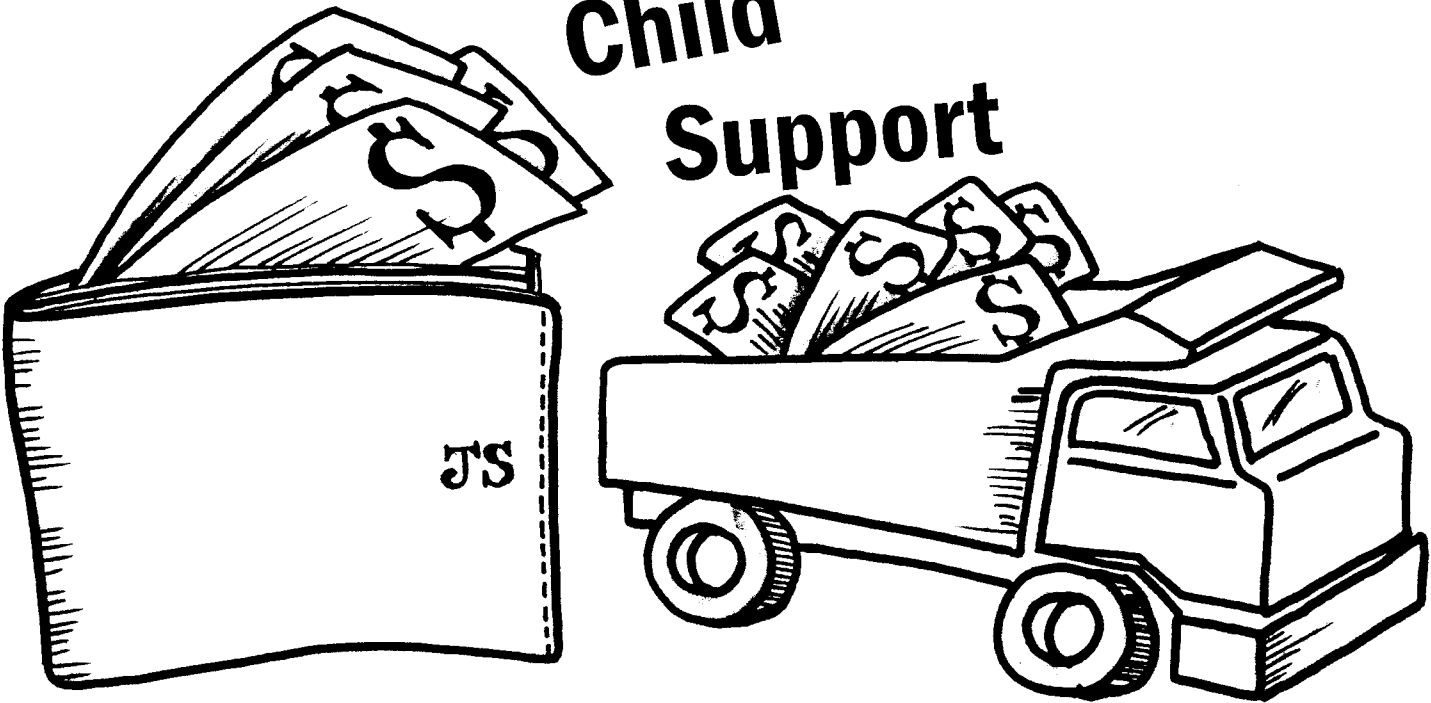


Retroactive

Child Support



Melanie Eastley

I am a lawyer who is taking an appeal about retroactive child support to the Alberta Court of Appeal. It will be heard at the beginning of May 2004, and I will report back to you in this magazine after the judgment has been handed down. Today I want to give you some background about the questions of retroactive child support.

- Does each payer of child support have a duty to be aware of the existence of the federal Child Support Guidelines?
- Must each payer get acquainted with the Guidelines and pay the Guideline amount of child support without the other parent having to take the payer to court?
- Should a payer who has not paid child support or who has avoided paying the Guideline amount for many years be let off scott-free or be ordered to pay retroactive child support?
- Conversely, should a payer be able to reduce his or her monthly child support retroactively if it turns out he or she was overpaying for some time?

I look forward to finding out how the Alberta Court of Appeal will answer the first three of these questions. In this article, however, I won't go into the final question of payers

seeking a retroactive reduction in child support to cancel out accumulated arrears.

There is no dispute that from the very day a child is born, each parent has an obligation to provide financial support for that child. Also, child support is the right of the child, and no parent can give up or bargain away a child's right to child support. Courts acknowledge these principles even when they then go on to refuse to order retroactive child support.

Some of the reasons given by courts in the last twenty years for refusing to order retroactive child support are as follows:

- the award of money will be a "windfall" for the recipient parent, who will not spend the money on the child's needs;

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- the recipient parent did not have to go into debt or encroach on capital as a result of the payer's failure in the past to pay an appropriate amount of child support;
- if property or spousal support are also issues, lump-sum retroactive child support may actually be redistribution of property or spousal support in disguise;
- the recipient parent waited too long to enforce the child support obligation;
- if there was an order in place, the payer should be able to rely on that order even if it was a ridiculously low order;
- the payer is entitled to arrange his or her financial affairs based on the existing order or arrangement;
- it is unfair to impose an obligation now for a period the payer "reasonably" thought had passed;
- a retroactive order would impose hardship on the payer;
- the payer had no notice of the claim for child support until the court application

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was filed, even if earlier there had been informal demands or negotiation; and

- very recently, the Ontario Court of Appeal in its decisions of *Walsh* and *Marinangeli* stated that unless specifically ordered to do so earlier, the payer has no legal obligation to disclose changes in income; instead, the onus is on the recipient to chase down the payer for information, and subsequently force through a variation of child support. Until quite recently, the only time courts would order retroactive child support was when the payer was blameworthy, for example, through deliberate unemployment, delay tactics, or incomplete or misleading financial disclosure. But blameworthiness was always balanced against the reasons or factors for not ordering retroactive child support. The blameworthiness had to be pretty serious before retroactive support would be ordered. The rule set out by the Alberta Court of Appeal in the January 2000 case of *Ennis* is that support is normally retroactive only to the date of filing of the application. Only in "exceptional circumstances" would support be ordered back beyond that date.

The threshold of "exceptional circumstances" was somewhat lowered by the Alberta Court of Appeal in the two 2001 decisions of *Hunt* and *Whitton*. There the Court of Appeal stated the threshold is "appropriate circumstances." That is still a very loose threshold and

open to wide interpretation depending on the individual justice in the court hearing the application on the day you are presenting it. Face it, justices are people like you and me, and any decision they make is based in part on subjectivity. It is impossible to strip a person of his or her subjectivity, especially about a contentious issue like retroactive child support. In court, we call it discretion.

Quite recently, some lower court justices have awarded substantial retroactive child support in cases where three or four years earlier, none would have been ordered. I have done the side-by-side comparisons to allow me to make this statement. These orders are based on the 1997 Child Support Guideline objectives and the practical side of the Guidelines:

- the Guidelines are relatively simple, widely accessible, and known to the public;
- since the coming of the Guidelines, and the public education campaign that accompanied them, it is extremely hard for a payer to claim to be surprised by a claim for retroactive child support; and
- the payer shares responsibility with the recipient to make sure that appropriate child support is being paid; that is, there should be no more of the *catch me if you can* mentality.

Until Parliament amends the Guidelines to deal with the question of retroactivity, appeal courts in each province, or even eventually the Supreme Court of Canada, will make up the rules as we go along.

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The objectives of the Guidelines are

- to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- to improve the efficiency of the legal process by giving courts and spouses guidance in setting the level of child support orders and encouraging settlement; and
- to ensure consistent treatment of spouses and children who are in similar circumstances.

Consistency and standards are guiding principles in the Guidelines. Therefore, justices have literally no discretion over future, or ongoing, child support. They must by law order the amount of child support prescribed by the Guidelines. However, for retroactive child support, the state of the case law right now is that justices still have very wide discretion. And that leads to differences in treatment of children based on the subjective opinion of the individual justice about retroactive support.

The Guidelines do not explicitly state that they apply to retroactive child support, and there lies the dispute over retroactivity. Until Parliament amends the Guidelines to deal with the question of retroactivity, appeal courts in each province, or even eventually the Supreme Court of Canada, will make up the rules as we go along. As I had mentioned above, the Ontario Court of Appeal has recently stated that unless specifically ordered earlier, payers have no obligation to disclose changes in income. Taken one step further, they have no responsibility to make sure that the correct amount of child support is being paid, the onus is completely on the recipient. I wait to see whether the Alberta Court of Appeal will find otherwise.

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