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Flipping DBS: Finding Limits on Retroactive Child Support Variation

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In 2006, the Supreme Court of Canada released its decision in the case of *DBS v SRG*, 2 SCR 231, 2006 SCC 37 (CanLII), which addressed the nuances of retroactive child support. A retroactive order for child support is one that has a start date prior to the date the order was made – for example, an order made in October for child support payments deemed to be payable as of August. In *DBS v SRG*, the Court reiterated that child support is the right of the child, and that this right survives the child's parents' marriage breakdown (at para 38). I have previously blogged on the pre-existing nature of this right to support (see here). The Court also stressed that courts are not precluded from considering retroactive awards just because the current child support regime is application based. The Court in *DBS v SRG* also held that the presumptive start date for a retroactive child support order should be the date the recipient gave notice to the payor that child support was needed, or "broaches the subject" as Justice Bastarache J (for the majority) puts it (at para 125). The majority held that child support may be sought retroactively to a maximum of three years from the date of the recipient's application to court. However, if the payor has been found to have engaged in blameworthy conduct or misconduct of some sort, this three-year time limit would not apply (at para 5). The Court was silent with respect to time limits on retroactive *variation* orders like that sought in *CLW v SVW* 2016 ABQB 546 (CanLII), the case that is the subject of this post.

Addressing the topic of variation in *DBS v SRG*, Bastarache cautioned that "While the payor parent does not shoulder the burden of automatically adjusting payments, or automatically disclosing income increases, this does not mean that (s)he will satisfy his/her child support obligation by doing nothing" (para 59). That is, if the payor's income rises and the amount of child support paid stays the same, there will remain an "unfulfilled obligation that could later merit enforcement by a court" (para 59). This enforcement would take the form of a retroactive child support order. As we will see in *CLW v SVW*, though, sometimes a payor's income decreases dramatically. In this post I will discuss the steps parties ought to take in cases like this, the law in Alberta that governs them, and the novel interpretation of *DBS v SRG* that Justice Hawco's ruling hinges on.

The applicant/payor, SVW and the respondent/recipient CLW had two children of the marriage: DW born in 1992 and AW born in 1993. Pursuant to a consent order granted by Justice Strekaf on 31 July 2008, SVW agreed (and was required to) pay $5,000 per month by way of child support to CLW. The circumstances leading to this figure are somewhat unique, and indeed set the stage for an interesting judgment by the Alberta Court of Queen's Bench. Because SVW was undergoing an audit at that time, his income was undetermined. The $5,000 amount was based upon an average of the incomes of his previous three years (to 2005), which would have been approximately $400,000 a year (para 4). Averaging over the last three years results from the application of s 17 of the Alberta Child Support Guidelines, which provides that if "the determination of a parent's annual income…would not be the fairest determination of that

income, the court may have regard to the parent's income over the last 3 years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years."

SVW's reported income for 2007 was $746,000, but it is important to note that he argued he never had an income of that amount that year. That figure for 2007 was taken together with his income of $263,000 from 2005 and $210,000 from 2006 to arrive at the child support payment amount noted above. It was agreed between the parties that SVW's income from 2004, $1.3 million, would not be taken into consideration because it would unduly influence the average. In 2008 and 2009 SVW reported an income of $25,000. He attributed these fluctuations to a company he owned which closed in 2011 due to financial difficulties. In 2010 his income barely exceeded $5,000 (para 6). SVW began working for Cenovus Energy in 2011, earning $141,800 that year, $269,000 in 2012, $311,000 in 2013, and $306,000 in 2014 (para 8).

In April 2011, SVW was reassessed by the Canada Revenue Agency (CRA) for 2007 and his income was considered to be $11,600— a difference of over $734,000. To better display SVW's income fluctuations, I have listed his annual incomes chronologically below:

2004: $1.3 million
2005: $263,000
2006: $210,000
2007: $746,000— re-assessed to $11,600
2008: $25,000
2009: $25,000
2010: $5,000
2011: $141,000
2012: $269,000
2013: $311,000
2014: $306,000

Apparently as a result of SVW's reduced income, his monthly child support payments were correspondingly "irregular" in 2008 and 2009 (para 13). By the end of 2010, he was in arrears some $65,000. In 2011 he was an additional $50,000 in arrears and "appeared to unilaterally reduce his payments, when made, to $1,900 per month" (at para 14). He further reduced his child support payments in 2012, again unilaterally, to $1,200 per month. In 2013 his payments leveled off at $1,700 per month and continued at that amount through the end of 2014.

SVW's rationale for unilaterally reducing his payments was that "his son DW should have ceased being considered a child of the marriage in 2010, when he graduated from high school, and that he should not have had to pay for his son AW after 2013" (para 16). Throughout all of these fluctuations in income and child support amount and frequency, SVW's child support obligation remained at a steady $5,000 per month.

On 28 July 2015, SVW was contacted by Maintenance Enforcement and informed that his support payments had never been reduced, and that he was now in arrears some $140,000.

SVW's position was that Justice Strekaf's order of 31 July 2008 was a without prejudice order and was only to be temporary, until his true income was known. Justice Hawco noted that this order provided that "the amount of $5,000.00 would be paid until further agreement of the parties or further order of this Court" (para 24). I should note that Justice Strekaf's order setting

SVW's support payments at $5,000 per month was not incapable of being altered – that amount could be changed if the parties reached a new agreement or if the matter proceeded to arbitration, where a judicially binding determination of income would occur. In fact, the order stated that once SVW's income was determined, the parties were to enter into an agreement or attend a mediation/arbitration for a final determination of his income (at para 23). Neither of those two events occurred. The first formal application by SVW to reduce his support payments was not made until 13 November 2015. An application to reduce his payments could have been made much earlier, pursuant to s 17 of the *Divorce Act*, RSC 1985, c 3 (2nd Supp) .

The issues for SVW thus were twofold. First, he took no steps to finalize his income amount as per the order of 31 July 2008 and, following his reassessment by the CRA, his child support payments did not accurately reflect his income for 2007. Second, he saw a marked decrease in his income in 2008, but because he took no measures to consult with CLW or disclose financial information reflecting his decrease in income, his child support obligation was never changed.

SVW brought an application to terminate his requirement to pay child support because the children were no longer children of the marriage (para 20), and sought a declaration that he would be subject to undue hardship if he were required to pay the amount presently ordered along with arrears (para 21). However, I will restrict my analysis to SVW's retroactive variation application. In his 16 February 2016 application, SVW sought an order retroactively varying his child support obligation back to 31 July 2008 to "an amount commensurate with his income in each year since 2008" (para 20). Justice Hawco dismissed the variation application, finding that "SVW remained obligated to pay CLW the sum of $5000 per month from the date of Justice Strekaf's order until the end of 2011" when (as Justice Hawco found) the oldest son ceased to be a child of the marriage (para 48).

Section 22(1) of the Alberta Child Support Guidelines outlines the continuing obligation to provide income information. This provision allows a recipient to request annual financial disclosure of tax returns and other documents, for the most recent three taxation years, for as long as the child is a child of the marriage. While s 22 states that the payor must disclose "on the written request of the other parent," it is nevertheless good practice to disclose and exchange income information annually anyway, to avoid snowball effects or compounding problems like that which occurred in this case. Disclosure of income information could also be ordered by a court. It wasn't in this case. As Justice Hawco opined, "[w]hat concerns me here is that SVW was the only person who knew what his income was throughout the years after the parties separated in 2008" (at para 44).

I have already noted that SVW did not bring any application to reduce his support obligation until November 2015, some 8 years after his income was first meaningfully reduced. As mentioned, this variation could have been sought much earlier, because a reduction of a payor's income can reflect a material change and is thus a common impetus for such an application. Section 17(4) of the *Divorce Act* provides that a child support order may be varied if the court is satisfied that a change in circumstances has occurred since the making of the original order. A "material change" for the purposes of calculating child support was defined in *Willick v Willick*, [1994] 3 SCR 670, 1994 CanLII 28 (SCC) as being a change that, if known at the time the original order was made, would have resulted in a different order being made. An unforeseen change such as that of SVW's income level in 2007 would satisfy this definition.

Unilaterally varying a court order in the way SVW did here does not create the most favourable circumstances in which to seek equity from a court. Justice Hawco, not surprisingly, picked up

on this several times. He noted SVW "took no steps to…alert CLW" that his income had changed (at para 44), and that "he decided he would reduce his support without any agreement, or even consultation" (at para 16).

In support of his dismissal of the retroactive variation order sought by SVW, Justice Hawco cited *DBS v SRG* correctly for the proposition that "a recipient seeing retroactive support will not be entitled to go back more than three years, unless the payor has engaged in blameworthy conduct" (at para 42). Justice Hawco flips this reasoning (partially) and arrives at the proposition that "a payor seeking to reduce his support should not be able to do so for any more than the three years prior to his application, if he has not engaged in blameworthy conduct" (at para 43). However, this "flipside" (para 43) of the three-year rule was only partially completed. Full and complete application of the three-year rule from *DBS* to the facts of *SVW* would place the condition of not engaging in blameworthy conduct on the recipient, instead of keeping it on the payor in both instances. No more attention is given to this point, the case of *DBS v SRG*, or the nuanced reasoning contained in that case.

Citing the three-year limit on recipients seeking retroactive child support and fashioning it into a three-year limit on payors seeking retroactive variation orders is a novel interpretation of the law. A notice of appeal has been filed on behalf of SVW, and I am not certain that this interpretation of *DBS v SRG* will survive the scrutiny of the Court of Appeal of Alberta. I have concerns because the Supreme Court in *DBS v SRG* (decided concurrently with three other cases) seemed to contemplate only an increase in a payor's income, not a decrease. Because changes in the payor's income correspondingly affect changes in the child's right to support, application of a three-year limit has a different effect depending on whether it is applied to a party seeking to secure or increase child support, or a party seeking to reduce it. The rationale behind this three-year limit deserves more scrutiny.

Reasoning in support of the three-year limit in *DBS v SRG*, Justice Bastarache turned to s 25(1)(a) of the Federal Child Support Guidelines, which limits a recipient parent's request for historical income information to a three-year period (para 123). Furthermore, this three-year limit appears to grow conceptually from s 17 of the Guidelines, which provides that a court may have regard to a payor's income over the last three years to determine an amount of support that is fair and reasonable when a payor's annual income may not be the fairest determination of that income. This provision is mirrored in Alberta's Child Support Guidelines.

Because Justice Hawco relied on the three-year limit articulated by Bastarache J in *DBS v SRG*, I should note that Justice Abella's concurring reasons in that case (with Fish and Charron JJ) differed in some significant ways that may be material to the facts of this case. Keeping in mind that the Court seemed only to contemplate retroactive child support orders arising from a payor's historical *increase* in income, Justice Abella nevertheless did address the presumptive limitation period of three years upon which Justice Hawco's dismissal relies. Most significantly, Justice Abella disagreed that it was a useful limit. She noted that "[f]or payor parents, certainty and predictability are protected by the legal certainty that whenever their income changes materially, that is the moment their obligation changes automatically, even if *enforcement* of that increased obligation is not automatic" (at para 166). Abella J's use of the word *"increased*" here keeps the law she articulates from being neatly applied to the facts of *CLW v SVW*.

A child-focused approach to family law and child support, like that taken by the court in *DBS v SRG*, remains mindful of the notion that child support is the right of the child. It is the child's

entitlement. At paragraph 175 of *DBS v SRG*, Abella J writes that "the suggestion of a three-year limitation period is, with respect, an unnecessary fettering of judicial discretion. Such a clear restriction of a child's entitlement requires, in my view, an express statutory direction to that effect."

Perhaps most salient though, is Abella J's articulation that in cases of retroactive child support, "a presumptive date of entitlement to child support does not…eliminate the role of judicial discretion" (at para 171). While the existence of the three-year time limit warrants circumspection on account of its potential to deprive children of their pre-existing right to support, the question here, as I see it, is whether a correlative three-year limit exists that has the effect of protecting children from a similar diminution of that pre-existing right.

How should a court treat the limits of a retroactive variation order that has the effect of reducing the child's entitlement to support? There does not appear to be any codified time-limit in place with respect to orders that, if successful, could have the effect of reducing the child's right to support. Perhaps there ought to be, and perhaps Justice Hawco's decision is the first step toward this change.

This post may be cited as: Kyle Gardiner "Flipping *DBS*: Finding Limits on Retroactive Child Support Variation" (28 October, 2016), on-line: ABlawg, http://ablawg.ca/wp-content/uploads/2016/10/Blog_KG_CLW_SV_Oct2016.pdf