TAB 15

Duelling Banjoes in the Court of Appeal

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When the law is against you, argue the facts
When the facts are against you, argue the law
When both the law and the facts are against you,
attack the opposing counsel

I have been urged to call this paper the trilogy on retroactive support, however, while applicable, I thought the title a little dull.

In truth, we do have three Court of Appeal decisions on the issue of retroactive child and spousal support. All three decisions differ from each other and two of the decisions were written by the same judge.

Marinangeli v. Marinangeli

In *Marinangeli*, a decision released by the Court of Appeal on July 11, 2003 the Court of Appeal affirmed the decision of the trial judge to grant a variation of both child and spousal support retroactive to the date that the husband had experienced an increase in his income.

The parties had settled all issues in Minutes of Settlement dated October 11, 1996. The husband, under the Minutes of Settlement, was to pay $2,000 a month child support and $6,000 a month spousal support. The husband was earning $308,000 a year at the time the Minutes of Settlement were signed.

Within 3 months, the husband's income increased. His actual income in the year the Minutes of Settlement were signed was $341,576 and in the following year it was $1,292,409. Part of that increased income in 1997 was a result of the husband exercising stock options, but even in subsequent years when he did not exercise stock options, his income was substantially higher than it was when the Minutes of Settlement were signed.

At trial in May 2001, Mr. Justice Paisley awarded child and spousal support retroactively to January 1, 1997. The Court of Appeal upheld the Judgment of Paisley, J. with the exception of 4 months of child support. The Court of Appeal stated that it would be inappropriate to award the Child Support Guideline amount of support for a period prior to the Guidelines coming into force.

With respect to child support the Court of Appeal noted that the obligation to pay child support arises immediately upon the birth of the child and continues regardless of whether or when the payee spouse brings an action for support. Therefore, the use of the word "retroactive" is somewhat of a misnomer.

The factors to be considered in deciding to award retroactive support as accepted by the Court of Appeal in *Marinangeli* are:

(1) the need on the part of the children and a corresponding ability to pay on the part of the non-custodial parent;

(2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order;

(3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses;

(4) an excuse for the delay in bringing the application where the delay is significant; and

(5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.

Factors that militate against awarding retroactive support include:

(1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations;

(2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and

(3) a significant, unexplained delay in bringing the application.

Walsh v. Walsh

On February 2, 2004 (only 7 months after the Court of Appeal decision in *Marinangeli*) the Ontario Court of Appeal delivered it's decision in *Walsh v. Walsh*. The facts in *Walsh* were not the least bit unusual. The parties had been separated in 1995 and the father (formerly husband) had been

ordered to pay child support in 1997 based on an income of $175,000. In 2002, at the request of the mother, the father produced his income tax returns since 1997. His income had increased substantially. In 2001 his income was $376,000.

The mother commenced a variation application. On an interim motion, Justice Snowie awarded child support in accordance with the Child Support Guidelines retroactive to 1998, finding that the retroactive payment should be $42,917.

The husband appealed.

The Court of Appeal found that Justice Snowie had *recalculated* the support (not varied it) and noted that there is no jurisdiction under the Divorce Act or the Child Support Guidelines to *adjust* child support just because the payor's income increased. In fairness, Justice Snowie stated in her reasons that she had not been asked on the motion to vary the child support based on a material change of circumstances. She stated that she was being asked to *adjust* the amount of the child support to accord with the father's actual income in the years in issue, based on his income tax returns.

With respect, this wording puts form before substance but then decides on the substance. Surely, the motions judge was being asked to vary retroactively. What else could the mother have been asking for ?

Unfortunately, the Court of Appeal overturned the motions judge by placing form above substance.

The Court of Appeal took a formal approach to what was requested and granted. While Laskin, J. A. is absolutely correct that there is no power under the Divorce Act to "recalculate" support, there is jurisdiction to vary support to accord with the Child Support Guidelines, even when there is no material change in circumstances.

What is worrisome is that the Court of Appeal could have reached the same decision by relying on the factors set out in the *Marinangeli* case.

In *Walsh* some of those factors militated against awarding a retroactive amount, certainly on an interim motion. For example, there appeared to be no blameworthy conduct by the father.

The Court of Appeal chose not to base it's decision on the equities, and in so doing, tried to limit the impact of *Marinangeli*

Indeed, Laskin, J.A. goes so far as to limit the *Marinangeli* case to one about duty to disclose only. He states (para. 24):

> *"Absent such a contractual duty, however, failure to disclose an increase in income does not allow a court to award a retroactive increase in child support. Instead the payee must ascertain a payor's change in income, apply for a variation, establish a change of circumstances, and if seeking a retroactive order, establish ability to pay and need during the relevant period."*

Laskin, J. in the *Walsh* decision takes us back to need as a primary consideration. He states (at para. 16) that evidence of need is required before the court will award support for a period prior to the commencement of the application or the request for a variation. A Court must have evidence that the child "suffered from a lack of financial support during the period in question." What does that mean in this Child Support Guidelines world and how does one establish that a child has suffered ? It is reminiscent of the days when wives had to provide a budget based on the income they were receiving and support was then awarded based on that same budget. You can only spend what you have. How could you ever get higher support if you did an honest budget? How can you show that a child has suffered from not being able to take piano lessons ? (Indeed, some would see that as a blessing).

Laskin, J.A. goes back to need again at paragraph 27, requiring that Mrs. Walsh prove that the children *needed* more support and that the husband was able to pay.

Only in the penultimate paragraph does Laskin, J.A. say that the factual findings necessary to make a retroactive order could not be made on an interim motion. However, he states that the motions judge erred in making any retroactive order, and, as an apparently secondary consideration, in doing so on an interim motion.

Another comment from *Walsh* is that the Child Support Guidelines do not override or modify the statutory requirement in section 17 of the Divorce Act for variation in child support. What about *Wright v. Zaver* ? Had we not finally accepted that the Child Support Guidelines are a material change in circumstances ? Once we are into the Child Support Guidelines, the table amount applies, does it not ?

Justice Laskin refers to section 25 of the Child Support Guidelines which enables a provincial government to establish a body that will recalculate child support, at regular intervals. The provincial government has failed

to do this for reasons that are beyond me (although frankly, I wonder if such a body would be constitutional – that whole federal/provincial powers thing).

The Court of Appeal could have decided *Walsh* on the basis that the mother did not pursue disclosure in a timely way; that it is not appropriate to sit in the weeds and then claim a large lump sum. It could have simply said that on a consideration of the relevant factors no retroactive support be awarded. It could also have said that it was just inappropriate to consider the claim on an interim motion. That would have been consistent with *Marinangeli* and other cases before *Walsh*.

Horner v. Horner

Finally, on October 21, 2004 the Court of Appeal released it's decision in *Horner v. Horner*. The decision was written by Weiler, J.A. who also wrote the decision in *Marinangeli*.

In *Horner*, the parties had signed a separation agreement in 1995 in which they agreed that the husband would pay spousal support of $400 a month and child support in the amount of $500 per month for each of the two children. The spousal and child support was indexed. The agreement provided that the spousal and/or child support could be varied in the event of a material change of circumstances. The husband's income at the time was $75,000 a year.

A variation application was brought and heard in 1997 and in 1999 the parties signed an amending agreement.

On April 26, 2001 the wife notified the husband that she wanted an increase to the child and spousal support retroactive to January 1, 2000. It was on that date that the husband had received a promotion and resulting increase in income. The Notice of Application was not issued until August, 2001.

The trial judge awarded increased child and spousal support but only retroactive to May 1, 2001 the start of the month following the request for the increase. The wife appealed and requested that the increased amounts of support be retroactive to January 1, 2000.

On spousal support, the Court of Appeal found that the May 1, 2001 commencement date was appropriate. It pointed to the fact that there are no normative standards for spousal support, unlike child support. Weiler, J.A. distinguished *Marinangeli* on the basis of an implied duty to

disclose in that case, the fact that the husband made no representations that turned out to be inaccurate and the fact that Mrs. Horner did not testify that if she had learned the facts earlier, she would have brought an application then for increased spousal support.

With respect to retroactive child support, Weiler, J.A. distinguished *Walsh* on the basis that it was an appeal from interim order that was, in effect, a final order. The Court of Appeal also found blameworthy conduct on the basis that Mr. Horner had a duty to disclose his income accurately and he had not. The reasoning was that the income stream was an asset and should have been disclosed when the domestic contract was signed and it was not. (On the other hand, the Court had found no lack of disclosure with respect to the spousal support !)

Weiler, J.A. addressed Laskin, J.A.'s comments about there being no jurisdiction to "recalculate" child support by pointing to the court's power to award retroactive support and the common law right to intervene and determine an appropriate amount of child support.

Where does all this leave us, aside from confused ?

It's very safe to say that courts will look differently at claims for retroactive child support than claims for retroactive spousal support. Today, you are more likely to get the retroactive child support.

What is disappointing is that there is little discussion of the equities and the fact that a payor's failure to disclose his or her accurate income may very well result in no sanctions and no retroactive award. The approach taken by the courts is, with respect, not a particularly principled one.

Cases decided between Walsh and Horner

The following is a summary of some the decisions released after the *Walsh* decision and prior to *Horner* which further exemplify the need for a principled approach.

1. Parties separated and entered into negotiations. The husband continued to deposit part of his income into a joint account for the use of the wife for some time. Thereafter the husband paid child support to the wife at less than the table amount. Litigation was commenced at some point. Retroactive child support ? Retroactive spousal support ?

Yes and no. With respect to child support the court found it would be unfair to the wife to ignore the table amounts that should have been

paid, even though there was no evidence of need between the date of separation and the date of trial. To not award retroactive child support would encourage litigation not negotiation. No retroactive spousal support was ordered. To award retroactive spousal support would be an unfair burden to the husband, given the wife's lack of need.

MacKinnon v. MacKinnon, 2004 CarswellOnt 534 (February 10, 2004)

2. The husband was ordered to pay interim support based on his disclosed income at that time. At trial it turned out that his income was actually higher in the year of the motion, although that was not known at the time of the motion. Retroactive support or not ?

No. On the strength of *Walsh*, the trial Judge found that there should be no retroactive support. The court found that a refusal to provide details of his overtime income was not "blameworthy" conduct by the husband justifying a retroactive award. Furthermore the wife had not encroached on her capital to pay expenses.

Ramdatt v. Ramdatt, 2004 CarswellOnt 655 (February 13, 2004)

3. In 1998, the wife was awarded child support in accordance with the CSG. A number of material changes take place after the trial, including an increase in the husband's income and the wife obtaining full-time employment. The wife sought to vary child support retroactively to 1999 and the husband sought to vary the spousal support retroactively. Retroactive variation or not ?

No variations retroactively. A pox on both spouse's houses because neither was forthcoming about their financial situation. The husband had not disclosed his increased income, but the wife had not informed the husband that she had obtained full-time employment. The wife had not explained the delay in making an application and her application appeared to be a response to the husband's application for an accounting of the section 7 expenses.

Marcantonio-Zito v. Zito 2004 CarswellOnt 871 (February 19, 2004)

4. The father was ordered to pay child support on an interim motion. On further interim motion, child support was reduced as a result of the father's claim of poverty. Father paid in accordance with interim order. Mother requesting a retroactive variation based on the husband's now known income. Retroactive variation ?

Yes. Mother had been living very frugally with daughter and there was ample evidence that the child could not participate in activities as a result of the lack of child support.

Coyle v. Danylkiw et al. 2004 CarswellOnt 975 (March 9, 2004)

5. The father was ordered to pay child support on an interim motion and he complied with the order. Mother seeking retroactive support from the date of separation (October 1, 2002) to the date of the interim order (May 1, 2003). Retroactive support ?

No. No evidence that the father was hoarding, diverting or otherwise hiding his income. Both parties had been paying off joint debts and neither party had savings from that time.

Sellick v. Bollert 2004 CarswellOnt 1934 (May 13, 2004)

6. Parties separated in 1993. Mother sought child support retroactive to January 2000. Mother accepts that father's obligation fulfilled to the end of 1999. In 2000, the father stopped paying support, but did contribute to the children's extracurricular activities. The application was commenced in July, 2001. Retroactive support ?

Yes. Mother had encroached on capital, cashing in her RRSP's. Father's net worth had increased.

Hugel v. Hugel 2004 CarswellOnt 2115 (May 25, 2004)

7. The father was paying child support substantially below the CSG amount. The action was commenced in 2000 and in 2002, on an interim motion, the father was ordered to pay a higher amount, *subject to retroactive readjustment.* The mother sought the adjustment to the date of commencement of the action.

After referring to *Walsh*, retroactive adjustment made.

Cross v. Cross 2004 CarswellOnt 2285 (June 2, 2004)

8. In mediation, the husband agreed to pay child support in an amount less than the CSG. No agreement was ever signed. Subsequently the husband lost his job and sought spousal support. The

wife increased her hours of work substantially to meet her own needs and those of the children. The husband lost his job and sought spousal support. The wife requested retroactive child support based on the CSG to the date of separation. Yes or no ?

Yes and No. Yes to the retroactive spousal support and no to the retroactive child support. The wife was ordered to pay spousal support retroactive to the date the husband became unemployed.

The husband was ordered to pay child support in accordance with his employment insurance income retroactive to the date the application was commenced. No other retroactive adjustment.

Dhanji v. Dhanji 2004 CarswellOnt 3830 (June 18, 2004)

9. Father agreed to pay child support in 1994 separation agreement. In1996, father's income increased dramatically. In 2003, mother brought action for corollary relief claiming retroactive child support for the period 1997 to 2002.

The father's increase in income appears to have been noticeable in that he was earning $60,000 after the separation and some years later he increased the child support payments and paid for the children's private schooling. The mother's claim for retroactive child support amounted to $600,000 over the almost five year period.

Windfall or not ?

No. The children's needs were being met during the relevant time. An inability to go on expensive vacations or purchase more clothes is not evidence of need. There was no blameworthy conduct. The father's improved circumstances were, or should have been, apparent to the mother. The mother did not incur debt to support the children and her net worth had increased.

Baldwin v. Funston, 2004 CarswellOnt 2742 (June 29, 2004)

10. Parties signed a separation agreement in 1995 pursuant to which the father paid child support. In 2001 the father increased the payments and in April 2003 he reduced the payments. Mother was seeking retroactive support to the date of separation on the interim motion.

Order that child support be varied retroactively to the date April 2003 when the father reduced the payments. Balance of retroactive claim to be determined at trial.

Winton v. Lofranco, 2004 CarswellOnt 3346 (August 17, 2004)

11. Husband was paying spousal support pursuant to a 1996 order. The wife sought a variation of the support, retroactive to 1996 (8 years by the time of trial).

No, no, no. For various reasons, but primarily a delay of 8 years does not demonstrate an inability to survive on the interim amount awarded.

Thomson v. Thomson, 2004 CarswellOnt 3404 (August 20, 2004)

12. Mother commenced application in 2003 to vary a final order for child support made in 1995. At the time of the 1995 order, the father was unemployed, receiving EI benefits of $1,100 per month. Under the terms of the order, the father was obligated to "notify the mother of any part-time or full-time employment that exceeds the $1,100 per month, net." The father had not notified the mother of changes to his employment status.

Retroactive support, right ? Duty to disclose ?

Wrong. Father had notified FRO of changes to his employment and that was how the support ordered was being collected. Mother made no attempt in 8 years to follow up. Support effective as of the date of the commencement of the application.

J.M.S. v. F.J.M., 2004 CarswellOnt 3712 (September 13, 2004)

What are the rules that we can take from these cases ?

1. Most people seem to get matters on for trial a lot faster than I do;

2. You can usually find a case to support any position you want to take;

3. It is not automatic that any underpayment of support from the date of commencement of an action to the date of trial will be adjusted;

4. In obtaining an interim support order, consider trying to have the judge include the wording "subject to readjustment at trial" or "without prejudice to the parties presenting further evidence as to the appropriate amount at trial";

5. Retroactive support to a period prior to the start of the proceeding is never to be assumed;

6. If requesting retroactive support, use charts or graphs that clearly show what was paid and what should have been paid;

7. There is no general obligation to give information about improved financial circumstances;

8. There is an obligation to ask for financial information and indicate an intention to claim support if you want it to be retroactive;

9. You cannot sit in the weeds;

10. If you suspect improved circumstances, ask for disclosure;

11. Timing is everything (In *Marinangeli* the change took place on January 1, 1997 and the wife requested the husband's 1997 income tax return in August 1998. It was not provided until December 1998, and the application was commenced shortly thereafter.);

12. Fairness, while not a specific factor, does come into play;

13. Do not even try to get retroactive support for any time prior to the commencement of the proceeding on an interim motion unless there is dire need.