

C. Determination of when child support shall be ordered retroactively and/or increased retroactively

D.B.S. v. S.R.G., 2005 ABCA 2 (CanLII), 2005 ABCA 2 ("D.B.S."); **L.J.W. v. T.A.R.**, 2005 ABCA 3 (CanLII), 2005 ABCA 3 ("L.J.W."), **Henry v. Henry**, 2005 ABCA 5 (2005-01-07) ("Henry"); **Hiemstra v. Hiemstra**, 2005 ABCA 16 (2005-01-17) ("Hiemstra")

The above listed cases are the leading cases in Alberta regarding when child support should be ordered and/or increased retroactively.

The Supreme Court of Canada heard an appeal of the above listed cases in February, 2006. It is not known when they will release their judgment, but it may take up to or over a year. The SCC was asked to consider when it is appropriate to order retroactive child support.

Our courts typically hear two types of applications for retroactive child support. One occurs when an applicant for child support has waited months, or years after the parties have separated to apply for child support, but wants the payments to be directed to be made back to the date of separation. The second occurs when there is an existing order for child support and the recipient finds out that the payor's income has increased and seeks an increase in child support back to the date of the increase in the income. For many years, our Courts interpreted the Child Support Guidelines as placing the onus upon the recipient of support to prove why they should be granted retroactive support. Usually the Courts were reluctant to grant retroactive support unless the recipient could provide a good explanation for why there was a delay and very frequently the Courts would not grant retroactive support unless the recipient could show the payor had behaved in an underhanded manner (such as failing to provide documents when requested, lying about income, failing to pay support owing, etc.)

In the four cases under review by the SCC, the Alberta Court of Appeal approached retroactive child support applications from the perspective that child support is the right of the child and should be paid. Accordingly, instead of placing the burden on the recipient to show why child support should be payable retroactively, they shifted the burden to ask the payor why retroactive support should not be ordered. They also held that the payor had an obligation to provide information regarding changes of income to the recipient, even though it does not state so explicitly in the Child Support Guidelines.

For example, at paragraph 153 of D.B.S., the Alberta Court of Appeal stated the following:

1. A child is entitled to child support. Need is presumed.
2. The Guidelines presume an ability to pay on the part of the payor in accordance with his or her income as established in accordance with s.16 of the Guidelines.
3. Blameworthy conduct on the part of the payor is not required.
4. The payee does not need to demonstrate an encroachment on his or her capital;
5. Notice of an intention to pursue child support is not a prerequisite to a retroactive award.
6. Whether there is an unreasonable burden placed on the payor should not be assumed, but must be established; it must be incapable of alleviation by creative payment options. Further, the reason for or the cause of the inability to pay must be considered and any burden must be balanced against the corresponding deprivation to the payee and child.
7. A lump sum payment is not precluded merely because it involves a transfer of capital.
8. The date of the increase in income as defined by the Guidelines is the presumptive date for the commencement of a retroactive award unless the payor has satisfied the additional financial obligation in some other manner, has taken all reasonable steps to fulfill the obligation, has a previous arrangement for child support that contemplates the provisions of the Guidelines, or the payee fails to act diligently without reasonable excuse."

The four Alberta Court of Appeal cases do not represent the law regarding retroactive child support in all of Canada. The Courts of Appeal in other Canadian Provinces have been more conservative regarding the interpretation of the Child Support Guidelines, than Alberta. Typically, the other Courts of Appeal have struck more of a balance between the old approach of placing the onus entirely on the recipient to show blameworthy conduct and the Alberta approach of placing a heavy burden on the payor. We will update this site once the SCC have published their decision in the Henry, D.B.S., T.A.R. and Heimstra appeals.