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Understanding Retroactive Child Support

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In the current era of "Big Data" and information overload, law is no different from other aspects of life in the sense that one must be careful not to cut corners impetuously due to the oversimplification and unwary distillation of complex legal matters. Self-represented litigants in family law may be particularly vulnerable when it comes to the issue of retroactive support when conducting an internet search. While the idea of using Google is perhaps more trustworthy than resorting to an unpredictable odyssey through the neighbourhood grapevine, even the case law found on the internet can be challenging for some.

The 2006 Supreme Court of Canada decision in *DBS v SRG*, 2006 SCC 37 has often been cited as the seminal authority for a (maligned) three-year rule on ordering retroactive child support. On December 13, 2016, the Ontario Court of Appeal released its decision in *Wharry v Wharry*, where it had to deal with the trial judge's decision in 2015 regarding retroactive child support. At trial, the judge noted there was a "judicially imposed three-year limitation on retroactive child support" when he made reference to the Supreme Court of Canada decision in DBS. The trial judge effectively allowed child support to be only calculated from 2012 up to the trial date in 2015, even though the parents separated in 2006 and commenced litigation in 2007. The appellant mother ultimately was successful in her argument on this issue at the Ontario Court of Appeal. In its reasoning, the Ontario Court of Appeal correctly followed DBS and considered the four factors that had to be weighed to determine whether the trial judge was correct in deciding on the overall appropriateness of retroactive child support. Having done so, the trial judge then had to go back in time to start the clock running, so to speak. The trial judge had four dates to choose from: 1) the date of the court application, 2) the date from which child support ought to have been increased, 3) the date the payor received effective or constructive notice of the request for support from the recipient, 4) the date the payor received formal notice.

In *DBS*, the Supreme Court of Canada stated that the date of "effective notice" will generally serve as a default option when choosing a date of retroactivity since it served as a fair balance between certainty and flexibility. Where it becomes complicated is that *DBS* also stipulated that even though there may be a general default to effective notice, it will usually be inappropriate to make a support order retroactive to a date more than three years before formal notice was given. In *Wharry*, the appellant mother filed her request for child support in March of 2007, shortly after the separation date. In other words, she gave both effective and formal notice eight years before the trial in 2015; so, for the trial judge to limit her support from 2012 to 2015 was an error. In *Wharry*, the payor (father) did begin his child support payments of

$360 per month under an interim order dated July 11, 2007 predicated on an income of $25,000 per year, however, the interim payments were not based on persuasive evidence of the father's income. Thus, the Ontario Court of Appeal felt the trial judge should have overridden the interim support payments made for the period of 2007 to 2012.

The misapplication of the three-year rule in *DBS* appears not only in *Wharry* but in many other cases involving retroactive support. It is clearly not a simple issue of just starting the clock 36 months before the trial date and then reverting to the *Child Support Guidelines*. Although the *Guidelines* were designed to promote fairness and predictability, the concept of retroactive child support in *DBS* must be remembered as a rule to promote or advance parties' support discussions during the time between effective notice and formal notice, not as a "one size fits all" type of rule to simply limit retroactive claims to an artificial three-year maximum.

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