

## MILNE SELKIRK PRESENTS “YOU AND THE LAW”

### Spouse Can Get Retroactive Support

If you apply for child and/or spousal support, you might also get a lump sum as “retroactive” support for the previous months or years when you should have received support in the past. Consider the following recent case.

Sofia and Stewart lived together for four years. After she moved out with their child, he voluntarily paid her \$500 month as child support. About five months later, he started paying her another \$500 month as spousal support. A year after they separated, she applied for a court order for child and spousal support.

The BC Court of Appeal (which treated their common-law relationship like a marriage) upheld the trial judge’s decision. Stewart was ordered to pay Sofia \$1,119 month in child support, plus retroactive child support of \$26,567. He was also ordered to pay \$2,169 month as spousal support for five years, plus retroactive spousal support of \$68,429. The retroactive awards took into account what he had already previously paid.

The Court of Appeal said that while not exceptional, retroactive orders are also not automatic. It then referred to an earlier Supreme Court of Canada case known as D.B.S. v. S.R.G., which set out four factors that must be considered in determining whether retroactive support is appropriate:

1. reasonable excuse for why support wasn’t claimed earlier
2. blameworthy conduct of the payor parent
3. circumstances of the child
4. hardship occasioned by a retroactive support order

The D.B.S. case dealt specifically with retroactive child support, but the BC Court of Appeal said the same analysis applies to whether spousal support should be retroactive too.

The court determined that Sofia had a reasonable excuse for not formally claiming support until a year after she and Stewart separated. About five months after they split, they had specifically discussed the issue of going to court, and he convinced her not to do so. He also didn't fully disclose his financial position to her and persuaded her that he was already meeting his support obligations.

The court also decided that Stewart was guilty of "blameworthy conduct" of the sort described in the D.B.S. case. That case said that "a payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support" nor "mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not." As well, Sofia's income was meagre and she had debts, so retroactive support would help their child, said the court. And finally there was no evidence that a retroactive order would cause any hardship for Stewart.

How far back should retroactive support reach? The Supreme Court of Canada in D.B.S. favoured the date at which "effective notice" is given, i.e., "any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be renegotiated." In general, it said that retroactive support shouldn't reach back more than three years before the date formal legal notice is given claiming support.

In Sofia and Stewart's case, the Court of Appeal approved the date of separation as the date for starting retroactive child support. The date Sofia discussed going to court with Stewart (about five months after they separated) was the "effective notice" and start date for retroactive spousal support.

*This article was written by Janice Mucalov, LL.B. with contribution by Gordon Neate of MILNE SELKIRK. A version of this was previously published in the Langley Times. Copyright by Janice Mucalov. "You and the Law" is a registered trade-mark. Please call Gordon Neate (604-882-5015) if you have any questions or for legal advice.*