divorce Act* by ultimately requiring the payor parent to contribute a larger portion of child-related costs than the recipient parent (at para. 8).

In making this argument, the father held that the authority conferred on the GIC to design child support guidelines is limited as to direct child costs, such as the essentials of life. Second, he claimed that s. 26.1(2) of the *Divorce Act* requires child-related costs to be allocated based on the parents' respective financial capacities (at para. 72).

The father submitted that the *Federal Child Support Guidelines* violated these two constraints by:

- (1) Failing to take into account the recipient parent's income;
- (2) Assuming that parents spend the same percentage of income on their children, regardless of levels of income and children's ages;
- (3) Failing to factor government child benefits paid to the recipient parent;
- (4) Failing to consider direct spending on the child by the payor parent when they have less than 40% parenting time; and
- (5) Doubling the payor's obligations to s.7 expenses. (at para. 6)

The Court was tasked with applying the administrative law standard of reasonableness to determine whether the GIC's approach to the *Federal Child Support Guidelines* was within its legislative authority under the *Divorce Act* (at para. 66). In conducting the reasonableness review, the Court assessed whether the *Guidelines* were justified, transparent, and intelligible (at para. 50).

Overall, the Court held that the *Divorce Act* granted "extremely broad" powers to the GIC to develop child support guidelines, and that in the manner in which this authority was exercised passed the applicable reasonableness standard of review (at para. 115).

Reasonableness Review of the *Guidelines*

Significance of the *Guidelines*

The Court began by explaining how the early statutory scheme to child support granted judges broad discretion to determine support using a needs-based approach. However, it was criticized for being unreliable, subjective, and unfair, as the burden of proof fell on the recipient to adduce evidence of expenses. If the recipient failed to do so, it would result in a subjective amount of support being awarded (at para. 67). The introduction of the *Guidelines* marked a significant shift in family law, bringing predictability and certainty to child support determinations (at paras. 68 - 69).

Citing *D.B.S v. S.R.G*, 2006 SCC 37, the Court explained the core foundational principles that the *Guidelines* reflect:

- (1) Child support is the right of the child;
- (2) The right to support survives the breakdown of the child's parents' marriage;
- (3) Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together; and
- (4) The specific amounts of child support owed will vary based upon the income of the payer parent (at para. 69).

The Authority of the GIC in the *Divorce Act*

Next, the Court looked at the governing legislation of the *Guidelines*.

Section 26.1(1) of the *Divorce Act* provides:

26.1 (1) The Governor in Council may establish guidelines respecting orders for child support, including, but without limiting the generality of the foregoing, guidelines

- (a) respecting the way in which the amount of an order for child support is to be determined;
- (b) respecting the circumstances in which discretion may be exercised in the making of an order for child support;
- (c) authorizing a court to require that the amount payable under an order for child support be paid in periodic payments, in a lump sum or in a lump sum and periodic payments;
- (d) authorizing a court to require that the amount payable under an order for child support be paid or secured, or paid and secured, in the manner specified in the order;
- (e) respecting the circumstances that give rise to the making of a variation order in respect of a child support order;
- (f) respecting the determination of income for the purposes of the application of the guidelines;
- (g) authorizing a court to impute income for the purposes of the application of the guidelines; and
- (h) respecting the production of information relevant to an order for child support and providing for sanctions and other consequences when that information is not provided.

Section 26.1(2) further describes:

- (2) The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their **relative abilities** to contribute to the performance of that obligation.
(emphasis added)

The Court rejected the Appellant father's interpretation of s. 26.1(2) as requiring equal financial contribution to child expenses. Writing for the majority, Côté J. clarified, "While a "joint financial obligation" means that the parents have a *shared* financial obligation to support their children, it does not necessarily mean that this obligation must be *equal*..." (at paras. 78 - 79).

The Recipient Parent’s Income in Table Amounts

The Court went on to conduct a reasonableness review of each of the father’s five submissions against the *Guidelines*. In his first submission, the father held that by failing to account for the recipient parent’s income, the *Guidelines* did not prescribe table amounts in accordance with the relative economic abilities of both parents, as required by s. 26.1(2) of the *Divorce Act* (at para. 80).

The Court acknowledged that although the table formula assumes the same income for the payor and recipient parent, it intentionally deviates from a purely needs-based approach (at para 81). Following ample research, the formula was recommended by the GIC Committee as a child-centered approach (at paras. 83 and 85). Its purpose is to ensure the child continues to enjoy the same standard of living they had before the separation (at para. 85). The formula further assumes that, because the child resides with the custodial parent, that parent will continue to support the child in proportion to their income, as they did prior to the separation (at para. 87).

The Court held that, therefore, this approach was indeed justified and reasonable (at para. 89).

Percentage of Income Spent on Children

The father’s second submission contended that the *Guidelines* unreasonably assume that parents spend the same proportion of income on their children, regardless of income or the children’s ages. The Appellant asserted, that in practice, as income increases, while the total amount spent on children increases, the percentage of income used decreases. (at para. 90)

While the Court acknowledged that the table does assume that parents spend a linear percentage of income on their children, it found that it was reasonable for the GIC to implement a fixed table amount for payor incomes under \$150,000 while providing discretion for courts to depart from table amounts for payor incomes above

\$150,000 (at para. 91). Further, the GIC's broad authority under the *Divorce Act* can be reasonably interpreted to mean children's specific ages do not have to be taken into account (at para. 94).

Government Child Benefits

The father also argued that child benefits should be factored into calculating a payor's support obligation. However, the Court reiterated that this exclusion was a purposeful departure from a needs-based approach to child support. Highlighting this principle, the Court explained that government benefits are intended to increase "... the ability of recipient parents to spend more on [children] than would otherwise be possible" and, as such, should not be treated as additional income for the recipient parent (at para. 96). By affirming this position, the Court confirmed that child benefits are designed to enhance a child's quality of life, not to reduce the financial obligations of the payor parent.

Factoring Direct Spending for the parent with less than 40% parenting time

The father maintained that it was unreasonable for the *Guidelines* to only factor direct costs such as housing, food, and other integral child expenses when a payor parent has 40% or more parenting time (at para. 100).

As section 26.1(2) states, parents have a joint financial obligation to contribute to child expenses, rather than an equal one (at para. 101). The Court clarified, "... The principle in s. 26.1(2) is not violated even if setting the threshold for considering payer parents' direct spending on their children at 40 percent of annual parenting time results in some payer parents paying more than half of the child-related costs." (at para. 101). Furthermore, the Court recognized that in practice, recipient parents shoulder a significant share of financial responsibilities as the child's primary caregiver (at para. 102).

Nevertheless, section 10(1) of the *Guidelines* provides discretion to award child support that deviates from the default table amount if it may cause undue hardship on the payor. This safeguards against the payor paying disproportionately high expenses in relation to their parenting time. (at para. 103)

Section 7 Expenses

The Court rejected the father's claim that section 7 expenses, in addition to table child support, results in duplicated child-related costs (at paras. 107 and 108). Once again, the Court denounced a solely needs-based approach to child support, which would require both parents to contribute equally to their children's needs in proportion to their respective incomes. Instead, the Court emphasized that a central principle of the *Guidelines* is that children are entitled to benefit as much as possible from both parents' income within their relative means (at paras. 108 - 109).

Citing the Department of Justice report on the federal child support formula, the Court noted, "The concept of "cost of raising children" is an illusory theoretical construct." As such, "...The Federal Child Support Guidelines aim to approximate, as closely as possible, the spending on the children that occurred in the pre-separation family." (at para. 109)

The Court concluded that some overlap between table child support and section 7 expenses is to be expected. However, this approach was deemed reasonable, as it ensures the child continues to benefit in accordance with the parent's financial capacities. (at para. 113)

Conclusion

Although *Auer* is presumably an administrative law case, it presents several key takeaways for family law lawyers. First, the Supreme Court of Canada affirmed the crucial role that the *Child Support Guidelines* play in objectively calculating child support obligations. Second, it clarified that "joint financial obligations" to child

support in the *Divorce Act*, should not be interpreted to mean *equal* financial contribution from payor and recipient. Third, the Court reiterated the importance of the *Guidelines* demonstrating an intentional departure from a needs-based approach. Rather than awarding child support based on the mere essentials of life, the calculation methods used in *Guidelines* promote a child’s overall well-being and quality of life.

Ultimately, the decision reinforces the foundational principles of a child-centered approach to family law and the importance of ensuring that the best interests of the child remain at the center of child support arrangements.



A “clean break”? Not so fast: lump sum payments for prospective child support

Oriana Visser

Overview

In Ontario, courts have the authority under Section 34 of the *Family Law Act* and Section 26.1(1) of the *Divorce Act* to order lump sum prospective child support payments. Section 11 of the *Child Support Guidelines* also provides for the possibility of lump sum payments. However, the use of lump sum payments for prospective child support is discouraged.

Case law has established that such awards are only appropriate when a payor has a history of non-compliance, including failure to make voluntary payments or provide required financial disclosure, or where the payor is at risk of leaving the country. In determining the amount of lump sum support, courts consider factors such as the length of time the child(ren) will require support, the possibility of post-secondary education expenses, and the payor’s financial capacity. In situations where a payor has a history of making voluntary support payments and demonstrates an ability to continue fulfilling obligations, courts may decline to order lump sum payments for prospective support.

Introduction

In cases where child support is owed, a “clean break” following separation or divorce is generally not possible. Although Ontario’s *Family Law Act* permits lump sum child support payments, they are usually reserved for situations involving retroactive support owing or exceptional circumstances where there is clear evidence that future periodic payments may not be made. They may also be appropriate in cases where there are anticipated post-secondary education costs.

A payor seeking to pay their prospective child support obligations in full in order to sever financial ties quickly will likely be out of luck. On the other hand, a payee requesting lump sum child support for prospective payments must demonstrate to the court that there is a genuine risk that periodic payments may not be made.

Child support is a child's right, aimed at ensuring a fair standard of living by enabling the child(ren) to continue benefiting from both parents' incomes after separation. As a result, child support can fluctuate year-to-year based on changes to the payor's income, which is difficult to capture when determining a lump-sum amount.

Generally, parents cannot choose to not pay or choose to make a lump sum payment simply because they wish to sever financial ties with each other.

This article will explore the key factors that courts consider when determining the appropriateness of lump sum prospective child support awards and considerations when quantifying their amounts.

Legislative Background

Section 34 of the *Family Law Act* empowers a court, when ordering support under section 33 of the *Act* to make an order:

34 (1) (b) requiring that a lump sum be paid or held in trust;

34 (1) (c) requiring that property be transferred to or in trust or vested in the dependent, whether absolutely, for life, or for a term of years;

34 (1) (k) requiring the securing of payment under the order by a charge on property or otherwise.

Similarly, sub-section 26.1(1) (c) of the *Divorce Act* allows the court to order a lump sum payment of child support.

Section 11 of the *Child Support Guidelines* provides that: “The court may require in a child support order that the amount payable under the order be paid in periodic payments, in lump sum or in a lump sum and periodic payments.”

General principles

The Ontario Court of Appeal found that “where there is a real risk that periodic payments will not be made” a lump sum child support award may be appropriate (*Makeeva v. Makeev*, 2021 ONCA 232 at para. 11).

Likewise, the Court of Appeal determined that lump sum child support may be warranted when a payor has failed to make voluntary payments, has not provided adequate financial disclosure, and has prolonged litigation with the other party (*Roscoe v. Roscoe*, 2012 ONCA 817 at paras. 3 and 4).

Lump sum child support has been ordered in many cases where the payor has a history of poor payment compliance. Case law also supports such orders in situations where a party has a history of asset dissipation or has previously refused to meet their support obligations (*Milutinovic v. Milutinovic*, 2018 ONSC 4310 at paras. 102 and 103).

Lump sum child support awards may also be appropriate where there is a risk that the payor may leave the country (*Thompson v. Westlake*, 1996 CanLII 8303 (ONSC) at para. 13).

In the context of family law, a vesting order functions similarly to an enforcement order. Therefore, courts must be convinced that the past behaviour of the person required to make payment, along with their reasonably expected future actions, suggests that they are unlikely to comply with a payment order without the imposition of more stringent measures (*Lynch v. Segal*, 2006 CanLII 42240 (ONCA) at para. 27).

Additionally, courts should not make an order that prioritizes the interests of a non-compliant support payor over those of the dependent parties. It must take all

appropriate, lawful, and reasonable measures to ensure that the payor meets their legal obligations to their dependents (*Daciuk v. Daciuk*, 2023 ONSC 70 at para. 113).

Quantifying lump sum payments for prospective child support

Once a court decides to award a lump sum payment, its next step is to determine the amount. The court should calculate the present value of the future periodic support payments that the payor spouse will likely make under the *Guidelines*. To do this, the court must assess how long the child is expected to receive support and whether the support amount is likely to change over that period (*Swanson v. Swanson*, 2004 CanLII 48679 (ONSC) at para. 115).

Recent case law

***Cirota v. Girota* - lump sum awarded**

In *Cirota v. Girota* (2024 ONSC 4117), the parties met in Italy in 1998 and shortly after married in Canada in 2000. They had three children together. They separated in 2022 after the husband's threatening behaviour caused the wife to move out of the matrimonial home with the children.

Since separation, the wife had been solely responsible for the children's care, with little financial support from the husband who had moved back to Italy in 2023. At trial the court was tasked with determining, among other things:

- What income should be imputed to the husband for support purposes?
- What *Guideline* child support and section 7 expenses does the husband owe retroactively and ongoing?
- Should lump sum child support be ordered and paid from the husband's share of the net proceeds of the matrimonial home?

The court determined that income in the amount of \$100,000 should be imputed to the husband who had made no effort to comply with disclosure as required by the

Family Law Rules. The husband also had the potential to earn \$100,000. He had previously owned a profitable construction business in Canada. He made no effort to find jobs in Canada or in Italy following separation. The court was satisfied that the husband was underemployed.

The court then assessed the wife's request for lump sum child support and section 7 expenses. Justice Horkins found that a lump sum payment of child support was appropriate. There was a real risk that the husband would not make period payments. He had been non-compliant with court orders and was not forthcoming with disclosure. He had failed to find a job following separation and his move to Italy, refusing to prioritize earning any income. Additionally, he had not made voluntary support payments and had forced the wife to endure financial hardship because of his actions.

The court also noted that if it orders periodic support, the wife would be left trying to "enforce an interjurisdictional support order and hunt down funds in Italy" (at para. 131). The husband had provided no disclosure regarding his Italian bank accounts, which would be necessary information in any attempt to enforce periodic support payments.

Satisfied that lump sum prospective child support was appropriate, Justice Horkins ordered that the husband pay \$224,316 in lump sum child support and section 7 expenses from his share of the net proceeds of the matrimonial home. The court accepted the wife's calculations which were based on her 2023 income of \$103,313.10 and the husband's imputed income of \$100,000. Her calculations covered the children until they turned 18, at which time child support would be reviewed for each child. Section 7 calculations contemplated expenses for daycare, tutoring fees, and extracurricular activities, including swimming lessons and soccer.

The husband was also ordered to pay an additional \$43,924.78 for retroactive child support and section 7 expenses owing.

The court did not include calculations for potential post-secondary education costs, finding that these expenses should be reviewed when each child proceeds to post-secondary education and the parties exchange updated financial disclosure.

J.A. v. M.K. - lump sum awarded

In *J.A. v. M.K.* (2024 ONSC 1698), Justice MacPherson ruled on an uncontested trial, finding that, while unusual, it was necessary to make a prospective lump sum child support award in this case.

The parties were married in 1997 and separated in 2017. They had four children together. On the date of separation, the parties and the children resided in Canada. The husband left Canada following separation and it was unclear to the court whether he was living in Israel or Russia. The parties were divorced by a court Order in Russia on May 4, 2018. As the children were habitually resident in Canada on the date of separation, Canada assumed jurisdiction to deal with parenting issues.

The issues remaining were financial, including child support and section 7 expenses on a retroactive and ongoing basis.

The husband had not complied with basic disclosure requirements and had not complied with court ordered disclosure. The husband's sworn financial statement, deposing an annual income of \$45,000 did not explain millions of dollars accumulated in assets and the lifestyle enjoyed by the parties. The husband had made no voluntary support payments. The husband was likely living in Russia, and his assets and income were outside the Court's reach.

Justice MacPherson was satisfied that the husband's pattern of obfuscation would continue and found that it was in the best interests of the children and the administration of justice to order lump sum prospective child support.

When determining the amount of the lump sum payment, Justice MacPherson considered the potential that the children would pursue post-secondary education.

As the two older children had completed post-secondary studies, the court found it was likely that the two younger children would also attend. Accordingly, the prospective lump sum child support amount was calculated on the basis that child support would end when each child turns 21.

Justice MacPherson accepted the wife's calculations, finding that the lump sum child support award from the date of separation until December 2035 is set at \$2,303,606. The court did not detail what her calculations were based on, citing only an exhibit contained within her trial affidavit. Retroactive section 7 expenses were also ordered in the amount of \$45,944.83 based on the husband's imputed income of \$1,210,000 and the wife's imputed income of \$30,000. The wife did not seek prospective section 7 expenses.

***Abdul-Ridha v. Kandil* - lump sum not awarded**

In *Abdul-Ridha v. Kandil* (2024 ONSC 5089), the court declined to award lump sum child support. Justice Labrosse found that there was no real risk that periodic payments would not be made.

The parties married in 2011 in Cairo, Egypt. They separated in 2018. The parties had two children together, who at the time of the decision, were 10 and 9 years of age.

The wife sought an order that prospective child support be paid in a lump sum from funds held in trust from the sale of a multi-unit building the husband had purchased in Gatineau in 2016.

In this case, the husband voluntarily paid child support dating back to 2018. He stopped paying in 2021 when he was no longer employed and sold the multi-unit building. It was unclear to the court how much funds remained in trust from this sale. The husband also continued to be unemployed

Justice Labrosse considered that the husband had ongoing child support obligations but weighed them against the ability of the husband to subsist. As the husband had

voluntarily made child support payments in the past, the court was not convinced that he would not pay in the future. Labrosse J. confirmed that the husband had an obligation to pay child support at least at minimum wage and confirmed that he has an obligation to become gainfully employed. However, the threshold to make an order for prospective lump sum child support was not met.

Practically speaking

Based on the above case law, there are some general factors that courts look for when determining if an order for lump sum child support is appropriate. Consider the following factors when evaluating the suitability of lump sum child support in your case:

- a real risk that that periodic payments will not be made;
- non-compliance with disclosure requests or court ordered disclosure;
- absence of voluntary periodic child support payments;
- payor's behaviour has required other party to endure protracted litigation;
- a payor residing outside Canada or the potential risk of a payor leaving the country; and,
- children over the age of majority.

Also consider the following factors when quantifying the amount of prospective child support for the court:

- potential post-secondary expenses;
- potential extracurriculars, activities, and other section 7 expenses; and,
- imputing an appropriate level of income

In addition, consider if there are assets from which a lump sum could be paid, such as proceeds from the sale of a property being held in trust. Demonstrating that such assets are available to a payor could assist an argument for lump sum payment of prospective child support where other factors are also present.

Conclusion

While lump sum prospective child support can be a useful tool in certain circumstances, it is not a favoured remedy when determining ongoing child support. Courts are more likely to consider a lump sum prospective child support award when there is a demonstrated risk that periodic payments will not be made, such as in cases of non-compliance with disclosure, failure to voluntarily meet child support obligations, and where a payor lives abroad or may leave the country.

When determining the quantity of a lump sum payment, courts will consider future post-secondary education or section 7 costs that may need to be secured in advance. They will also consider the appropriateness of imputing income to the payor, as these cases in particular often deal with a party who has failed to provide adequate disclosure necessary to determine appropriate income.

Ultimately, these decisions are guided by the principle that child support is the right of the child and is meant to ensure that children continue to benefit from both parties' income following separation.



Private School vs. Public School: the court’s default position is clear

Samantha Rich

Overview

Private school versus public school can be a point of contention in family law matters. When addressing this issue, lawyers turn to section 7 of the *Child Support Guidelines*. Section 7 sets out the circumstances under which the court may order the payment of the education expenses, as well as provide the principles to decide whether the child attends public or private schooling.

In deciding whether private school would fall under the category of an extraordinary expense, the court will look at the necessity and reasonableness of the expense in relation to the child’s best interests and the parties’ financial circumstances. The current jurisprudence sets out a number of general principles which the court will assess when making a decision of this nature.

As expected, evidence plays an important role in determining the entitlement and quantum of s. 7 expenses. And ultimately, absent a compelling reason why the child should attend a private school and sufficient evidence supporting the reasoning, it appears that a court’s default position will be for the child to attend public school.

Section 7 of the Guidelines

Subsection 7(1) of the *Federal Child Support Guidelines* (“*Guidelines*”) states that:

In a child support order the court may, on either spouse’s request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account **the necessity of the expense in relation to the child’s best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family’s spending pattern prior to the separation:**

...

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs; (emphasis added)

The term "extraordinary expenses," is defined in subsection 7(1.1) of the *Guidelines* as follows:

(a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

(i) **the amount of the expense in relation to the income of the spouse requesting the amount**, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the **nature and number of the educational programs** and extracurricular activities,

(iii) any **special needs and talents of the child or children**,

(iv) the **overall cost** of the programs and activities, and

(v) any other similar factor that the court considers relevant. (emphasis added)

With respect to the sharing of s. 7 expenses between parties, subsection 7(2) states that, "The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child."

General Principles

Justice O'Brien in *Kostrinsky v. Nasri* (2022 ONSC 2926 at para. 146) noted that evidence plays an important role in determining the entitlement and quantum of s. 7 expenses, "The party claiming a s. 7 expense must provide evidence to support the reasonableness and necessity of the expense..."

When deciding whether to award a claimed s. 7 expense, the court will take into account whether the support payor was consulted, however, "...**consultation is just one of many factors to be considered** in the determination of the entitlement and is **not a pre-requisite for obtaining an order...**" (*Kostrinsky v. Nasri*, 2022 ONSC 2926 at para. 147) (emphasis added)

Private School vs. Public School

Deciding which school a child should attend is often a point of contention for parents. Moreover, the decision can become litigious where one parent favours attendance at a private school instead of a public school, and is seeking to claim the private school fees as a s. 7 expense from the support payor.

Justice Price in *Roberts v. Symons* (2023 ONSC 4757 at para. 49) held that, "...if parents cannot agree on which school their child should attend, and the court is called upon to make the decision, the best interests of the child govern."

Justice Price cited the case of *Thomas v. Osika* (2018 ONSC 2712), which set out a number of general principles taken from the caselaw "to assist the decision-maker"

when making a decision relating to the public versus private school issue in the child's best interests. They include:

- a. a consideration of the **child's unique needs, circumstances, aptitudes, and attributes**;
- b. focusing on the **interests of the child** rather than those of the parents, or their rights;
- c. whether a school placement or educational program will **promote and maintain a child's cultural and linguistic heritage**;
- d. assessing any **impact on the stability of the child**, which may include examining whether there is any prospect of one of the parties moving in the near future; where the child was born and raised; whether a move will mean new childcare providers or other unsettling features;
- e. a consideration of **any problems with the proposed schools**; and
- f. a consideration of the **resources that each school offers in relation to a child's needs**, rather than on proximity of either school to the residence of one parent or the other, or the convenience that the child's attendance at the nearest school would entail. (*Roberts v. Symons*, 2023 ONSC 4757 at para. 50) (emphasis added)

Justice Clark in *Williamson v. Rezonja* (2014 ONCJ 72), discussed subsection 7(1)(d) of the *Guidelines*, reiterating the discretion the court has when deciding whether a support payor must pay all or part of the s. 7 expense claimed, with a focus on the child's particular needs:

"... this must satisfy the dual test of reasonableness and necessity.

The following non-exhaustive list of factors are relevant to a determination of whether this expense is appropriate:

1. whether one or both parents attended private school.
2. whether the child had been enrolled in a private school prior to the separation.
3. whether there had been an expectation the child would have a private education by express agreement or otherwise.

4. whether the parents can afford same.
5. whether there are special needs public school cannot provide, thereby making private education in the best interests of the child.

...

The case of *Correia v. Correia*, 2002 MBQB 172 (Man. Q.B.) (CanLII) identifies other factors to assist in determining the reasonableness of this expense:

- 1.the combined income of the parties.
- 2.the fact that two households must be maintained.
- 3.the extent of the expense in relation to the parties' combined level of income.
- 4.the debt position of the parties.
- 5.any prospects for a decline or increase in the parties' means in the near future.
- 6.whether the non-custodial parent was consulted regarding the expenditure prior to the expense being incurred." (*Williamson v. Rezonja*, 2014 ONCJ 72 at paras. 50-53)

Compelling Evidence

As noted earlier, evidence plays an important role in determining the entitlement and quantum of s. 7 expenses. There are numerous cases where the court did not award private school as a s. 7 expense for the simple fact that there was insufficient evidence placed before the court to allow the decision-maker to make such a finding. Justice Price in *Roberts v. Symons*, noted the following:

In *Karim v. Mohamed*, a case focusing on whether the costs of a private school were excessive or proper s. 7 costs, Justice S. Shore rejected the Respondent mother's request that the father pay for their five-year-old child's tuition at a private school, costs of which far exceeded the amount in this case, writing, at paragraph 12:

In *Pomozova v. Mann*, the Mother sought contribution from the Father towards expensive private school tuition for the three-year-old child. **The Court noted that there was no evidence, aside from the Mother's**

own wishes, to suggest that private school was necessary, or that the child had any particular needs that required her attendance at private school at this young age. The Court also noted that **there was no evidence about why the child's needs could not be met at a public school**. Private school was not deemed a necessary s. 7 expense... (*Roberts v. Symons*, 2023 ONSC 4757 at para. 74) (own emphasis added)

Another example can be found in Justice Akazaki's decision of *Hall v. Galbraith*. In this matter, Akazaki J. requested the mother's counsel to provide the court with educational and developmental reasons to support the child attending private school, such as the child attending the same school as their sibling or the impact on the child's self-esteem. There turned out to be no evidence in the record, and the Applicant's motion was ultimately dismissed. (*Hall v. Galbraith*, 2023 ONSC 2161 at para. 33)

Justice Jones in *Meade v. Latouche* also noted that the mother justified her decision to place the child at a private school on the basis that he was a gifted child, "...although no educational assessment in this regard was put before the court and there was no evidence that his education needs could not be met in a public school." Again, the Court found that the father would not be required to contribute towards the private school fees claimed as s. 7 expenses by the mother. (*Meade*, 2016 ONCJ 272 at para. 71)

Conclusion

From the above decisions and as pointed out by Justice Price in *Roberts v. Symons*, an inference can be drawn that the courts are of the view that absent a compelling reason and sufficient evidence, attendance at a public school appears to be the default position. (*Roberts*, 2023 ONSC 4757 at para. 76)

While parents may aspire to provide their children with the perceived advantages of attending a private school, the court will make the decision based on the necessity and reasonableness of the expense in relation to the child's best interests and the parties' financial circumstances.

If a party wishes to be successful with a claim for s. 7 expenses for private school fees, it is of the utmost importance that sound reasoning and sufficient evidence supporting the reasoning is placed before the court to advocate for the child's attendance at a private school versus a public school.

Absent compelling reasons, such as the child having special needs that cannot be addressed in a public school setting, the default position continues to be that a child most likely will attend a public school.



***Colucci v. Colucci* - retroactively decreasing child support and recent decisions**

Jessica Melchiorre

Overview:

Child support is an area of the Ontario family legal system in which the court has considerable powers and discretion at its disposal to make orders and then subsequently vary them. In recent years the court has sought to further clarify these powers and their boundaries.

The significant decision in the Supreme Court case of *Colucci v. Colucci*, 2021 SCC 24 has done this by building on principles established in *D.B.S. v. S.R.G.*, 2006 SCC 37 and *Michel v. Graydon*, 2020 SCC 25. *Colucci* distinguishes three main areas of retroactive variation: a retroactive decrease of support, a retroactive increase of support, and a rescission of arrears (at para. 30). This article will explore the legislative foundation for decreasing child support, the *Colucci* principles, as well as its impact on recent case law.

Background of *Colucci v. Colucci*

In *Colucci*, the parties were married for 13 years before divorcing in 1996. They had two daughters who were 8 and 6 years old at the time. The consent order (pre-*Guidelines*) gave sole custody to Ms. Colucci and required Mr. Colucci to pay the indexed amount of \$997 per month. Mr. Colucci did not provide any evidence of his income at the time.

In 1998, Mr. Colucci contacted Ms. Colucci through counsel and asked for a reduction in child support. He did not provide any financial disclosure, nor did he pursue further legal action. He then left the country. In 2016, Mr. Colucci returned to Canada (after his daughters had ceased to be children of the marriage) and applied to retroactively reduce his child support and rescind the arrears. The motion judge found a material

change of circumstance based on the Federal *Child Support Guidelines* coming into effect in 1997. Mr. Colucci was imputed a minimum wage income for some of those years. Again, Mr. Colucci did not provide the court with the relevant documentation or financial disclosure to verify his position. The court ordered to reduce the arrears to \$41,642.

On appeal, the Ontario Court of Appeal reversed the decision and ordered full arrears of more than \$170,000 to be paid.

The Supreme Court of Canada ultimately upheld the child support arrears ordered by the Court of Appeal, covering 14 years, and finally held Mr. Colucci accountable for his debt.

The Supreme Court noted the following in its decision:

...courts must bear in mind that child support arrears are a debt. Under general principles of debtor-creditor law, the debtor is required to seek out and pay the creditor, and debts are not forgiven by the mere passage of time in the absence of a statutory limitation period... (at para. 100)

Family Law Act

In *Colucci*, the court cited section 17 of the Federal *Divorce Act* in its proceedings.

Similarly, section 37 of the *Family Law Act* provides the following:

Powers of the court: child support

2.1) In the case of an order for support of a child, if the court is satisfied that there has been a change in circumstances within the meaning of the child support guidelines, or that evidence unavailable at the previous hearing has since become available, the court may,

- (a) discharge, vary or suspend a term of the order, either prospectively or retroactively;
- (b) relieve the respondent from the payment of part or all of the arrears, or any interest due on them; and
- (c) make any other order for support of a child that the court could make on an application under section 33. 1997, c. 20, s.6

The following framework for varying a retroactive decrease in child support was set out by the court in *Colucci* at paragraph 113, cited in full:

(1) The payor must meet the threshold of establishing a past material change in circumstances. The onus is on **the payor to show a material decrease in income that has some degree of continuity**, and that is real and not one of choice.

(2) Once a material change in circumstances 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**. In the decrease context, effective notice requires clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change and allow the recipient parent to meaningfully assess the situation.

(3) **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.

(4) **The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair**. The D.B.S. 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.

(5) Finally, once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified. **The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the Guidelines**. (emphasis added)

In his article *Retroactive Support After Colucci* (40, CFLQ 61, 2021), Mr. Rollie Thompson provides a helpful approach to the *Colucci* framework by breaking it down into the following steps:

Step 1: Material change

Material change is contemplated at section 14 of the *Child Support Guidelines*. Section 14(a) states that when the amount of child support has been determined in accordance with the *Tables*, a material change occurs in any circumstance that would result in a different child support order. In this context the threshold for the payor to establish a material change is very low.

Conversely, section 14(b) of the *Child Support Guidelines* applies to cases where the *Tables* have not been used to calculate a child support obligation. In such instances, the court thus has discretion to evaluate a material change in accordance with its traditional test.

Step 2: Effective notice

The Supreme court provides guidance on what constitutes “effective notice”. The court makes it clear that an email from the payor requesting a reduction in support is insufficient to successfully meet the threshold for “effective notice”. Instead, “effective notice” is only established when the payor provides specific details of the alleged change, along with corresponding evidence “to support the legitimacy of the change.”

Furthermore, the court notes at paragraph 87 that “the timing and the extent of disclosure will be critical in ascertaining whether and when effective notice has been given.”

Payors must also act diligently by initiating a proceeding if the recipient does not agree to reduce the support obligation (*Jonas v. Akwivu* 2021 ONCA 641).

Step 3: Formal Notice

Where the payor has not provided “effective notice”, the presumptive date for retroactivity will be the date of formal notice. In many instances, this will be the date an application is brought to vary the order, which may occur much later than the date of the material change.

Step 4 - D.B.S. factors

The court adapts the *D.B.S.* factors to the retroactive decrease context in circumstances where adhering to the presumptive retroactive date would result in an unfair outcome.

i) **Understandable reason for delay:**

- One example is if the payor is suffering from health problems or other difficulties that prevent the payor from confronting the situation (*Colucci*, at para. 98).
- Other examples are where the recipient threatens to withhold the child or uses other tactics to dissuade the payor from initiating court proceedings to address the material change (*Colucci*, at para. 99).

ii) **Payor's conduct:**

- The payor's efforts to disclose information and maintain communication with the recipient regarding the material change will be important in assessing the application for retroactive decrease in support (*Colucci*, at para. 102).

iii) **Circumstances of the child:**

- If the child has experienced hardship or remains in need, the court is likely to favour a shorter period of retroactivity (*Colucci*, at para. 104).

iv) **Hardship**

- The payor must "establish real facts supporting a finding of hardship" (*Colucci*, at para. 107).
- A full accounting of the payor's financial situation, including income, assets, and debts, is required.

Step 5 - Qualification

The *Guidelines* provide the basis for calculating the quantum of support. The court retains discretion in cases involving undue hardship or where it is necessary impute income. This qualification largely depends on the disclosure provided by the payor.

Recent Case Law

Since *Colucci*, the trend in applications to retroactively decrease child support has largely been consistent, with payors frequently failing to meet the high threshold of providing effective notice. In short, it is a demanding test that very few payors can pass.(40,CFLO 61, 2021, at page 8).

On the heels of *Colucci*, Thompson notes the Ontario Court of Appeal upheld the dismissal of a reduction claim in *Dreesen v. Dreesen* (2021 ONCA 557). The onus was on the payor, who failed to provide effective notice by omitting his corporate tax returns from his disclosure (40,CFLO 61, 2021, at page 8).

Smith v. Smith

In *Smith v. Smith*, 2024 ONSC 5735, Justice Price found that a material change had occurred when the payor accepted a promotion that increased his hourly wage but reduced opportunities for overtime. The court noted that this did not constitute intentional underemployment, as the position was a promotion with prospects for further advancement in the company. While the payor’s salary was higher, his income without overtime was lower overall.

Accordingly, the presumption would seem to be in favour of retroactively decreasing support to Mr. Smith’s requested date of January 2017. However, the payor failed to provide effective notice with significant disclosure under *Colucci*. The court stated that “Mr. Smith provided no evidence of having given Ms. Smith any notice of the change in his income as of 2017, or of an intention to seek a change in child support”. Further, Mr. Smith acknowledged he had not provided Ms. Smith with financial disclosure in 2017, or “until he commenced proceedings, in 2018” (at para. 130). As a result, although the material change occurred in January 2017, the presumptive retroactive date was set as January 1, 2019, which was the first day of the month after the Motion to Change was issued.

Soo-Chan v. Rodriguez

In *Soo-Chan v. Rodriguez* (2024 ONSC 3390), the Respondent was seeking to recalculate his support and decrease it based on two Family Responsibility Office (“FRO”) orders dating back to 2007. The first order made in April of 2007 required the Respondent to pay \$117 a month based on an imputed income of \$14,700. The second order made in November of that year set child support at \$239 a month based on an income of \$27,456. The Respondent asserted that FRO had been double dipping by garnishing his wages according to both orders.

However, the court in *Soo-Chan* asserted that “it is not open to a litigant to fail to produce financial information, run the risk that a trial judge will impute an income, and then come back to a new court and suggest the imputed income was wrong” (at para. 70). The Respondent had repeatedly disregarded his obligation to provide financial disclosure for over 14 years, even though the 2007 orders required him to do so (at para. 72). Justice Ramsay therefore stated that “non-disclosure of financial information which exists even to date, this is not a case where the court ought to exercise its discretion in his favour, as to do so would be to condone his repeated breach of the orders for annual financial disclosure” (at para. 77).

Tsafaroff v. Plejic

Conversely, in *Tsafaroff v. Plejic* (2024 ONSC 5198), Justice Kraft found that the Respondent father was entitled to a reduction in arrears for the year 2022 following the loss of his employment. The court utilized the *D.B.S.* factors cited in *Colucci* in its analysis. Justice Kraft noted that the father did not delay in seeking a reduction. She stated, “in fact, he asked for leave to bring a motion to change in January 2022, just two months after his employment was terminated” (at para. 71).

Additionally relevant was the support recipient’s conduct, as the Applicant mother did not cooperate with the agreement to obtain a voice of the child report. The report

was needed to ascertain the child’s living arrangements and if a set off was appropriate (at para. 71).

The mother’s delay meant the court was unable to decide on the issue until the report’s completion. Next, Justice Kraft examined the payor’s conduct and stated, “he did not shrink from his child support obligation” and the FRO statement of accounts illustrated this by showing the father was paying what he could (at para. 71).

The child’s circumstances were contemplated where the father was found to be contributing significant sums toward the child’s section 7 expenses. The court clarified that the father had experienced a change in circumstances while the arrears were accruing which resulted in him being unable to make his ongoing child support payments when they came due (at para. 74).

Conclusion

The decision in *Colucci v. Colucci* has established a clear framework for seeking a retroactive decrease in child support. It emphasizes the critical importance of effective notice and comprehensive disclosure in these cases.

Additionally, the recent decisions noted above demonstrate that the courts are holding payors to a high standard in meeting these requirements. Therefore, when coming to court on behalf of a client to reduce support, remember to review the notice requirements carefully and double check the evidence, just to be sure.

