

RETROACTIVE CHILD SUPPORT—A TANGLE OF COMPETING INTERESTS

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I. INTRODUCTION

Creating an effective structure to guide parents' financial obligations toward their children after the breakdown of a marriage or cohabitation poses a challenge for many legal systems. Canada is no exception. In 1997 the Parliament of Canada enacted a new legislative regime to address child support calculations for children of divorced parents.¹ Within a few years of the federal legislation enactment, Canadian provinces and territories enacted very similar legislation to guide support determinations falling under provincial/territorial legislative competence.²

Since 1997 a number of interpretive issues relating to the new statutory regime have made their way to the Supreme Court of Canada. In *S. (D.B.) v. G. (S.R.)*,³ the supreme court faced the difficult task of determining whether the court should order retroactive child support, and if so, for what period and in what quantum.⁴ The court interpreted and balanced the rights and interests of children, recipient parents, and

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¹ Federal Child Support Guidelines (Divorce Act) SOR/97-175.1 (Can.).

² Department of Justice Canada, About Child Support, <http://www.justice.gc.ca/eng/pi/fcy-fea/sup-pen/index.html> (last visited March 24, 2010) [hereinafter About Child Support]. Canada's federal structure provides an interesting interplay of legislative competence. The Constitution Act enumerates marriage and divorce as areas within the federal legislative domain. Constitution Act, 1867, 30 & 31 Vict. Ch. 3, § 91(26) (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985). Courts have held that matters corollary to divorce, such as custody and support, fall within the same domain. The Constitution Act also provides that provinces have legislative authority over "property and civil rights." *Id.* § 92(13). As a result, support and custody matters not tied to divorce proceedings fall within provincial/territorial legislative authority.

³ *S. (D.B.) v. G. (S.R.)*, [2006] 2 S.C.R. 231, 2006 SCC 37 (Can.). The Canadian courts decided *S. (D.B.) v. G. (S.R.)* along with three companion cases: *R. (T.A.) v. W. (L.J.)*; *Henry v. Henry*, and *Hiemstra v. Hiemstra*. *Id.*

⁴ *Id.* at para. 1.

paying parents.⁵ A number of areas of debate arise from the decision; some stem from legislation⁶ and others relate to the court's approach of balancing fairness and certainty within the context of a child-centered analysis.⁷ This attempt to balance the interests of family members, and the impact of both the applicable legislation and the court's decision on issues related to ongoing postseparation family conflict, make the area one that lends itself well to a therapeutic jurisprudence analysis. While the following Article focuses primarily on Canadian jurisprudence and legislation related to these questions, aspects of the discussion will no doubt apply to other jurisdictions.

Part II provides an overview of the issues before the Supreme Court of Canada, the legal landscape in which they arose, and the manner in which the court resolved the issues. Part III includes a brief review of the therapeutic jurisprudence principles that tie into the analysis. Part IV highlights ways in which relevant legislation and the court's approach to balancing interests leads to effects that may be inconsistent with children's well-being and the associated emphasis on decreasing parental conflict after separation. Part IV also introduces the question of whether the current approach to enforcing retroactive support is consistent with the day-to-day realities of recipient parents. Part V calls for an increasingly more attuned response to the circumstances of separated families.

⁵ See *id.* at paras. 4-6.

⁶ *Id.* at para. 3. Two of the cases in *S. (D.B.)* were commenced under Alberta's since-repealed Parentage and Maintenance Act, R.S.A., ch. P-1 (2000) (repealed 2005), while the other two were commenced pursuant to the Divorce Act, R.S.C., ch. 3 (2d Supp.) (1985) (Can.) and the Federal Child Support Guidelines. *Id.* at paras. 3, 50. While the courts below were happy to proceed on the basis that the analysis to be taken was common to each situation, the Supreme Court of Canada did not accede happily to this approach. *Id.* at para. 50. Justice Bastarache stated: "I will reluctantly accept this proposition for the purposes of deciding these appeals. The parties do not dispute that Alberta courts, under the *Parentage and Maintenance Act*, have discretion to adopt the paradigm espoused by the federal regime. However, I cannot support a general approach that purports to follow the *Guidelines* whenever a court's discretion under applicable provincial law is invoked." *Id.* at para. 51. For the purposes of this Article, the legislative analysis focuses on the Federal Child Support Guidelines.

⁷ *Id.* at para. 43 (citing Federal Child Support Guidelines (Divorce Act) SOR/97-175.1(a)-(d); *Francis v. Baker*, [1999] 3 S.C.R. 250, para. 39 (Can.)).

II. ANALYSIS OF *S. (D.B.) v. G. (S.R.)*

A. *The Issues Arising in S. (D.B.)*

The Supreme Court of Canada addressed four Alberta-based cases at the same time—three the Alberta Court of Appeal combined and a fourth case added by the supreme court.⁸ In each case, the parent who received child support sought an amount of support for a prior period.⁹ Specifically, the amount sought was the support obligation attributable to the payor parent's income during that period.¹⁰ These claims became further complicated because the parents sought to enforce specific obligations the courts had not previously spelled out by order or agreement.¹¹ Had a court previously ordered the support, the relief sought would have been the enforcement of arrears that had accrued over the years.¹² Instead, as the supreme court explained, the claims concerned “the enforceability and quantification of support that was neither paid nor claimed when it was supposedly due.”¹³

These claims often arise where either an agreement or court order settles support obligations, and subsequently the payor's income increases, but the amount of support paid does not.¹⁴ As the court recognized in *S. (D.B.)*, *retroactive* is technically a misnomer in such circumstances—the court is not asking the payor to comply with a legal obligation that did not exist in the past.¹⁵ Instead, the recipient is seeking to hold the payor accountable for the obligations that would have been associated with his or her income during the period in question if

⁸ *Id.* at para. 12.

⁹ *Id.* at para. 1.

¹⁰ *Id.* Two of the cases involved support payments that were never paid to the recipient parent, while the other two cases involved recipient parents seeking an increase in the original support award. *Id.* at para. 3.

¹¹ *Id.* at para. 1.

¹² *See id.* at para. 2.

¹³ *Id.* at para. 1.

¹⁴ *See About Child Support, supra* note 2 (“Sometimes child support amounts have to change . . . in order to remain objective and fair—to reflect a parent's capacity to pay . . .”). It is also possible for an initial support application to be amended after taking into consideration a spouse's past income if there appears to be a pattern of income or fluctuation. *See Federal Child Support Guidelines (Divorce Act) SOR/97-175.17 (Can.)*.

¹⁵ *S. (D.B.)*, 2 S.C.R. at para. 2.

the court had recalculated at the time the payor's income increased.¹⁶ In *S. (D.B.)*, the ultimate issues for the court were whether it could order such retroactive support, and if so, under what circumstances it should do so.¹⁷

The legislative framework surrounding child support informed the court's analysis in *S. (D.B.)*. In Canada, an important shift in the characterization of child support obligations occurred in 1997 with the introduction of the Federal Child Support Guidelines (Guidelines)¹⁸ and corresponding amendments to the Divorce Act.¹⁹

Section 1 of the Guidelines provides its objectives:

(a) 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;

(b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

(c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(d) to ensure consistent treatment of spouses and children who are in similar circumstances.²⁰

The legislative provisions for calculation of the support obligation provide one approach to meeting the objective of ensuring that children continue to benefit from the financial means of both parties after separation. The Guidelines assume a traditional postseparation regime, where one parent is primarily responsible for the care of children younger than the majority age while the children see the other parent for

¹⁶ *See id.*

¹⁷ *Id.* at para. 33.

¹⁸ Federal Child Support Guidelines 175.1.

¹⁹ *Id.*

²⁰ *Id.* at 175.1(a)-(d).

access visits.²¹ This assumption leads to a second assumption: the person with whom the children reside most of the time will automatically contribute to the children's well-being in accordance with his or her financial ability. The court calculates the other parent's support obligation by using a table that dictates amounts owed for each income level.²² In other words, the payor's income directly determines his or her obligation (along with the number of children the payor supports and the province of residence).²³ The monthly amount set out within the Guidelines table approximates the proportion of income that one could appropriately transfer based on that person's ability to pay.²⁴

Prior to the implementation of the Guidelines, courts determined support by first calculating children's needs based on budgets provided by parents and then assessing the proportion of the required amount that each parent should contribute.²⁵ Thus, the court based support amounts on each parent's financial ability.²⁶

This shift in approach affects the analysis in this Article because theoretically, the impact of the payor parent failing to increase his or her support amount when income increases affects the child more directly than would the same failure in the pre-Guidelines era. This is because prior to the Guidelines enactment, the law based the payment amount on *each* parent's financial ability, whereas now only the payor's income determines the amount of support owed by the payor. Formerly, assuming that a child's assessed needs had not changed, a parent's failure to revise the amount of financial responsibility he or she bears in meeting

²¹ *Id.* at 175.3(1). This assumption can be drawn from the Federal Child Support Guidelines providing different methods of calculation for split (175.8) and shared (175.9) custody, but not providing a separate calculation for traditional custody.

²² *Id.* at Schedule I(1).

²³ *Id.* Note that this describes a basic amount of support owed. Often, children will have needs, or will be involved in special activities, that give rise to additional costs under section 7 of the Guidelines. *Id.* at 175.7. The guiding principle is that such expenses are distributed between parents in proportion with their respective incomes. *Id.* at 175.7(2).

²⁴ *Id.* at Schedule I(1).

²⁵ See Parentage and Maintenance Act, R.S.A., ch. P-1, § 6(2)(a)-(e) (2000) (Can.) (repealed 2005).

²⁶ *Paras v. Paras*, [1970] 2 R.F.L. 328, para. 19 (Can.). This case came to stand for the articulation of the proportionate share approach.

the child's budgeted needs would directly impact the other parent, who would effectively bear a disproportionate burden for support. In the current era, however, not raising support payments in accordance with increased income leads to a situation where the child is not benefiting appropriately from the paying parent's financial means, and the Guidelines' objective of ensuring children benefit from such means is not being fully met.

Notwithstanding the fact that the law bases child support obligations on the paying parent's income, and that both the Divorce Act²⁷ and the Guidelines²⁸ contemplate changes to orders based on material changes in circumstances, there is nothing in either legislative enactment dictating a parent must increase his or her payments as income increases. Section 25 of the Guidelines supplies the key provisions speaking to this question:

(1) Every spouse against whom a child support order has been made must, on the written request of the other spouse or the order assignee, not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, provide that other spouse or the order assignee with

(a) the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents;

(b) as applicable, any current information, in writing, about the status of any expenses included in the order pursuant to subsection 7(1); and

(c) as applicable, any current information, in writing, about the circumstances relied on by the court in a determination of undue hardship.²⁹

²⁷ Divorce Act, R.S.C., ch. 3, § 17 (2d Supp.) (1985) (Can.).

²⁸ Federal Child Support Guidelines 175.14.

²⁹ *Id.* at 175.25.

Thus, there is an onus on the *recipient* spouse to request annual income disclosure from the payor spouse. An ancillary inquiry is whether, during any period that a recipient does not make such a request and does not initiate subsequent proceedings (either through informal negotiations or court application) to alter support amounts in accordance with the new income information, the law requires a payor parent to affirmatively adjust the amount of support he or she pays.

B. The Supreme Court of Canada's Approach to the Issues

1. Determining Whether There Is an Obligation

Justice Michel Bastarache, speaking for the *S. (D.B.)* majority,³⁰ began his analysis by noting that parentage in and of itself establishes a support obligation: “[u]pon the birth of a child, parents are immediately placed in the roles of guardians and providers.”³¹ For over a century, this parent-child relationship has entailed both moral and legal obligations.³² Notwithstanding the breakdown of the parents’ marriage, the child’s right to support from his or her parents survives,³³ and to the extent possible, it should provide children with the same standard of living they were accustomed to before their parents divorced.³⁴

The court recognized a key distinction between the *existence* of an obligation and *enforcement* of an unfulfilled obligation.³⁵ It is apparent the Guidelines create an ongoing obligation to pay child support in accordance with income.³⁶ However, the mechanism for enforcing this

³⁰ The majority consisted of Chief Justice McLachlin, and Justices Bastarache, LeBel, and Deschamps. A minority opinion was rendered by Justice Abella on behalf of herself, Justice Fish, and Justice Charron.

³¹ *S. (D.B.) v. G. (S.R.)*, [2006] 2 S.C.R. 231, para. 36, 2006 SCC 37 (Can.). For an interesting discussion of the theoretical underpinnings of the child support obligation, see Lucinda Ferguson, *Case Comment: Retroactivity, Social Obligation and Child Support*, 43 ALTA. L. REV. 1049 (2006).

³² *S. (D.B.)*, 2 S.C.R. at para. 37; see also Divorce Act § 26.1(2) (“The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.”).

³³ *S. (D.B.)*, 2 S.C.R. at para. 38.

³⁴ *Id.*

³⁵ See *id.* at paras. 77-80.

³⁶ *Id.* at para. 38.

ongoing obligation is to bring a court application.³⁷ While section 25.1 of the Divorce Act authorizes the creation of federal-provincial agreements whereby provincial child support services would recalculate the amount of support owed at different intervals without court involvement,³⁸ within the current regime, the requirement for assessing obligations and ensuring compliance seems to rest in significant measure on the recipient parent.³⁹ However, the existence of an application-based regime does not preclude the court's ability to contemplate retroactive awards if the child is a child of the marriage within the meaning of the Divorce Act and therefore entitled to support at the time the recipient files the application for retroactive support.⁴⁰ Applicable legislation within a particular jurisdiction and the exercise of judicial discretion determine whether the court awards retroactive child support.⁴¹

2. Should the Obligation Be Enforced?

In the Supreme Court of Canada's view, it is important to balance the payor parent's interest in certainty with the need for flexibility in fulfilling the parental support obligation: "Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted."⁴² The majority of the court took the position that the paying parent's certainty interest is strongest when the payor has been in compliance with a valid court order;⁴³ the certainty interest is somewhat less strong where the parents established the obligation by

³⁷ See Federal Child Support Guidelines (Divorce Act) SOR/97-175.22-25 (Can.).

³⁸ Divorce Act, R.S.C., ch.3, § 25.1 (2d Supp.) (1985) (Can.). For a good discussion of the desirability of such schemes, see Dena Bonnet, Article, *Recalculating D.B.S.: Envisioning a Child Support Recalculation Scheme for Ontario*, 23 CANADIAN J. FAM. L. 115 (2007). Automatic child support recalculation services exist in Newfoundland and Manitoba, as well as in British Columbia and Alberta as pilot initiatives. See *infra* note 137.

³⁹ *S. (D.B.)*, 2 S.C.R. at para. 58.

⁴⁰ *Id.* at paras. 59, 86.

⁴¹ See *id.* at paras. 60, 94.

⁴² *Id.* at para. 96.

⁴³ *Id.* at para. 63.

virtue of a private agreement;⁴⁴ and the interest does not exist where there is no existing order or agreement.⁴⁵

Justice Bastarache noted these cases require a fact specific inquiry.⁴⁶ Included in this inquiry is the question noted above, whether the child qualified for support at the time of the application.⁴⁷ Assuming the child meets this threshold inquiry, one should delve into the reasons the recipient spouse delayed in commencing the application for retroactive support.⁴⁸ Delay by the recipient parent strengthens the payor parent's perception that he or she was adequately fulfilling his or her obligations.⁴⁹ Acceptable reasons for delay include situations where the applicant feared the payor parent would "react vindictively to the application to the detriment of the family."⁵⁰ Another reasonable excuse might exist where the applicant lacked sufficient emotional or financial capacity to commence an application, or where the legal advice provided for the applicant was inadequate.⁵¹ However, "a recipient parent will generally lack a reasonable excuse where s(he) knew higher child support payments were warranted, but decided arbitrarily not to apply."⁵² As one author noted, subsequent case law does not establish a firm approach to assessing the impact of a recipient parent's delay.⁵³ Therefore, there is no clear sense of the kind of evidence required for a determination that the delay was excusable.

⁴⁴ *Id.* at para. 77 ("[A] payor parent who adheres to a separation agreement that has not been endorsed by a court should not have the same expectation that (s)he is fulfilling his/her legal obligations as does a payor parent acting pursuant to a court order."). This is an interesting analysis, especially in light of previous Supreme Court of Canada jurisprudence emphasizing the strong deference to be given to domestic agreements. *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, para. 9, 2004 SCC 22 (Can.); *Miglin v. Miglin*, [2003] 1 S.C.R. 303, para. 4, 2003 SCC 24 (Can.).

⁴⁵ *See S. (D.B.)*, 2 S.C.R. at para. 80.

⁴⁶ *Id.* at para. 6.

⁴⁷ *See id.* at paras. 86-90.

⁴⁸ *See id.* at paras. 100-04.

⁴⁹ *Id.* at para. 102.

⁵⁰ *Id.* at para. 101.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See D. Smith, Retroactive Child Support—An Update*, 26 CANADIAN FAM. L.Q. 209, 242-43 (2007).

Delay by the recipient impacts the payor's interest in certainty, notwithstanding that it is the paying parent who holds the information relating to his or her own financial circumstances, and presumably the obligations attached to those circumstances.⁵⁴

Next, the court turned its attention to the payor's conduct, noting that when he or she has engaged in blameworthy conduct, his or her interest in certainty becomes less compelling.⁵⁵ Blameworthy conduct that diminishes the certainty interest is "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support."⁵⁶ Blameworthy conduct encompasses a wide array of actions, such as hiding income, misleading the recipient about real income, consciously ignoring one's support obligation, and intimidating the recipient such that he or she feels unable to pursue increased support.⁵⁷ A parent who knowingly avoids support obligations should not profit from such behavior, though failure to automatically increase support payments does not necessarily amount to blameworthy conduct.⁵⁸

The issue of blameworthy conduct requires an assessment of the payor parent's subjective view, though objective indicators help determine whether conduct is blameworthy.⁵⁹ For example, where the actual payment amount is fairly close to the amount that should have been paid, the belief that one had been satisfying one's obligations is more plausible.⁶⁰ While compliance with a previous court order or agreement may raise the presumption a payor is acting reasonably, this presumption can be rebutted where a change in financial circumstances is significant enough that it is no longer reasonable for a payor to rely on the order or agreement and fail to disclose an increased ability to pay.⁶¹ Finally, a payor may have behaved in a way that militates against a

⁵⁴ *S. (D.B.)*, 2 S.C.R. at para. 102.

⁵⁵ *Id.* at para. 105.

⁵⁶ *Id.* at para. 106.

⁵⁷ *Id.* at paras. 106-07.

⁵⁸ *Id.* at paras. 107-08.

⁵⁹ *Id.* at para. 108.

⁶⁰ *Id.*

⁶¹ *Id.*

retroactive award, for example, when he or she paid for expenses over and above the statutorily-required amount.⁶²

To decide whether a retroactive award is appropriate, it is also essential to examine the child's past and present circumstances. Past hardship suffered by a child justifies a retroactive support award, while a child who enjoyed all of the advantages he or she would have enjoyed with full parental support reveals a less compelling case for retroactive support.⁶³ However, considering the hardships suffered by other family members who made additional sacrifices to assist the child is not appropriate in a determination of retroactive support.⁶⁴ The potential hardship imposed on the payor of a retroactive award must also be thrown into the mix of items to consider.⁶⁵ For example, a payor's new family obligations must be taken into account along with the extent to which payment of a retroactive support award would disrupt the payor's management of his or her financial affairs.⁶⁶ Retroactive awards should be crafted in a way that minimizes hardship, but avoidance of hardship will not always be possible. In Justice Bastarache's view, courts should balance the hardship imposed on a payor with the amount of blameworthy conduct engaged in by that parent.⁶⁷

Once a court determines, in light of the balancing of the factors set out above, that retroactive support is appropriate, the next question is which date to use as the commencement date for the order. The possible options include: the date the financial circumstances of the payor parent changed such that he or she owed a higher support amount, the recipient parent's application date, the date of *formal* notice by the recipient parent requesting additional support, or the date of *effective* notice by the recipient parent there was a need to pay or renegotiate support payments.⁶⁸ In the court's view, using the date on which formal proceedings commenced would effectively discourage parents from set-

⁶² *Id.* at para. 109.

⁶³ *Id.* at paras. 110-13.

⁶⁴ *Id.* at para. 113.

⁶⁵ *See id.* at para. 115.

⁶⁶ *Id.*

⁶⁷ *Id.* at para. 116.

⁶⁸ *Id.* at para. 118.

ting matters informally.⁶⁹ Here, the court recognized the potentially damaging effects of litigation for both parents and children:

[L]itigation can be costly and hostile, with the ultimate result being that fewer resources—both financial and emotional—are available to help the children when they need them most. If parents are to be encouraged to resolve child support matters efficiently, courts must ensure that parents are not penalized for treating judicial recourse as the last resort.⁷⁰

On the other hand, favoring the middle-ground effective notice date, Justice Bastarache adopted the position that applying the date the support obligation would have changed erodes the payor's certainty interest too much.⁷¹ In contrast, Justice Rosalie Silberman Abella's concurring opinion suggests that the recipient parent's role in ensuring the paying parent updates their income information is inappropriate, and regardless of notice date, support should vary retroactively to the date of the change in income.

[The payor parent] is the parent with the major responsibility for ensuring that a child benefits from the change as soon as reasonably possible. A system of support that depends on when and how often the recipient parent takes the payor parent's financial temperature is impractical and unrealistic. . . . Because the child's right to support varies with the [parent's income] change, it cannot . . . be contingent on whether the recipient parent has made an application on the child's behalf or given notice of an intention to do so.⁷²

Whether the court chose an appropriate commencement date is debatable. However, the court sparked a potentially greater debate by adding a three-year limitation period to the mix.⁷³ The limitation gener-

⁶⁹ *See id.* at paras. 118-20.

⁷⁰ *Id.* at para. 120.

⁷¹ *Id.* at para. 122.

⁷² *Id.* at paras. 161-62.

⁷³ *See id.* at para. 123.

ally makes it inappropriate to make a support award retroactive to a date more than three years before the date of formal notice, though this presumptive three-year limitation can be eschewed where the payor engaged in blameworthy conduct.⁷⁴ While the court did not state the three-year limitation as absolute, there is potential for parties seeking some level of predictability to characterize it as such.⁷⁵

Finally, having determined the appropriate date for the retroactive award, a court must determine an appropriate quantum. The amount must fit the circumstances, and blindly adhering to the applicable amount tables is not recommended by the court for this purpose.⁷⁶ In summary, “a court should not order a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case.”⁷⁷

Applying the factors set out earlier in its judgment, the court held that retroactive support was inappropriate in two of the cases and appropriate in the other two.⁷⁸ In the two cases where retroactive support was held inappropriate, the court focused on the payors’ non-blameworthy conduct;⁷⁹ while in the latter two cases, the payors’ blameworthy conduct in refusing to increase support payments where

⁷⁴ *Id.* at paras. 123-24.

⁷⁵ *See id.* at para. 123; Carole Curtis, *The D.B.S. Cases: The Supreme Court of Canada and Retroactive Child Support*, 16 COUNTY CARLETON L. ASS’N INST. FAM. L. 1, 26 (2007). The analysis within this Article does not turn on this three-year limitation, but it is an interesting aspect of the court’s decision, especially since, as noted by one counsel on the matter before the court, the issue was “not before the Alberta Court of Appeal, was not pleaded by any party in the Supreme Court of Canada, . . . and was never mentioned by court.” Curtis, *supra* note 75, at 21. Note that in the United States, many jurisdictions limit retroactive recovery to the date a motion or petition for modification of support is filed, or alternatively, to the first day of the month following the filing date. *See, e.g.*, Crayton v. Burley, 2005-CA-01126-COA (¶ 19) (Miss. Ct. App. 2006); Hicks v. Quednow, 197 S.W.3d 217, 222 (Mo. Ct. App. 2006); Pecoraro v. Pecoraro, 148 S.W.3d 813, 814 (Ky. Ct. App. 2004); Gartner v. Hume, 686 N.W.2d 58, 63 (Neb. Ct. App. 2004); Moore v. Bauer, 657 N.W.2d 25, 27 (Neb. Ct. App. 2003).

⁷⁶ *S. (D.B.)*, 2 S.C.R. at para. 128.

⁷⁷ *Id.* at para. 130.

⁷⁸ *Id.* at paras. 141-42, 145, 150-51, 154-55.

⁷⁹ *Id.* at paras. 141, 145 (finding a retroactive award to be appropriate in *S. (D.B.) v. G. (S.R.)* and *W. (L.J.) v. R. (T.A.)*).

their incomes increased significantly played a large role in the decision to award retroactive support.⁸⁰ Further, one recipient parent was unable to discern changes in the payor's income.⁸¹ The court accepted that it was understandable one of the recipient mothers would be hesitant to commence further proceedings in light of previous overwhelming litigation that strained the mother-child relationship.⁸²

III. ASSESSING THE RETROACTIVE CHILD SUPPORT LANDSCAPE— ESTABLISHING AN ANALYTICAL FRAMEWORK

The substantive backdrop for dispute resolution in Canadian family dissolution matters changed dramatically in 1968, when the Federal Parliament enacted Canada's first national divorce statute.⁸³ In addition to establishing entitlement to divorce upon proof of a party's fault through conduct such as adultery or cruelty, the 1968 Divorce Act introduced the additional concept of divorce based on parties living separate and apart for a defined length of time with no prospect for reconciliation.⁸⁴ In 1985 further amendments reduced the period of time the statute required parties to live separate and apart in order to be granted a divorce to one year.⁸⁵ The result of these enactments was the legal adoption of what is commonly referred to as *no-fault divorce* in Canada.⁸⁶

Coincident with these more liberal grounds for divorce was a dramatic increase in divorce rates.⁸⁷ With increased numbers of judicially-sanctioned family dissolution came a greater number of related questions about child custody and access, and the associated question of child support. The de-emphasis on legal findings of fault led to an in-

⁸⁰ *Id.* at paras. 147, 153 (awarding retroactive support payments for the recipient parent in *Hiemstra v. Hiemstra* and *Henry v. Henry*).

⁸¹ *Id.* at para. 146 (referring to the recipient parent in *Henry v. Henry*).

⁸² *Id.* at para. 153 (describing the recipient mother in *Hiemstra v. Hiemstra*).

⁸³ See Divorce Act, R.S.C., ch. 24 (1968) (Can.).

⁸⁴ *Id.* §§ 3-4.

⁸⁵ Divorce Act, R.S.C., ch. 3, § 8(2)(a) (2d Supp.) (1985) (Can.).

⁸⁶ CHILD SUPPORT TEAM, DEP'T OF JUSTICE CAN., SELECTED STATISTICS ON CANADIAN FAMILIES AND FAMILY LAW: SECOND EDITION 9 (2000) [hereinafter STATISTICS ON CANADIAN FAMILIES], available at <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2000/stat2000/pdf/stats.pdf>.

⁸⁷ See *id.* at 8-9.

creasing characterization of separation and divorce as emotional, rather than legal events.⁸⁸ As a result, there has been a growing recognition of the mixture of law and human relationship dynamics entailed in family law matters.⁸⁹

The reality of postseparation relationship dynamics must be taken into account if the justice system seeks to help people sort out their affairs in a way that allows them to move forward with their lives. If this approach applies to retroactive child support matters, then therapeutic jurisprudence is a fruitful lens through which to analyze both the relevant legislation and the *S. (D.B.)* decision.

Therapeutic jurisprudence seeks to consider how legal actors, legal rules, and legal outcomes produce therapeutic or antitherapeutic consequences.⁹⁰ It assesses therapeutic considerations such as individuals' psychological well-being along with other, sometimes competing, interests that a particular area of law or procedure seeks to uphold.⁹¹ The various interests involved in a therapeutic jurisprudence approach serve to inform policy makers' decisions about law-reform initiatives.⁹²

While the initial focal point for the application of therapeutic jurisprudence principles was to the mental health law field, such principles are now applied to several other areas.⁹³ In the family law context, important initiatives focus on family dispute resolution procedures. For example, authors have emphasized a relationship between therapeutic jurisprudence and unified family courts, in particular, advocating the therapeutic services associated with those courts. Jeffrey Kuhn refers to

⁸⁸ See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1470-72 (1992).

⁸⁹ This recognition is seen in a variety of sources. See, e.g., Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 967-70 (1999). Tesler argues the advantages of collaborative lawyering over the adversarial court system with reference to the emotional well-being of ex-spouses during and in the aftermath of divorce. *Id.* at 967.

⁹⁰ Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997).

⁹¹ *Id.* at 195.

⁹² See Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1062-63 (2003).

⁹³ *Id.* at 1063.

therapeutic justice, stating that it concentrates on, among other things, “empowering families with skills development, assisting them in resolving their own disputes, . . . and providing direct services to [them]” when necessary.⁹⁴ Professor Barbara Babb argues that therapeutic jurisprudence involves defining and expanding the role of mental health intervention, and that much greater resort to informal dispute resolution is necessary in order to strengthen individuals and promote family functioning.⁹⁵ In addition, Professor Babb argues that therapeutic jurisprudence has the potential to apply broadly to family law reform initiatives, explaining, “[a] therapeutic and ecological Unified Family Court model allows for the resolution of legal, personal, emotional, and social disputes with the aim of improving the well-being and functioning of families and children.”⁹⁶ Therapeutic jurisprudence also provides a lens through which to consider retroactive child support in light of the relevant legislation and the *S. (D.B.)* decision.

A primary goal of this Article is to address key objectives reflected within both the Guidelines and the *S. (D.B.)* decision, along with the therapeutic or antitherapeutic considerations that can aid in assessment. While this work does not involve empirical research on the psychological impact of the law as it applies to the families, such research would benefit retroactive child support and other areas of family law. As a starting point however, this Article proposes some thoughts about how therapeutic jurisprudence considerations might add to the analysis of this issue.

This work, and the initiatives that potentially follow from it, is consistent with the approach suggested by Canadian researcher Nathalie Des Rosiers. In thinking about how law reformers might employ a ther-

⁹⁴ Jeffrey A. Kuhn, *A Seven-Year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 FAM. L.Q. 67, 68 (1998).

⁹⁵ See Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 478 (1998) [hereinafter Babb I].

⁹⁶ Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 FAM. CT. REV. 230, 232 (2008) [hereinafter Babb II]; see also Barbara A. Babb, *An Analysis of Unified Family Courts in Maryland and California: Their Relevance for Ontario's Family Justice System*, 24 CANADIAN FAM. L.Q. 25 (2005) [hereinafter Babb III].

apeutic jurisprudence approach, she says that they should not ignore rights, but enter into a more in-depth analysis of how real people exercise their rights.⁹⁷ To do so, she argues, involves employing “law as lived” as the scope of inquiry, using empirical studies as sources of knowledge, and involving the clients of a particular system in consultation and participation.⁹⁸

The key points this Article aims to canvass in relation to the status of retroactive child support laws are: (1) whether the balancing task undertaken in *S. (D.B.)* resulted in an approach that is in tension with the Guidelines’ stated objectives;⁹⁹ (2) whether the onus placed on recipient parents in both the Guidelines and the *S. (D.B.)* decision rely on assumptions about women (who are still primarily the recipient parents) not supported by social science literature; and (3) whether ultimately, the current approach to enforcement of support obligations bears the danger of increasing, rather than decreasing, the amount of conflict within postseparation families.

This Article maintains that conflict reduction is therapeutic and conflict increase is antitherapeutic.¹⁰⁰ Generally speaking, conflict reduction functions as a positive psychological outcome in postseparation families, and conversely, conflict escalation has negative psychological outcomes, especially for children.¹⁰¹ Over time, courts have moved to-

⁹⁷ See Nathalie Des Rosiers, *Rights Are Not Enough: Therapeutic Jurisprudence Lessons for Law Reformers*, 18 *TOURO L. REV.* 443, 444-50 (2002).

⁹⁸ See *id.* at 445-49.

⁹⁹ See Richard L. Wiener, *Social Analytic Jurisprudence and Tort Law: Social Cognition Goes to Court*, 37 *ST. LOUIS U. L.J.* 503, 506-07 (1993) (“The research and practice agenda of the [therapeutic jurisprudence] approach includes . . . determining how and whether the substantive law acts to promote intended therapeutic objectives . . . and . . . examining the relationships between therapeutic objectives and the roles of judicial and legal actors.” (citation omitted)).

¹⁰⁰ Professor Bruce Winick suggests that researchers must settle on, and be explicit about, the definition of therapeutic they will apply to their work. Winick, *supra* note 90, at 195. While the definition in this work is not as explicit as would be the case where empirical research was being undertaken, it provides an appropriate framework for the purposes of the analysis being undertaken.

¹⁰¹ The impact of conflict on postseparation families has been examined extensively in recent years. Much of the focus has been on the adverse effects of conflict on the emotional and psychological well-being of children; however, the impact of conflict on other areas of the child’s life has also been studied. See, e.g., Kathryn E. Maxwell,

ward a better understanding of the role parental behavior plays in causing emotional harm for children in the context of custody and access matters. In the 1993 *Young v. Young* decision, for example, Madame Justice Claire L'Heureux-Dubé referred to literature suggesting that discord and disharmony after separation are detrimental to children.¹⁰² In her view,

[w]hile this remains an area of social science that has yet to be comprehensively researched, studies of both the effects of divorce and the role of conflict in the subsequent family life indicate that children often suffer more extensively than is generally acknowledged on divorce, and that those who must endure continuing conflict after divorce stand at serious risk of harm down the road. The resounding message is that courts must pay more, not less, attention to the needs of children on divorce.¹⁰³

This recognition of emotional harm occasioned by exposure to parental conflict continues to be reflected by jurisprudence; some cases explicitly reference social science literature,¹⁰⁴ while others do not.¹⁰⁵

Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients' Divorces on their Children, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 162-66 (Dennis P. Stolle ed., 2000). Maxwell points to studies that show "a correlation between interparental conflict and a decline, over time, in visitation with the non-custodial parent. This drop off in visitation . . . is also associated with reduced compliance with child support awards. Thus, inter-parental conflict can directly affect the child's emotional well-being and indirectly detract from the child's financial stability." *Id.* at 166 (citations omitted); see also Janet R. Johnston, *High-Conflict Divorce*, FUTURE OF CHILD., Spring 1994, at 165, 171; Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 566-70 (2000); GLENN A. GILMOUR, HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION (2004), available at http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004_1/pdf/2004_1.pdf. For a comprehensive discussion of the effects of conflict on children by gender and age group, see Miguel A. Firpi & Andrew Wenger, *The High-Conflict Family: What Ongoing Fighting Means For Your Children*, FAM. ADVOC., Summer 2004, at 32.

¹⁰² See *Young v. Young*, [1993] 4 S.C.R. 3, paras. 197-200 (Can.).

¹⁰³ *Id.* at para. 194.

¹⁰⁴ See, e.g., *Jackson v. Jackson*, [2008] W.D.F.L. 1825, para. 14 (Can.) ("The amount of research in this area is remarkable [A]s members of the judicial system, we

Unified Family Courts and their affiliated parent education programs provide examples of legal systems' efforts to assist families in reducing postseparation conflict and its negative effects on both adults and children.¹⁰⁶ Unified Family Courts across North America often offer parent education programs.¹⁰⁷ These programs, among other things, inform parents of the negative consequences for them and their children of ongoing parental conflict and suggest mechanisms for organizing their postseparation lives in ways that reduce conflict.¹⁰⁸ In light of this recognition of conflict as a significant issue for separated families, it seems appropriate to include an assessment of the potential connections between the development of retroactive child support law and levels of conflict between parents in the current analysis.

can attempt to help parents see the potential impact on children of their . . . parental conflict.”).

¹⁰⁵ One such example is *Boukema v. Boukema*, [1997] 33 O.T.C. 190, para. 36 (Can.), where Justice Macdonald talks about the *war* between the parents in relation to the mother's attempt to change custody arrangements for the parties' eleven-year-old daughter. Note as well the growing concern about child alienation. See *A. (A.) v. A. (S.N.)*, [2007] BCCA 375, para. 5 (Can.); *A.F. v. I.V.*, No. 02-BN-0621, 02-BN-1523, [2006] O.J. 126, at paras. 50-55 (O.S.C.J. Jan. 16, 2006), available at 2006 ON.C. LEXIS 214.

¹⁰⁶ See generally Kuhn, *supra* note 94; Babb I, *supra* note 95; Babb II, *supra* note 96; Babb III, *supra* note 96; Shelley Kierstead, Parent Education Programs in Family Law Courts: Perils and Potential (May 2005) (unpublished D.Jur. dissertation, Osgoode Hall Law School) (on file with author).

¹⁰⁷ See, e.g., COURT PROGRAMS & MGMT. SERVS. DIV., N.C. ADMIN. OFFICE OF THE COURTS, NORTH CAROLINA'S UNIFIED FAMILY COURTS: BEST PRACTICES AND GUIDELINES 11 (2006), <http://www.nccourts.org/Citizens/CPrograms/Family/Documents/unifiedfamilycourts-guidelines.pdf>; Department of Justice Canada, Canada's Court System, <http://www.justice.gc.ca/eng/dept-min/pub/ccs-ajc/page3.html> (last visited March 24, 2010); New York State Unified Court System, The New York State Parent Education & Awareness Program, <http://www.nycourts.gov/ip/parent-ed/> (last visited March 24, 2010).

¹⁰⁸ See Matthew Goodman et al., *Parent Psychoeducational Programs and Reducing the Negative Effects of Interparental Conflict Following Divorce*, 42 FAM. CT. REV. 263, 274 (2004). The authors of this review of psychoeducational programs to reduce interparental conflict in divorcing families and the negative impact of interparental conflict on children found the results of the programs reviewed “provide encouraging evidence about improving parenting and child adjustment” *Id.*

IV. ASSESSING THE RETROACTIVE CHILD SUPPORT LANDSCAPE— APPLYING THE ANALYTICAL FRAMEWORK

The remainder of this Article introduces some initial thoughts about the queries set out earlier. Section A examines the balancing task undertaken by the supreme court. The Article then delves a bit deeper into the assumptions about recipient parents that are potentially problematic. Finally, the Article concludes with a brief opinion about the levels of family conflict that might arise should the law and the administrative procedures associated with the law not continue to evolve.

A. *Balancing: Certainty vs. Flexibility Interests*

The *S. (D.B.)* decision clearly provides that certainty for payors is a key objective in terms of upholding the integrity of the justice system.¹⁰⁹ It is in keeping with this interest that the court confirmed the presumptive validity of an existing court order, stating: “In my view, a court order awarding a certain amount of child support must be considered presumptively valid. This presumption is necessary not only to maintain the certainty promised by a court order, but also to maintain respect for the legal system itself.”¹¹⁰

Indeed, it is broadly accepted, as stated by the Supreme Court of Canada’s Madame Chief Justice Beverley McLachlin in a recent public address that “certainty, stability and predictability . . . are cornerstones of the rule of law.”¹¹¹ It is logical then, that fostering certainty for those affected by family law is a desirable objective.

The Guidelines’ stated objective of reducing conflict between parents by making support calculations more objective seems to align with the certainty interest.¹¹² However, the test as articulated by the court also contains subjective elements, such as the paying parent’s understanding with respect to whether he or she was fulfilling support ob-

¹⁰⁹ See *S. (D.B.) v. G. (S.R.)*, [2006] 2 S.C.R. 231, para. 63, 2006 SCC 37 (Can.).

¹¹⁰ *Id.* at para. 65.

¹¹¹ Right Honourable Beverley McLachlin, P.C., Remarks at the 2005 Lord Cooke Lecture in Wellington, New Zealand (Dec. 1, 2005), available at <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm05-12-01-eng.asp>.

¹¹² Federal Child Support Guidelines (Divorce Act) SOR/97-175.1(b) (Can.).

ligations.¹¹³ One might worry that this element could lead to less objective determinations and less success in meeting this particular objective. Further, the presumptive ongoing validity of a support award, while potentially enhancing a payor's certainty interest, arguably diminishes children's interest in the consistent recognition of their rights.

The court repeatedly refers to the balance between certainty and flexibility in the law, describing it as fairness for children and the recipient parent and certainty for the payor parent.¹¹⁴ Fairness surely must entail the Guidelines' objective of ensuring that children benefit from the financial resources of each parent.¹¹⁵ It is a bit difficult to see how flexibility with respect to this objective assists children in circumstances like those illustrated in *S. (D.B.)*. Certainly, courts and lawmakers often recognize flexibility as necessary within family law generally; one example of this recognition is the inclusion within family law legislation of the possibility that a change of circumstances may lead to a change in the rights and obligations of parties impacted by these changes.¹¹⁶

However, the characterization of the child's interest as embedded within the notion of flexibility seems to lead to results that are not always consistent with ensuring appropriate enforcement of the child's right to support. Passages of the *S. (D.B.)* judgment requiring courts to consider the past and present circumstances of the child most clearly illustrate this concept.¹¹⁷ It seems odd to consider the child's position both currently and at the time when the payor owed increased support. Rather, if the right to support is absolute, one wonders whether it is appropriate to temper this right because somehow the child, by virtue of the generosity of other people in his or her life, managed to have access

¹¹³ See *S. (D.B.)*, 2 S.C.R. at para. 102 (explaining that a recipient parent's delay in bringing an application to the court may lead the payor parent to believe he or she was fulfilling his or her support obligation).

¹¹⁴ See *id.* at paras. 5, 96, 105; Curtis, *supra* note 75, at 27.

¹¹⁵ Federal Child Support Guidelines 175.1(a).

¹¹⁶ See Divorce Act, R.S.C., ch. 3, § 17 (2d Supp.) (1985) (Can.) ("A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.").

¹¹⁷ *S. (D.B.)*, 2 S.C.R. at paras. 110-13.

to appropriate resources. It is not clear how this part of the test is necessary to advance the paying parent's interest in certainty—though it does alleviate concerns about ensuring that children have had access to appropriate levels of financial well-being. On the other hand, taking into account the potential hardship that a retroactive support award might cause the payor, who may have taken on responsibilities based on the belief that he or she fulfilled the obligations, seems more directly linked with fostering that payor's certainty interests.¹¹⁸

B. Promoting Autonomy/Responsibility

Thus far, the Article has hinted at a potential concern regarding the Supreme Court of Canada's focus on recipient parents' obligation to ensure that paying parents continue to meet their support obligations, and the complementary provisions within the Guidelines that authorize recipient parents to solicit income information from the paying parent. In consideration of this concern, the assumption that recipient parents make such demands for income information and commence follow-up legal proceedings free of constraint—even aside from the situations articulated within the decision that excuse delays in applications—is problematic. A *law as lived* biography of many support recipients would likely reveal that even absent overt intimidation from the payor parent, for many recipients, raising the question of additional support—assuming a parent has the time and energy as a primary caregiver to seek additional income information—is often simply not feasible. This may be due in part to the parent's (usually the mother's) struggle to meet the children's day-to-day needs,¹¹⁹ which often leaves recipients who might choose to litigate or relitigate support issues without realistic means to do so.¹²⁰ Further, it is likely that seeking income information

¹¹⁸ *Id.* at para. 115.

¹¹⁹ Statistics suggest that in approximately eighty percent of custody matters determined by courts, mothers retain sole custody of children while fathers retain sole custody in approximately 6.5% of cases, and shared custody is awarded in approximately thirteen percent of cases. STATISTICS ON CANADIAN FAMILIES, *supra* note 86, at 16. Further, regardless of the type of reported custody arrangement, eighty-six percent of the children surveyed in the National Longitudinal Survey of Children and Youth, which the Department of Justice statistical report was based on, lived solely with their mothers at the time of their parents' separation. *Id.* at 18.

¹²⁰ The realities of women's postdivorce lives has been documented. For a detailed and well supported account of the often extreme financial hardships women face, see

from a payor and attempting to enforce changed support obligations may raise significant stress for a mother and her children. Research suggests that women, in general, continue to shy away from litigation.¹²¹ Further, it has been suggested that women often accept less than the appropriate amount of child support, and oftentimes none at all, in order to receive custody without dispute.¹²² It follows that some women will also opt not to pursue increases in child support for their children out of fear that such action will lead to a custody battle.¹²³

Also problematic is the likelihood that the kind of evidence a court would require in order to excuse a recipient in relation to a delayed application may not exist in many cases, and the choice of whether and when to bring an application for increased support is not as autonomous as suggested by Justice Bastarache. Madam Justice Louise Arbour's comment that it is impractical and unrealistic to have a support system dependant on when and how often the recipient parent takes the payor parent's financial temperature¹²⁴ seems more in keeping with Des Rosier's *law as lived* approach.¹²⁵

Penelope Eileen Bryan, "Collaborative Divorce" *Meaningful Reform or Another Quick Fix?*, 5 PSYCHOL. PUB. POL'Y & L. 1001, 1003-11 (1999).

¹²¹ See Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC'Y REV. 67, 70 (1999) (arguing that women are generally socialized to avoid adversarial situations, and few situations are as adversarial as the court system). According to Morgan, women, unlike men, tend to view their lives as *relational* rather than autonomous; the impact of litigation on their family and other relationships tends to greatly influence a decision to pursue litigation. *Id.* at 87. Morgan argues this is especially true for mothers: "[M]others commonly evoked maternal responsibility as the final arbiter in their decisionmaking." *Id.* at 75. It is not hard to imagine then, knowing what we know of the effects of conflict on children, women will elect to *just forget it* rather than pursue litigation and risk their children's well-being.

¹²² Richard E. Behrman & Linda Sandham Quinn, *Children and Divorce: Overview and Analysis*, FUTURE OF CHILD., Spring 1994, at 4, 13.

¹²³ See *id.*; see also Virgil L. Sheets & Sanford L. Braver, *Gender Differences in Satisfaction with Divorce Settlements*, 45 FAM. REL. 336, 337 (1996) ("[A] family court system that makes women seem vindictive in their requests may discourage litigation and indirectly lead [women] to accede to hasty and less advantageous settlements." (citation omitted)).

¹²⁴ S. (D.B.) v. G. (S.R.), [2006] 2 S.C.R. 231, para. 161, 2006 SCC 37 (Can.).

¹²⁵ See Des Rosiers, *supra* note 97, at 446-50.

This emphasis on autonomy in situations where *real choice* is questionable seems to be present in several Supreme Court of Canada decisions. For example, in *Walsh v. Bona*,¹²⁶ Justice Bastarache, speaking for the majority of the court in dismissing a plaintiff's challenge to the constitutionality of Nova Scotia legislation which restricted access to the province's property division regime to married parties,¹²⁷ held that it was important to respect the individual choice as to whether to live in common law relationships or to marry.¹²⁸

Further, *Miglin v. Miglin*,¹²⁹ which dealt with a wife seeking to set aside a separation agreement, and *Hartshorne v. Hartshorne*,¹³⁰ which involved a wife seeking to set aside a marriage agreement, illustrate the Supreme Court of Canada's recent mindset. In these cases, the court upheld the contracts and emphasized the need to encourage parties to take responsibility for their own lives.¹³¹ All three cases contained dissenting opinions, which pointed out the possibility that the assumption of autonomous choice might not reflect the true complexity of domestic relationships.¹³² For example, as noted by Justice L'Heureux-Dubé in *Walsh*:

[T]he existence of many heterosexual non-marital relationships are rarely the product of choice in the sense that the choice not to marry is not a matter belonging to each individual alone. The ability to marry is inhibited whenever one of the two partners wishes to marry and the other does not. In this situation, it can hardly be said that the person who wishes to marry but must cohabit in order to obey the wishes of his or her partner chooses to cohabit. This results in a situation where one of the par-

¹²⁶ *Walsh v. Bona*, [2002] 4 S.C.R. 325, 2002 SCC 83 (Can.).

¹²⁷ *Id.* at para. 1; see Matrimonial Property Act, R.S.N.S., ch. 275 (1989) (Can.).

¹²⁸ *Walsh*, 4 S.C.R. at para. 201.

¹²⁹ *Miglin v. Miglin*, [2003] 1 S.C.R. 303, 2003 SCC 24 (Can.).

¹³⁰ *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, 2004 SCC 22 (Can.).

¹³¹ *Id.* at para. 36; *Miglin*, 1 S.C.R. at para. 91.

¹³² Justices LeBel and Deschamps dissented in *Miglin*; in *Hartshorne*, Justices Binnie, LeBel, and Deschamps dissented in part. Note that in *Miglin*, the court also emphasized the need to balance certainty with fairness; and in *Hartshorne*, fairness was a key analytical topic. *Hartshorne*, 1 S.C.R. at para. 78; *Miglin*, 1 S.C.R. at para. 223.

ties to the cohabitation relationship preserves his or her autonomy at the expense of the other: “[t]he flip side of one person’s autonomy is often another’s exploitation.” Under these circumstances, stating that both members of the relationship chose to avoid the legal consequences of marriage is patently absurd.¹³³

In assessing the objectives within this area of law, it is worth evaluating whether reliance on the recipient parent’s choice of when to seek updated information and when to take action regarding that information is a sound approach. At the very least, the issue highlights the need to conduct further empirical research about the nature of the choices exercised by the key parties within the family law domain.

C. Impact on Family Conflict

As noted earlier regarding retroactive support, the foundation for the emphasis on recipient parents’ actions lies in the Guidelines, which effectively places the onus on the recipient parent to seek disclosure from the other parent and subsequently to negotiate or litigate in order to obtain increased support.¹³⁴ It is arguable that in addition to fostering the difficulties outlined above, the current scheme inadvertently fosters increased conflict between parents. First, conversations about financial matters are difficult, and a scheme that calls for such conversations on an annual basis may lead to stress and conflict for those involved. Further, assuming that circumstances warrant an adjustment to support and parties cannot agree about the details involved in this adjustment, the ensuing litigation cannot help but increase conflict levels.¹³⁵

One of the key avenues for decreasing some of the concerns articulated within this Article is to implement support recalculation

¹³³ *Walsh*, 4 S.C.R. at para. 152 (citation omitted).

¹³⁴ See Federal Child Support Guidelines (Divorce Act) SOR/97-175.25 (Can.).

¹³⁵ In Amy Koel et al., *Patterns of Relitigation in the Postdivorce Family*, 56 J. MARRIAGE & FAM. 265, 274 (1994) the authors state: “[R]elitigation can promote more relitigation. Legal procedures have been reported to cause difficulty for parents, and may increase destructive conflict. The divorce process is adversarial, encouraging parents to perceive outcomes of divorce settlements in terms of winning or losing.” Amy Koel et al., *Patterns of Relitigation in the Postdivorce Family*, 56 J. MARRIAGE & FAM. 265, 274 (1994) (citations omitted).

schemes in all of the provinces and territories.¹³⁶ Such services would relieve the difficult burden that currently rests on recipient parents,¹³⁷ assist payor parents in having a clear sense of the obligations that attach to their changing income,¹³⁸ and ensure that children continue to benefit from their parents' financial means.¹³⁹ Such a move, assuming effective implementation,¹⁴⁰ would also make significant strides toward reducing

¹³⁶ The constitutional division of authority for family matters complicates the issue somewhat. While the Federal Child Support Guidelines apply to support matters linked to divorce, parallel provincial and territorial legislation exists in relation to support issues in cases unrelated to divorce proceedings. Recalculation services should be developed in a way that captures support obligations that arise from both federal and provincial or territorial legislation.

¹³⁷ Some Canadian provinces have, in fact, made moves in this direction. In Ontario, the Family Law Act, R.S.O., ch. F.3 (1990), amended by 2009 S.O., ch. 11 (Can.), provides for the possible establishment of a support recalculation service. In Newfoundland, a recalculation scheme has been adopted on a full-time basis while British Columbia and Alberta are in the process of implementing pilot projects, and Manitoba is assessing the results of a pilot project. For information regarding the recalculation scheme of Newfoundland, see Newfoundland and Labrador Regulation (Family Law Act) 31/07.3-4 (Can.), available at <http://www.assembly.nl.ca/legislation/sr/regulations/rc070031.htm>. For Manitoba, see Manitoba Department of Justice, Family Justice: Family Law: Child Support Recalculation Service—Q&A, <http://www.gov.mb.ca/justice/family/law/recalculation.html#2> (last visited March 24, 2010). For Alberta, see ALBERTA JUSTICE & ATTORNEY GEN., CHILD SUPPORT RECALCULATION PROGRAM: CONSULTATION DOCUMENT (2008), http://justice.alberta.ca/programs_services/families/mep/Documents/Backgrounder_Child_Support_Recalculation_20080422.pdf. For British Columbia, see British Columbia, Ministry of Attorney General, Administrative Recalculation of Child Support Orders, <http://www.ag.gov.bc.ca/justice-reform-initiatives/family-projects/support-orders.htm> (last visited March 24, 2010).

¹³⁸ Note that the recalculation could result in support obligations being decreased.

¹³⁹ For a discussion of the viability of automatic support adjustment mechanisms in the United States, see J. Thomas Oldham, *Abating the Feminization of Poverty: Changing the Rules Governing Post-Decree Modification of Child Support Obligations*, 1994 BYU L. REV. 841, 864 (“[Courts’] reluctance to embrace automatic adjustment stems from the majority view that child support should be based upon current evidence before the court, not predications of what is probable.”).

¹⁴⁰ Effective implementation has proven challenging in other jurisdictions. Both Australia and the United Kingdom have moved to an administrative agency structure for the determination, recalculation, and enforcement of child support. In Australia, the statutory authority for the operation of the child support scheme is the Child Support (Registration and Collection) Act, 1988 (Austl.) and the Child Support (Assessment) Act, 1989 (Austl.). The U.K. is in the process of revamping its administrative child support scheme following a 2006 White Paper that concluded the

parental conflict in relation to recalculation because the process would not enmesh the parties in personal negotiation or litigation.¹⁴¹ This result could only be characterized as therapeutic, as litigation can be costly and hostile. In Manitoba, where a three-year trial run recalculation service period ended in March 2008, none of the eighty recalculated orders were contested.¹⁴²

V. CONCLUSION

There is no simple answer about how to best balance the interests highlighted within this Article. There is an inevitable tension between upholding the presumptive validity of support orders in the face of changed financial capacity and ensuring that children continue to benefit from their parents' financial means. Further, some aspects of the *S. (D.B.)* decision illustrate the challenges involved with fulfilling

Child Support Agency, established in 1993 to assess, collect, and enforce child support payments, had "not delivered anywhere near what was expected of it." DEP'T FOR WORK AND PENSIONS, U.K., A NEW SYSTEM OF CHILD MAINTENANCE: SUMMARY 3 (2006), <http://www.dwp.gov.uk/docs/csa-summary.pdf>. The new system will aim to encourage parents to reach private maintenance arrangements, and will simplify the maintenance assessment process further to enable a faster, more accurate, and transparent process. *Id.* at 10. In July 2008 the Child Maintenance and Enforcement Commission was established as a non-departmental public body to replace the Child Support Agency. A complete transition to the new scheme is to be effected by 2013 or 2014. *See* Child Maintenance and Enforcement Commission, Timetable for Change: Changes to Child Maintenance, <http://www.childmaintenance.org/en/childsupport/timetable.html> (last visited March 24, 2010). For a discussion of the support policies and current reform efforts in Australia and the U.K., see Belinda Fehlberg & Marvis Maclean, *Child Support Policy in Australia and the United Kingdom: Changing Priorities but a Similar Tough Deal for Children?*, 23 INT'L J.L. POL'Y & FAM. 1, 1-24 (2009).

¹⁴¹ A news release from the British Columbia Ministry of the Attorney General cites support for the recalculation service from the Attorney General, several members of the legislative assembly, and judges. Press Release, British Columbia Ministry of Attorney General, Child Support Initiative to Help Children and Families (June 13, 2006), available at http://www2.news.gov.bc.ca/news_releases_2005-2009/2006AG0027-000801.htm. It is argued that the service will help stabilize family relationships, since "[t]oo often, changes in a payor's income level result in a permanent breakdown of relationships that negatively affects the whole family." *Id.* The new scheme is said to be a "practical means to resolve financial issues" in an onerous and adversarial process. *Id.*

¹⁴² *See* Manitoba Department of Justice, *supra* note 137.

the Guidelines' objective of decreasing parental conflict through objective support calculations. Finally, the decision raises concerns about the burdens placed on recipient parents by the current scheme.

There is obviously room for debate about whether the compromises articulated by the court are ideal. While some believe the decision will lead to antitherapeutic outcomes for families by increasing levels of conflict, others point out that the decision has had the positive result of fostering predictability by providing an impetus for payor parents to disclose income changes voluntarily and for recipient parents to ask for such disclosure.¹⁴³

In addition to highlighting these tensions, two points emerge from this Article. First, empirical evidence in this area of law is necessary to either bear out or negate this Article's hypotheses. Second, this work should serve as a reminder of the value of adopting a *law as lived* approach to considering the rights and obligations of the people directly impacted by the family law regime.

¹⁴³ Epstein and Madsen suggest that "the safe and cautious message to give payors is certainly to disclose changes in their income, pay in accordance with the Guidelines, or be at risk of a retroactive award at some point in the future." *Year in Review, 2007*, FAM. L. NEWSLS. (Epstein & Madsen's This Week in Family Law, Can.), Jan. 8, 2008.

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