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Child Support Disclosure & Support Information Exchange Requirements

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Since the **DBS** decision in 2006 historical financial disclosure has become the focal point of support law matters. The assessment of every file involving a change in the amount of monthly support or section 7 expenses, an adjustment to the amount of arrears or termination of child support necessitates a detailed review of the sufficiency of historical annual disclosure provided by the parties.

In **DBS**, Mr. Justice Bastarache emphasized the fact specific analysis required in each case to balance the competing interests of fairness to children and certainty to the payor. (1) There is room for significant debate in each situation regarding many issues, including, the applicable statute, whether there is a different consideration in cases where there is an agreement or an order, whether or not there is a disclosure provision and the nature of that disclosure provision, determining historical income, the date of effective notice, what constitutes blameworthy conduct and to what degree if any, has there been blameworthy conduct and has there been unreasonable delay in requesting income information and is that delay justified. Add a retroactive section 7 claim into this mix and you have a complex commercial litigation file with an emotionally charged overlay.

Despite the statutory objectives of the Guidelines, (2) it is very difficult to advise clients of their rights and obligations in retroactive cases due to the fact specific analysis that is required. In fact, the analysis required by **DBS** seems to run contrary to three of the four guideline objectives, namely, (b) reduce conflict; (c) improve efficiency of the legal process/encourage settlement; (d) ensure consistent treatment of similar circumstances. In the field, this is an area that is ripe for litigation but one where retainer dollars are hard to come by. In my practice, even the simplest of job loss income reduction cases have engendered considerable debate and disclosure demands. No one likes to receive less than has been budgeted. No one likes to pay more than has already been paid.

There have been a number of post **DBS** case surveys conducted. Decisions are numerous. In March 2009 Professor Shelley Kiersted of Osgoode Hall Law School conducted a survey of 136 post-**DBS** cases (3). My November 8, 2011 QuickLaw search indicated that the **DBS** decision had been mentioned in 739 decisions. Given that a fact specific analysis is required in each case there is little in the way of guidance from these decisions unless you can find a case that is close to your fact situation that has been decided by the judge who is going to hear your case!

Under section 25 of the Federal Guidelines the onus is on the recipient to request the income disclosure unless the order or agreement specifies otherwise. Professor Kiersted comments on the unfairness of this burden on the recipient (4). Mme. Justice Abella in the **DBS** dissent commented strongly on this

point and determined that the retroactive increase should always be effective the date of the income increase –regardless of notice by the recipient (5) .

An recent discussion of these difficulties is set out in the August 2011 Issue of the Hamilton Law Association Journal (Family Law News) regarding the Simone v Herres 2011 ONSC 1788 decision of Mr. Justice Taliano (6).

Since **DBS**, most court orders and separation agreements contain clauses that require some form of annual disclosure requirements. Many states and provinces have introduced disclosure requirements.

The Ontario Child Support Guidelines require parties to child support orders or agreements to exchange support information annually (section 24.1). Annual disclosure is now court-ordered in every case. The obligation to disclose is now a personal obligation to the Court. Each party to the order is accountable to the Court in any subsequent proceeding requesting relief.

Effective March 1, 2010 all support orders in Ontario require annual updating of income and section 7 expenses. Specifically all orders contain the following cause:

For as long as child support is to be paid, the payor and recipient, if applicable must provide updated income disclosure to the other party each year, within 30 days of the anniversary of this order, in accordance with section 24.1 of the Child Support Guidelines.

Section 24.1 of the Ontario Child Support Guidelines specify that the tax return for the most recent year, including any materials included in the return such as T4 slips and the Notice of Assessment or Reassessment from CRA **MUST** be supplied to the other party each year. In addition, the parties **MUST** supply current information in writing about the status and amount of any special expenses (section 7 expenses) and details of any student loans, scholarships or bursaries that will affect a court order for post-secondary expense contributions.

The risk of ignoring this annual disclosure requirement can be financially devastating. Proving that the annual disclosure requirements have been met is usually difficult and costly.

The Ontario Attorney –General’s web site confirms that the required information must be provided to the other party. It is up to the parties to provide the information to one another. This leaves open the possibility for dispute or disagreement in a number of areas such as:

1. How can you prove that the required information was actually provided?
2. How can you prove that you provided everything that is required?
3. How do provide the required information if the parties do not have an address for each other?
4. What do you do if you do not wish to have direct contact with the other party?
5. What do you do if you are not legally allowed to have contact with the other party as a result of a non-contact or restraining order or terms of probation?

In my practice I specialize in support payment change cases and the related enforcement and FRO interface. My website, www.thefrosolution.com has been in existence since 2006 and is a major public entry point for support payment information. We field hundreds of email questions and phone inquiries

monthly. There is real confusion out there regarding the family support obligations, rights and responsibilities of recipients and payors.

Most clients attend for a first consultation without a copy of the court order or agreement and without most if not all of the income tax returns, attachments or Notices of Assessment. The client rarely has a copy of the FRO Statement of Arrears. Section 7 information is unclear, unknown and/or highly disorganized.

When asked about provision of annual tax information to the opposite party the most common responses are as follows:

1. I sent the tax assessment to FRO;
2. I gave the recipient a copy when I picked up the child;
3. The recipient did not give me her tax return so I did not give her mine;
4. I think I did;
5. I am not sure;
6. I didn't know I had to;
7. My last lawyer didn't tell me about that clause.

Those parents that provided Notices of Assessment rarely if ever provided the actual return and attachments.

When acting for a recipient responding to a motion to reduce ongoing and arrears I ask about the section 7's. Most often the recipient responds by bringing in folders or grocery bags of receipts for child related activities and expenses, some going back for years, most of which have never been provided to the payor. Some are proud to bring in spreadsheets and folders that are so detailed and complex that it will take hours to go through and decipher and understand. The recipients usually provide the same answers when asked about the disclosure or notification of section 7 information as the payor gives regarding tax assessments. Recipients rarely provide annual income tax disclosure. Often recipient's advise that they don't provide the receipts because it will just produce conflict. I have met with many recipients who have never pursued basic section 7 claims such as day care because it is too much hassle or costly to pursue or will produce conflict.

It appears that recipients are not pursuing increases or section 7 claims due to evidentiary concerns (7). There is strong sociological evidence that interchanges over finances create tension and fosters conflict. This has a significant impact on children. The stress producing effect of legal involvement is obvious. An excellent analysis of these concerns and issues is provided by Professor Shelley Kiersted wherein she advocates for a therapeutic family justice model approach. (8).

This failure to disclose and exchange information persists despite detailed agreements or court orders which oftentimes clearly spell out the disclosure and information exchange obligations of the parties. In my experience, this situation persists right across the socio-economic spectrum.

The public expresses concerns about the time spent and the complexity and cost of proceeding in court on change cases. We all agree that these cases are frustrating and usually non-remunerative. Rarely do we have a file where both clients are fully organized and have updated each other in a timely manner as required.

The documentary requirements of the Family Rules (three years assessments, current pay stubs etc) just get the court room door opened. Rarely is this information sufficient to permit a reasonable

assessment of the case by the other party or the court. All too often judges are using premium court time to give disclosure homework assignments to parties in these cases.

In certain jurisdictions Dispute Resolution Officers or Case Management Masters have been appointed or volunteered to assign this homework. In Newmarket, detailed standardized disclosure requirements have been established (9).

As the post March 1, 2010 Orders start to find their way back into Court on change cases I expect the judges to be strict. If a payor with an income reduction has not complied with the annual disclosure requirement he will not likely get a reduction in arrears pre-dating the disclosure breach. A recipient will not likely be permitted to pull out a bag of section 7's if she has not provided the annual section 7 disclosure.

All parties take real risks by not complying with these requirements. Lawyers are subject to complaint and LawPro claims if they cannot demonstrate that the client has been advised of these requirements.

Professor Bala and Rachel Birnbaum have recently reported that Ontario family law lawyers report that 27% of cases had no lawyer on the other side (10). Law Society Treasurer Laurie Pawlitza notes that Courts are reporting that between 50 and 70% of the litigants appear without counsel in family cases. (11) In support change cases I venture that this proportion is higher. In my practice, whether acting for a payor or recipient, I am usually facing a self-represented opposite party. This is a challenge.

We all have an obligation to do our part to assist the public's access to justice (12). Over the past year we have developed a simple online information exchange to help parents connect the dots in the system. By using the Support Information Exchange [www.supportinformationexchange.com] parents can exchange annual income information and information regarding special expenses or section 7 costs in a secure & private online LEDGER. Either parent can download the entries from the exchange LEDGER to prove disclosure compliance in any future court proceeding or dispute resolution process.

The Support Information Exchange LEDGER is a permanent record of all entries to the exchange. When a tax return is uploaded or emailed to the exchange by a payor, the LEDGER is updated and automatic notification is provided to the recipient.

The information LEDGER can be downloaded at any time by either party to provide absolute proof of every document that has been provided and the date of notification. The exchange provides proof that the court ordered income notification requirements have been complied with. It provides absolute proof that requests for income information have been made and the date of those requests.

The exchange will automatically remind members to provide the annual income disclosure to the site. A parent can email a special expense receipt from his or her smart phone to the exchange and the other parent will be immediately notified.

Parents will always have immediate electronic access to their court orders or agreements, tax documents and special expense invoices and receipts. This will reduce legal fees and simplify the negotiation or document preparation exercise for court proceedings and dispute resolution procedures.

The support information exchange is a therapeutic family justice initiative which will enable separated parents to actively organize, and manage their children's expenses and the annual guideline and

proportionate share adjustments. This will ensure compliance with their agreements and orders and reduce conflict and disputes, including enforcement and FRO involvement or difficulties. Giving parents the utility to take on the primary responsibility to get organized so they can actively manage their children's costs and support will better ensure compliance and reduce family disputes and demands on the family justice system.

Endnotes

1. **D.B.S. v S.R.G.** [2006] S.C.J. No. 37 , para. 6;
 2. **Federal Child Support Guidelines**, section 1 , 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.
 3. Shelley Kiersted, **Retroactive Child Support: Benefits and Burdens**, Department of Justice March 2009, note 26.
 4. Shelley Kiersted, **Retroactive Child Support-A Tangle of Competing Interests**, Florida Coastal Law Review, May 2010, at pages 176-179.
 5. **DBS** at para 161-170.
 6. Lauren Bale & Kanata Cowan, **Family Law News, Hamilton Law Journal**, August 2011.
 7. Shelley Kiersted, **Retroactive Child Support-A Tangle of Competing Interests**, Florida Coastal Law Review, May 2010, at pages 176-179.
 8. Shelley Kiersted, **Retroactive Child Support-A Tangle of Competing Interests**, Florida Coastal Law Review, May 2010, parts III & IV.
 9. **STANDARD DISCLOSURE TERMS – SUPPORT CASES Newmarket Superior Court of Justice Family Branch**
 1. Financial statement, in Form 13 or 13.1 as required by the Family Law Rules, if the latest one is more than 30 day sole. If there have been only minor changes to the information in the party's latest financial statement, an affidavit updating is sufficient
 2. A copy of every personal income tax return, with all schedules, attachments and information slips, filed by the party with Canada Revenue Agency for three most recent taxation years.
 3. A copy of every notice of assessment or re-assessment received from Canada Revenue Agency for the three most recent taxation years.
 4. A copy of all income slips (T4s, T4As, T5s, etc) received for any of the three most recent taxation years for which a tax return has not been filed.
 5. Proof of any payments of support made directly to, or for the benefit of, the support recipient or a child (not through Family Responsibility Office) for the last 12 months and the years _____.
 6. A copy of any application made by or for the party within the last three years for a loan, line of credit, credit card, or mortgage, including any statement of income or net worth provided by or for the party.
- EMPLOYED PARTY**
7. A copy of the most recent paystub or statement with year to date income for the current calendar year.

8. A copy of all benefit information circulars or benefit booklets outlining all employee benefits for health care, dental care, prescriptions and life insurance. If no circular or booklet is available, a detailed statement from the employer or the group plan insurer outlining these benefits.

SELF EMPLOYED PARTY (Sole Proprietor)

9. Year end financial statements for all businesses, including income and expense statements and list of assets, liabilities and debts.
10. The most recent monthly or quarterly income and expenses statement for all businesses.
11. A statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, the party and persons or corporations with whom the party does not deal at arm's length.
12. A copy of any application made by or for the business for a loan, line of credit, credit card or mortgage, including any statement of income or net worth provided by or for the business.

PARTY WHO IS A PARTNER IN A PARTNERSHIP

13. Year end financial statements for all businesses, including income and expense statements and a list of assets, liabilities and debts,
14. The most recent monthly or quarterly income and expense statement for all businesses.
15. A statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the partnership does not deal at arm's length.
16. A copy of the partnership agreement.
17. Confirmation of the party's income and draw from, and capital in, the partnership for the current year.
18. A copy of any application made by or for the partnership for a loan, line of credit, credit card or mortgage, including any statement of income or net worth provided by or for the partnership.

PARTY WHO CONTROLS A CORPORATION OR MORE THAN 10% OF THE VOTING SHARES

19. A copy of every corporation tax return, with all schedules, attachments and information slips, filed by the corporation with Canada Revenue Agency.
20. A detailed statement of all personal expenses paid by the corporation.
21. The year-end financial statements, including balance sheet and income statement or statement of profit and loss, of the corporation and of any related corporations or subsidiaries.
22. A copy of the shareholder's agreement.

PARTY WHO IS A BENEFICIARY OR SETTLOR OF A TRUST

23. A copy of the trust's financial statements, including statement of income and expense and statement of distributions.
24. A copy of all income slips (T4s, T4As, T5s, etc) received from the trust and, if the party is the settler, all T5s or other tax information slips issued by the trust.
25. A copy of the documents which establish the trust.

PARTY WHO RECEIVES INCOME FROM ANY OTHER SOURCE

26. A letter from each income source setting out the party's total annual income and how the party's income is calculated.

PARTY WHO HAS BEEN BANKRUPT OR HAS MADE A PROPOSAL TO CREDITORS WITHIN THE LAST FIVE YEARS

27. Proof of bankruptcy, including copy of assignment in bankruptcy or petition into bankruptcy, statement of affairs, and any discharge.
28. A copy of any bankruptcy proposal signed by the party and the trustee under the Bankruptcy and Insolvency Act.
29. A copy of the projected cash flow statement of the party, signed by the party and filed by the trustee along with the final proposal.
30. A copy of the trustee's cash flow statement, the trustee's report on reasonableness of cash flow statement and the trustee's report containing prescribed representations of the insolvent party regarding the preparation of the cash flow statement.

PARTY WHO IS NOT WORKING

31. The party's personal resume, a list of all places or persons to whom the party has applied for employment in the last 12 months, with dates, and a copy of all responses received.
 32. Medical documentation verifying any inability to work due to illness or disability.
 33. A copy of any documentation for illness or disability benefits submitted to the Canada Pension Plan, the Ontario Disability Support Program, or any illness or disability insurer and the response to each application.
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10. Lawyers Weekly, Family Litigants Without Lawyers, August 5, 2011, Nicholas Bala and Rachel Birnbaum
 11. Treasurer Laurie Pawlitzka, Ontario Lawyers Gazette, Summer 2011, page 3-4
 12. At the 2011 Canadian Bar Association Conference in Halifax, Nova Scotia, Chief Justice Beverley McLachlin remarked "We have a justice system that is the envy of the world. The problem is that it is not accessible for far too many Canadians. In my view, access to justice is the greatest challenge facing the Canadian justice system. I sense that the tide is changing, as lawyers, judges and governments realize that there is a problem and that it is up to them to solve it. ... The public... fear expense. They fear delay. In the family law area, they fear getting mired in processes that exacerbate the dispute and have very bad consequences for preserving as much of the family assets as can be preserved. "