Senos v. Karcz

Ontario Reports

Court of Appeal for Ontario,

Juriansz, Pepall and Strathy JJ.A.

June 12, 2014

120 O.R. (3d) 321 | 2014 ONCA 459

Case Summary

Family law — Support — Child support — Receipt by disabled adult child of income support under Ontario Disability Support Plan Act rendering table approach to child support inappropriate — Ontario Disability Support Plan Act, 1997, S.O. 1997, c. 25, Sch. B.

When the parties divorced in 1993, the father was ordered to pay child support for their son A, who lived with the mother. A was diagnosed with schizophrenia and bipolar disorder in 2007. In 2009, he began receiving income support payments under the *Ontario Disability Support Plan Act, 1997*. The father brought a motion to change his support payments to reflect A's receipt of ODSP benefits. The motion was dismissed. The trial judge found that the table approach to child support under s. 3(2)(*a*) of the Federal Child Support Guidelines, SOR/97-175, was not inappropriate in the circumstances of this case. That decision was affirmed by the Divisional Court. The father appealed.

Held, the appeal should be allowed.

The fact that A was receiving almost $10,000 a year in the form of ODSP benefits was, in itself, sufficient to displace the "one-size-fits-most" approach in s. 3(2)(*a*) of the Guidelines in favour of the "tailor made" approach in s. 3(2) (*b*). ODSP reflects society's commitment to sharing financial responsibility for adults with disabilities. It made little sense to calculate child support on the basis that that responsibility fell only on the parents. The assumption of some responsibility by the state and A's receipt of income support for his board and lodging made the table approach inappropriate. The trial judge erred in finding that the ODSP payments were A's to use as he wished. To treat the ODSP as discretionary spending money did not reflect the purpose of ODSP income support. The money was paid to the mother as A's trustee and she was required to report annually on how the money was spent.

There was insufficient evidence of A's condition, means, needs and other circumstances to enable the court to determine the appropriate amount of child support under s. 3(2)(*b*)

of the Guidelines. The matter should be remitted for trial in order to determine the appropriate amount of support on a more complete record.

Briard v. Briard, [2010] B.C.J. No. 2368, 2010 BCCA 431, 297 B.C.A.C. 5, 94 R.F.L. (6th) 33; *Ontario (Director, Disability Support Program) v. Ansell*, [2011] O.J. No. 1823, 2011 ONCA 309, 281 O.A.C. 224, 333 D.L.R. (4th) 489, 98 R.F.L. (6th) 324, 201 A.C.W.S. (3d) 578, **consd**

Other cases referred to

Blonski v. Blonski, [2010] O.J. No. 1781, 2010 ONSC 2552 (S.C.J.); *Canada v. Canada-Somers*, [2008] M.J. No. 164, 2008 MBCA 59, 51 R.F.L. (6th) 262, 228 Man. R. (2d) 106, 167 A.C.W.S. (3d) 747; *Cossette v. Cossette*, [2003] O.J. No. 4928, 2003 CanLII 2086, 126 A.C.W.S. (3d) 469 (S.C.J.); *Francis v. Baker*, 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250, [1999] S.C.J. No. 52, 177 D.L.R. (4th) 1, 246 N.R. 45, J.E. 99-1813, 125 O.A.C. 201, 50 R.F.L. (4th) 228; *Geran v. Geran*, [2011] S.J. No. 310, 2011 SKCA 55, 97 R.F.L. (6th) 68, 371 Sask. R. 233, [2011] 10 W.W.R. 47; *Henry v. Henry*, [2010] O.J. No. 5665, 2010 ONSC 6990 (S.C.J.); *Hickey v. Hickey*, 1999 CanLII 691 (SCC), [1999] 2 S.C.R. 518, [1999] S.C.J. No. 9, 172 D.L.R. (4th) 577, 240 N.R. 312, [1999] 8 W.W.R. 485, J.E. 99-1206, 138 Man. R. (2d) 40, 46 R.F.L. (4th) 1, REJB 1999-12847, 88 A.C.W.S. (3d) 1044; *Krangle (Guardian ad litem of) v. Brisco*, [2002] 1 S.C.R. 205, [2002] S.C.J. No. 8, 2002 SCC 9, 208 D.L.R. (4th) 193, 281 N.R. 88, [2002] 3 W.W.R. 45, J.E. 2002-235, 161 B.C.A.C. 283, 98 B.C.L.R. (3d) 1, 9 C.C.L.T. (3d) 195, REJB 2002-27592, 111 A.C.W.S. (3d) 264; *Lewi v. Lewi* (2006), 2006 CanLII 15446 (ON CA), 80 O.R. (3d) 321, [2006] O.J. No. 1847, 267 D.L.R. (4th) 193, 209 O.A.C. 344, 28 R.F.L. (6th) 250, 148 A.C.W.S. (3d) 94 (C.A.); *Liscio v. Avram*, 2009 CanLII 43640 (ON SC), [2009] O.J. No. 3406, 75 R.F.L. (6th) 176, 179 A.C.W.S. (3d) 881 (S.C.J.); *Magne v. Magne*, 1990 CanLII 11090 (MB KB), [1990] M.J. No. 274, 26 R.F.L. (3d) 364, 65 Man. R. (2d) 241, 21 A.C.W.S. (3d) 551 (Q.B.); *N. (W.P) v. N. (B.J.)*, [2005] B.C.J. No. 12, 2005 BCCA 7, 249 D.L.R. (4th) 352, 207 B.C.A.C. 76, 36 B.C.L.R. (4th) 330, 10 R.F.L. (6th) 440, 136 A.C.W.S. (3d) 330; *Rebenchuk v. Rebenchuk*, [2007] M.J. No. 130, 2007 MBCA 22, 279 D.L.R. (4th) 448, [2007] 5 W.W.R. 87, 212 Man. R. (2d) 261, 35 R.F.L. (6th) 239, 155 A.C.W.S. (3d) 624; *Vivian v. Courtney*, [2012] O.J. No. 6134, 2012 ONSC 6585 (S.C.J.); *Welsh v. Welsh*, [1998] O.J. No. 4550, 79 O.T.C. 81, 83 A.C.W.S. (3d) 637 (Gen. Div.)

Statutes referred to

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), ss. 2(1), 15.1

Family Relations Act, R.S.B.C. 1996, c. 128 [rep. by *Family Law Act*, S.B.C. 2011, c. 25, s. 25]

Mental Health Act, R.S.O. 1990, c. M.7 [as am.]

Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Sch. B [as am.], s. 1(b)

Rules and regulations referred to

Federal Child Support Guidelines, SOR/97-175 [as am.], s. 3, (2), (a), (b)

O. Reg. 222/98 (*Ontario Disability Support Program Act, 1997*), ss. 33.2-36.2 [as am.], 37-43 [as am.], 37(1)

Authorities referred to

MacDonald, James C., and Ann C. Wilton, *Child Support Guidelines: Law and Practice*, 2nd ed., vol. 1, looseleaf (Toronto: Carswell, 2004-)

APPEAL from the order of the Divisional Court (Pardu and Grace JJ., Kiteley J. dissenting), [2013] O.J. No. 1705, 359 D.L.R. (4th) 342 (Div. Ct.) affirming the order of Gray J., [2012] O.J. No. 1172, 2012 ONSC 1547 (S.C.J.) dismissing the motion to vary the amount of child support.
Aaron Franks, *Michael Zalev* and *Melanie Sager*, for appellant.

Martha McCarthy and *Eric Sadvari*, for respondent.

The judgment of the court was delivered by

[1] **STRATHY J.A.**: — Parents of a disabled adult child face unique financial, emotional and social challenges. When they are divorced or separated, the immediate burden usually falls on the parent with whom the child resides. This appeal concerns the appropriate allocation of financial responsibility for the child between divorced parents and between those parents and the state.

[2] On a technical level, this appeal raises the issue of whether the receipt of income support under the *Ontario Disability Support Program Act*, 1997, S.O. 1997, c. 25, Sch. B ("*ODSPA*") by an adult child makes the presumptive "table" approach to child support inappropriate, so that support must be determined based on an individualized assessment of the condition, means, needs and other circumstances of the child. For the reasons that follow, I find that the receipt of income support can make the table

approach inappropriate, and in this case it does. I would therefore allow the appeal and remit the matter for trial on a more complete factual record.

A. *Facts*

[3] The appellant father[1] brought a motion to change the amount of support he had been paying for his adult son, Antoni. The trial judge dismissed the motion, and the Divisional Court dismissed the father's appeal. The father now appeals to this court, arguing that the child support should be reduced by the amount of Antoni's ODSP income support.

[4] The parties were married in 1984. Antoni was born in 1989. They separated in 1991 and divorced in 1993, at which time the father was ordered to pay child support of $900 per month. The *Federal Child Support Guidelines*, SOR/97-175 (the "Guidelines") had not yet been enacted.

[5] The amount has been adjusted for cost of living and stood at $1,153 per month in 2009.

[6] Antoni was diagnosed with schizophrenia and bipolar disorder in 2007. He lives with his mother, her second husband and their 10- or 11-year-old daughter in Acton, Ontario. Antoni occasionally visits his father, who lives near Sudbury with his second wife and their 11-year-old son. As Antoni has a disability, the parties agree that, for support purposes, he remains a "child of the marriage" as defined by the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 2(1).

[7] There was conflicting evidence at trial concerning Antoni's degree of independence. He is now 24 years old and does not work. The father claimed that Antoni makes his own meals, uses public transportation and does not require supervision. He has been able to travel on his own to Sudbury by bus to visit his father and his family. According to the father, Antoni spends time fishing, skateboarding, snowboarding, watching movies and collecting hockey cards. He enjoys eating, smoking cigarettes and drinking beer. The mother, on the other hand, says that Antoni's condition makes him susceptible to addiction and compulsive behaviour, necessitating additional supervision. He is subject to a community treatment order under the *Mental Health Act*, R.S.O. 1990, c. M.7, which permits him to live in the community.

[8] In September 2009, Antoni was approved for ODSP and began receiving income support payments of $796 per month, subsequently increased to $814. These payments are net of taxes. He also received a drug and dental card and other medical benefits. His ODSP application was approved retroactive to February 2008, with the result that he received a lump sum payment of about $12,000. The payments are made directly to the mother as Antoni's ODSP trustee and are deposited into a bank account in their joint names.

[9] The father earned an average of about $110,000 per year between 2006 and 2009. The mother has not worked for several years. Her husband's income is a matter of dispute -- the father alleges he earns $200,000 per year. The mother asserts that he only earned that amount in 2009 because he lost his job and received severance payments.

[10] The father stopped making child support payments in July 2009, when he learned that Antoni had applied for ODSP. He brought a motion to change his support payments to reflect Antoni's receipt of ODSP and obtained an order directing the Family Responsibility Office ("FRO") to hold any funds garnished from his employer in trust, pending the outcome of the litigation. As of the date of trial, the FRO held $11,007.57 in trust. The Ministry of Community and Social Services has asked the mother to advise it on the completion of this litigation of any support payments she has received and how they have been used since November 1, 2010. Pursuant to the ODSP income support directives, the mother is required to file a form setting out whether child support payments are being given directly to Antoni or are used for his direct benefit.

B. *The Child Support Guidelines*

[11] Section 15.1 of the *Divorce Act* provides that a court may make an order requiring a spouse to pay for the support of a child of the marriage. Such an order must be made in accordance with the Guidelines.

[12] Section 3 of the Guidelines provides as follows:

> 3(1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
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> *(a)* the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (*b*) the amount, if any, determined under section 7.
>
> (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> *(a)* the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> *(b)* if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[13] Section 3(2)(*a*) prescribes the table approach, unless the court considers it "inappropriate", in which case the court is to apply the approach under s. 3(2)(*b*).

C. *Positions of the Parties*

[14] The father's position is that the table approach under s. 3(2)(*a*) of the Guidelines is inappropriate in the circumstances and the amount of child support should be determined based on a consideration of Antoni's "condition, means, needs and other circumstances" under s. 3(2)(*b*). He says his support payments should be reduced dollar-for-dollar by Antoni's ODSP benefits.

[15] The mother's position is that the father should continue paying full table support. Relying on this court's decision in *Ontario (Director, Disability Support Program) v. Ansell*, [2011] O.J. No. 1823, 2011 ONCA 309, 281 O.A.C. 224, she argues that the ODSP payments belong to Antoni, whereas the child support belongs to her.

D. *Proceedings Below*

(1) *Trial judge*

[16] The trial judge held that because Antoni was of the age of majority, s. 3(2) of the Guidelines applied. In determining that the table approach under s. 3(2)(*a*) was not inappropriate, the trial judge took guidance from this court's observation in *Lewi v. Lewi* (2006), 2006 CanLII 15446 (ON CA), 80 O.R. (3d) 321, [2006] O.J. No. 1847 (C.A.), discussed below, that the amount generated by the table is the "presumptive amount" and that the s. 3(2)(*b*) approach is the exception.

[17] The trial judge observed that if s. 3(2)(*b*) were applied, it would be too simplistic an approach to simply deduct the ODSP payments from the amount otherwise payable as child support. He noted that in *Ansell*, Laskin J.A. listed certain features of child support that distinguish it from ODSP. Justice Laskin concluded, at para. 29, that in the recipient mother's hands, child support payments were not the child's income and the child had no control over how they were spent. The recipient was entitled to use those payments "to repair the roof, pay a hydro bill or buy a new television set".

[18] Drawing on this distinction in *Ansell*, the trial judge stated, at para. 21, that the ODSP payments clearly belong to Antoni, not to the mother:

> Similar reasoning reflects the status of ODSP payments. They belong to Antoni. They do not belong to Ms. Senos. Ms. Senos has no legal entitlement to them, and no control over how they are spent. Antoni could use them to take a trip, buy a car, or buy liquor. In the meantime, Ms. Senos must maintain a home for Antoni and support him.

[19] The trial judge concluded that the approach under s. 3(2)(*a*) was not inappropriate in this case. He noted the significant disparity between the parties' respective incomes and said that there was no evidence that the mother's spouse used

his income to support Antoni and the spouse was under no obligation to do so. He added that the fact that Antoni had his own "spending money" did not make the approach under s. 3(2) (*a*) inappropriate.

[20] At para. 26, the trial judge contrasted the facts of the present case with cases such as *Lewi*, where a child is at university and living away from home for a good part of the year and is expected to contribute to the costs of his or her education:

> In a case such as this, however, the child suffers from what is likely a permanent disability that will render him unemployable. He has access to some spending money of his own. Should that mean that Mr. Karcz should be relieved of all or part of the normal obligation he would otherwise have to support his child? Does that make the formula prescribed by s. 3(2)(a) inappropriate? In my view, the answer is no.

[21] Finally, the trial judge reiterated that even if the s. 3(2)(*b*) approach were applied, it did not mean that the court would simply deduct the ODSP payments from the child support. In view of the disparity between the parties' incomes, the support payments might be very close to or even equal to the table amount.

[22] In the result, the trial judge dismissed the father's motion.

(2) *Divisional Court*

[23] In the Divisional Court, the majority and the dissenting judge differed about the impact of Antoni's receipt of ODSP on the father's child support payments and *vice-versa*.

(a) *Majority (Pardu and Grace JJ.)*

[24] The majority dismissed the father's appeal. Referring to *Lewi*, they noted that the table amount is the presumptive rule for a child over the age of majority, unless the court considers that approach inappropriate. The onus of proof was on the father to establish that the Guidelines approach was inappropriate and the trial judge's determination that the burden had not been discharged was a discretionary decision and was entitled to deference: *Hickey v. Hickey*, 1999 CanLII 691 (SCC), [1999] 2 S.C.R. 518, [1999] S.C.J. No. 9.

[25] The majority did not agree that the *ODSPA* creates a primary obligation on the state to attend to the basic needs of an adult child of the marriage when there is a parent financially capable of doing so. There was no basis to conclude that Antoni's needs were less than the total of the support payments received by the mother and the portion of the ODSP payments that Antoni would receive after the director of ODSP had considered the effect of the support payments on Antoni's budget. Nor was there any basis for thinking the aggregate amount in this case was excessive or disproportionate. It would be an error to treat ODSP payments as equivalent to employment or investment income earned by an adult child. In this case, there had

been no analysis of Antoni's expenses and no evidence of the mother's earning capacity. Therefore, there was no basis on which to find the Guidelines approach inappropriate.

[26] Moreover, the majority noted that, even if the father had established that the presumptive Guidelines approach was inappropriate, it was not likely that an assessment of Antoni's condition, means, needs and other circumstances under s. 3(2) (*b*) would have resulted in a support payment markedly different from the table amount.

[27] Referring to *Ansell*, the majority observed that if child support payments are used for the benefit of the adult child, for purposes that are not exempt for the purposes of calculating the child's income under the ODSP Regulation, they become relevant to the assessment of the child's budgetary requirements for the purpose of calculating the amount of the benefit to which the child is entitled. The majority noted that, in this case, "there is no evidence of exempt expenditures for disability to which support payments are dedicated" (para. 14).

[28] Pardu J. concluded, at paras. 20 and 24, that Antoni's income support could be reduced to take into account the mother's application of child support payments for the benefit of the child. Consequently, it would not make sense to reduce child support to take into account Antoni's receipt of income support:

> Here, where the adult child resides with the support recipient, it would be reasonable in the absence of evidence to the contrary, to conclude that a significant portion of the child support is applied to the child's basic needs. These are the same expenses intended to be covered in part by ODSP payments, and on the authority of *Director (ODSP Program) v. Ansell*, the Director would be entitled to take the amount of child support applied towards these needs into consideration in assessing the adult child's budgetary requirements.
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> . . . . .
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> It would be circular to reduce support payments because of ODSP payments received by the adult child when those ODSP payments would properly be reduced by the extent to which support payments are applied by the recipient parent for the benefit of non-exempt living expenses of the child.

(b) *Dissent (Kiteley J.)*

[29] Kiteley J. observed that ODSP is meant to reflect a commitment that the legal obligation on parents is not unlimited, and that as a disabled child reaches the age of majority, the government or the community becomes a stakeholder.

[30] The payments for Antoni's support made by the father to Antoni's mother would not necessarily result in a reduction in Antoni's ODSP payments. He is entitled to ODSP in his own right, regardless of his father's legal obligation to pay child support to his mother and regardless of whether his father meets that obligation.

[31] The Guidelines were intended to represent a calculation of average expenditures for children that include items like "board and lodging". Thus, there was overlap between the ODSP payments Antoni received for board and lodging and the support payments made to the mother. This overlap must be recognized in the analysis of whether the approach in s. 3(2) (*a*) is inappropriate. Inappropriate means unsuitable, not inadequate: *Francis v. Baker*, 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250, [1999] S.C.J. No. 52, at para. 40. That leaves a wide discretion, but one that must be exercised on a principled basis. Receipt of ODSP means that the basis upon which the Guidelines were established no longer applies, and the approach under s. 3(2)(*a*) is unsuitable.

[32] Concluding that the trial judge should have analyzed the evidence on the basis of the factors in s. 3(2)(*b*), Kiteley J. undertook her own analysis. She concluded that the appropriate amount of support pursuant to s. 3(2) (*b*) would be $186 per month, on the assumption that the table amount would be $1,000, less the ODSP income support of $814.

E. *The Issues*

[33] The first issue is whether the Divisional Court erred in deferring to the trial judge's determination that the presumptive table approach under s. 3(1)(*a*) of the Guidelines was not inappropriate in the circumstances of this case, which include Antoni's receipt of ODSP.

[34] If the Divisional Court erred in that regard, the second question is whether, having regard to Antoni's condition, means, needs and other circumstances, and his parents' respective capacities to contribute to his support, the father's child support should have been reduced, and if so, by how much.

[35] The mother raises a third issue concerning the trial judge's calculation of the father's income and the need for updated financial information.

F. *Analysis*

[36] I approach these issues keeping in mind the discretionary nature of the trial judge's determination of support. An appellate court should not interfere with a support order unless there has been an error in principle, a significant misapprehension of the evidence or the award is clearly wrong: *Hickey*. This approach reflects the fact-based and discretionary nature of the underlying inquiry and the importance of finality in family disputes. As expressed in *Hickey*, at para. 12:

> There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

(1) *Child support*

[37] In *Francis v. Baker*, at paras. 42-49, the Supreme Court discussed the circumstances in which the presumptive table amount in the Guidelines can be displaced. Section 3 of the Guidelines establishes a presumption in favour of the table amount and the party seeking to deviate from that amount bears the onus of rebutting the presumption. That party is not obliged to call evidence and may simply choose to question the opposing party's evidence. However, the evidence must, in its entirety, be sufficient to raise a concern that the table amount is inappropriate. There must be "clear and compelling evidence" for departing from the Guidelines amount. The factors to be considered in determining both whether the Guidelines approach is "inappropriate" and the "appropriate" level of support are the conditions, means, needs and other circumstances of the child and the financial ability of both parents to contribute. Only after examining all the circumstances of the case should a court find the table amount to be inappropriate and craft a more suitable support award. To determine "appropriateness", the court must have sufficient evidence. Trial judges have the discretion to determine on a case-by-case basis whether a child expense budget is required and they have the power to order it. When the presumption in s. 3(2)(*a*) is rebutted, child support can then be set above or below the table amount.

[38] In *Lewi*, the majority observed that s. 3(2)(*b*) of the Guidelines only applies in the case of an adult child when the court determines that the table *approach* is inappropriate. At paras. 127-29, Juriansz J.A. explained that the focus of the inquiry at this stage is on the *approach* rather than the amount:

> Section 3(2) provides two ways of determining the amount of child support for a child of majority age. Under s. 3(2) (*a*), the amount of support for a child over the age of majority is calculated in exactly the same way as that for a minor child. The opening words of s. 3(2)(*b*) indicate that the amount determined by applying s. 3(2) (*a*) is the presumptive amount. Section 3(2) (*a*), by adopting the same approach for children of majority age that applies to minor children, fosters

> predictability, consistency and efficiency in the resolution of disputes concerning the amount of support for children of majority age.
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> Section 3(2)(*b*) only comes into play "if the court considers that approach to be inappropriate". It is apparent that the word "approach" was chosen with care, as the word "amount" is used six times in the section . . . The words "that approach" refer to the technique dictated by s. 3(2) (*a*) -- namely applying the Guidelines "as if the child were under the age of majority". I will refer to that technique as the "standard Guidelines approach". Before resorting to its discretion under s. 3(2)(*b*), the court must conclude that it is inappropriate to apply the Guidelines as if the child who is actually of majority age were a minor.
>
> The word "approach" makes it clear that the court cannot depart from the application of the Guidelines simply because it considers the "amount" determined under s. 3(2)(*a*), *i.e*., the table amount or additional expenses under s. 7, to be inappropriate. It must be satisfied that the standard Guidelines approach is inappropriate; clearly an exceptional situation rather than the rule. This further promotes predictability, consistency and efficiency in family law litigation.

[39] In considering whether the table *approach* is appropriate, a number of courts[2] have made reference to the commentary of James C. MacDonald, Q.C., and Ann C. Wilton, *Child Support Guidelines: Law and Practice*, 2nd ed., vol. 1, looseleaf (Toronto: Carswell, 2004-), at p. 3-10:

> The usual Guidelines approach is based on factors that normally apply to a child under the age of majority; that is the child resides with one or both parents, is not earning an income and is dependent on his or her parents. It is also based on the understanding that, though only the income of the person paying is used to calculate the amount payable, the other parent makes a significant contribution to the costs of that child's care because the child is residing with him or her. *The closer the circumstances of the child are to those upon which the usual Guidelines approach is based, the less likely it is that the usual Guidelines calculation will be inappropriate. The opposite is also true.* Children over the age of majority may reside away from home and earn a significant income. If a child is not residing at home, the nature of the contribution towards the child's expenses may be quite different.

(Emphasis added)

[40] Here, in determining whether Antoni's circumstances, including his receipt of ODSP income support and his disability, make the Guidelines approach inappropriate, it is necessary to examine the nature and purpose of ODSP support and the impact of child support on ODSP payments.

(2) *ODSP*

[41] The *ODSPA* recognizes that government, communities, families and individuals share responsibility for providing support to persons with disabilities: s. 1(*b*). The intent of the program, as expressed in its directives, is to provide supports necessary to enable individuals and families to live as independently as possible in the community and to lead more productive, dignified lives.

[42] To these ends, the program provides income support, health benefits and employment supports to people with disabilities in financial need. The policy of the *ODSPA*, insofar as it applies to adult children with disabilities, reflects the principle expressed by the Supreme Court of Canada in *Krangle (Guardian ad litem of) v. Brisco*, [2002] 1 S.C.R. 205, [2002] S.C.J. No. 8, 2002 SCC 9, at para. 40, that society shares the responsibility of caring for adults with disabilities:

> It is the policy of the Province of British Columbia to provide care for disabled adults. This policy is expressly stated in the *BC Benefits (Income Assistance) Act*, which confirms in the preamble that "British Columbians are committed to preserving a social safety net that is responsive to changing social and economic circumstances". When a disabled person becomes an adult, the burden of his or her care shifts from the parents to society as a whole, and it is accepted as fair and just that the continued burden of care of disabled adults should be spread over society generally. At one time, it may well have been the moral responsibility of parents to care for a disabled child for as long as they lived. But for some decades now, that moral responsibility has shifted to British Columbia society as a whole, as expressed by legislation enacted and preserved by successive governments. No evidence was presented for the proposition that it is shameful or wrong for parents to accept the benefits provided by the government which allow adult disabled children to be cared for under the social security network of the state. Great as social and medical progress may be, disability will inevitably strike some members of society, randomly and irrationally. It is not immoral for a society to say that when this happens, the burden will not be confined to the individual and his family, but will be shared by society as a whole.

[43] I agree with the observation in *Briard v. Briard*, [2010] B.C.J. No. 2368, 2010 BCCA 431, at para. 18, that this statement does not mean that the entire burden of caring for disabled adult children has shifted to society. Chief Justice McLachlin acknowledged, at para. 35, that, under the British Columbia *Family Relations Act*, R.S.B.C. 1996, c. 128, both parents must contribute equally when a child cannot leave home and remains a charge or burden on his or her parents.

[44] The determination of the amount of *ODSPA* income support requires the calculation of a "basic needs amount" to assist with the costs of food, clothing,

transportation and other needs, as well as a shelter allowance. Qualified recipients such as Antoni, whose parents provide them with housing and food, are considered to be in "board and lodging" and receive a benefit under that heading. Antoni's present benefit is $814 per month.

[45] In order to determine the amount of the benefit, a determination is made under O. Reg. 222/98 (the "Regulation") of the total budgetary requirements of the "benefit unit". In this case, Antoni himself is regarded as a benefit unit. As described in the Regulation, the amount of income support is generally calculated by reducing the budgetary requirements in accordance with ss. 33.2 to 36.2 of the Regulation, where applicable,[3] and subtracting from that amount all income received by the unit, determined in accordance with ss. 37-43 of the Regulation. Income includes "all payments of any nature paid to or on behalf of or for the benefit of every member of the benefit unit": s. 37(1).

[46] According to the ODSP directives, child support paid by a parent of an adult disabled child is not automatically considered income to the child so as to reduce the amount of his or her ODSP benefits. A determination must first be made whether the parent gives the support payments directly to the child, or uses the payments for the benefit of the child. An income support directive issued in November 2011 indicates that where the child support payments are not given directly to the child, or used for his or her benefit, the payments will be considered the recipient parent's income and not the child's, and will not impact the child's ODSP entitlement. If the payments are given directly to the child, or used for his or her benefit, the payments are treated as income unless an income exemption applies.

[47] Some forms of income may be wholly or partially exempt. For example, gifts or voluntary payments for disability-related items and services or for education and training incurred because of the disability will be exempt from inclusion in income. As well, the ODSP recipient may receive up to $6,000 in any 12-month period in the form of gifts or voluntary payments for any purpose from any source. The ODSP directive concerning spousal and child support recognizes that child support that is given directly to the child or used for the child's benefit will be considered income and deducted dollar-for-dollar against the child's ODSP support, unless one of the exemptions applies.

[48] Child support payments are exempt if they are paid pursuant to a court order and are applied to expenses for disability-related items, services, education, or training and have been approved by the director and not otherwise reimbursed.

[49] As Antoni's ODSP trustee, the mother is required to file an annual report stating how the ODSP income support has been spent on behalf of Antoni. She is also required to verify any amounts received for disability-related expenses pursuant to a court order.

(3) *The interaction between ODSP and child support: Ansell*

[50] In *Ansell*, this court considered the obverse of the question now before us.

[51] There, the director had treated support payments made to the separated mother of an adult child with autism as income "paid for or on behalf of or for the benefit of" the child, with the result that her income exceeded her budget, making her ineligible for ODSP. This court upheld the decision of the Divisional Court, which had in turn upheld the Social Benefits Tribunal in reversing the director's decision and finding that the child support paid to the mother was not to be treated as income of the child.

[52] In that case there was evidence of how the mother used the child support payments. They were used primarily for special horse therapy for the child -- therapy that specifically addressed her disability. Had the payments for those purposes been made directly by the father, or had he obtained a child support order that specifically stated his payments were to be used for the child's disability-related expenses, they would have been excluded in calculating the child's income for ODSP purposes.

[53] As in this case, the adult child in *Ansell* was entitled to be assessed independently for ODSP, notwithstanding that she was living with a parent, and was entitled to receive a board and lodging allowance.

[54] This court described the right of disabled adults to apply for income support in their own right as a fundamentally important element of ODSP, notwithstanding that they might live with a parent who receives child support: para 27. Treating the child support as income in the hands of the child would be inconsistent with the *ODSPA*'s purpose of serving persons with disabilities who are in need of assistance.

[55] Laskin J.A. observed, at para. 29, that, in the recipient mother's hands, the child support payments were not the child's income. It was in this context that he made the observation referred to earlier, that the mother could use the child support as she pleased:

> These features show that, in her mother's hands, the child support payments are not Jocelyn's income. Jocelyn has no legal entitlement to them, no ability to access them, and no control over how they are spent. Her mother could use the child support to repair the roof, pay a hydro bill or buy a new television set. Although these expenditures might be said to benefit Jocelyn indirectly, they are not the kind of expenditures that would be characterized as income attributable to Jocelyn under s. 37(1) of the Regulation. They are not payments to her or on her behalf or, at a practical level, even for her benefit.

[56] He added that the director should have focused not on the fact that the mother was receiving child support, but *on what she did with the payments*. Because the payments were used for disability-related purposes, they fell within a statutory exemption and were not to be included in the child's income.

[57] Laskin J.A. also noted that to treat the payments as income would undermine the objective of shared responsibility for the support of disabled adults and would unfairly discriminate against the children of separated parents. In an intact family, parental income that benefits a disabled child would not be considered in calculating that child's income for the purpose of ODSP entitlement. On the other hand, support payments in the hands of a single parent would qualify as income, resulting in discriminatory treatment.

(4) *Was the s. 3(2)(a) approach inappropriate?*

[58] In my respectful view, it was an error in principle to apply the table approach. Antoni's annual receipt of almost $10,000 in the form of ODSP income support was, in itself, sufficient to displace the "one-size-fits-most" approach in s. 3(2)(*a*) of the Guidelines in favour of the "tailor made" approach in s. 3(2)(*b*). That approach would have regard to Antoni's "condition, means, needs and other circumstances". That approach is particularly appropriate in light of Antoni's disability and society's commitment to share in his care.

[59] Antoni's eligibility for ODSP is based on a determination that his budgetary requirements exceed his income. Since he receives a payment in respect of board and lodging, it is reasonable to conclude that he established a budgetary requirement for this expense. As his mother and her spouse provide that board and lodging, it is also reasonable to conclude that some portion of the ODSP he receives is to enable him to make a contribution to the cost of his board and lodging.

[60] I agree with Kiteley J. that the trial judge erred in finding the ODSP payments were Antoni's to use as he wished -- that he "could use them to take a trip, buy a car or buy liquor" and in describing the payments as Antoni's "spending money of his own": paras. 21 and 26. To treat the ODSP as discretionary "spending money" does not reflect the purpose of ODSP income support. The money is paid to the mother as Antoni's trustee and she is required to report annually on how the money has been spent.

[61] I also agree with Kiteley J. that there is at least the potential for overlap between the amounts paid by the father for child support and the amount received by Antoni as income support for board and lodging. As Kiteley J. observed, at para. 106:

> As indicated in *Ansell #1*, the *Child Support Guidelines* were intended to represent a calculation of average expenditures for children that includes items otherwise categorized as "board and lodging". The overlap between the reason for ODSP income support and child support must be recognized in the analysis as to whether the approach in s. 3(2)(*a*) is inappropriate. It was an error of law to have concluded otherwise.

[62] As the majority in the Divisional Court noted, it would be reasonable to conclude that a significant portion of child support would be intended to contribute to the "child's needs for shelter, food and clothing and the multitude of other expenses associated with raising a child" (para. 19).

[63] I acknowledge the majority's concern about circularity -- that reducing child support to reflect the child's receipt of ODSP could be unfair because ODSP payments may themselves be reduced due to the recipient parent's application of child support to the non-exempt living expenses of the child. However, a reduction of ODSP would only be triggered by an increase in the amount of child support which the mother gives directly to Antoni or uses for his benefit. Calculating support under s. 3(2)(*b*), which may or may not result in an amount different from the table amount, will not necessarily affect the mother's use of the support payments or reduce the amount of the ODSP payments that Antoni receives. The impact, if any, of the change in support on ODSP is a matter that can be taken into account under the s. 3(2)(*b*) approach.

[64] ODSP reflects society's commitment to sharing financial responsibility for adults with disabilities. It makes little sense to calculate child support on the basis that this responsibility falls only on the parents. In my view, the assumption of some responsibility by the state and Antoni's receipt of income support for his board and lodging make the table approach inappropriate. These circumstances change the equation and call for a bespoke calculation based on Antoni's unique condition, means, needs and other circumstances, including his receipt of ODSP, and the ability of his parents to contribute to his support.

[65] It is useful to analogize to the cases involving adult children attending university, living away from home and earning an income, thereby contributing to their own education and support. There are numerous cases in which courts have concluded that these circumstances make the usual Guidelines approach "inappropriate" because the assumptions underlying the approach are not present. The Saskatchewan Court of Appeal noted in *Geran v. Geran*, [2011] S.J. No. 310, 2011 SKCA 55, 371 Sask. R. 233 that the fact that the child is earning a substantial income serves to displace one of the basic assumptions on which the table amounts are based: namely, that children under the age of majority have no incomes of their own. This operates in turn to throw the appropriateness of the table amount into doubt, which suggests in general that the amount is more appropriately determined pursuant to subsection 3(2)(*b*): *Geran v. Geran*, at para. 65. See, also, *Rebenchuk v. Rebenchuk*, [2007] M.J. No. 130, 2007 MBCA 22, at paras. 29-32; *N. (W.P.) v. N. (B.J.)*, [2005] B.C.J. No. 12, 2005 BCCA 7, at para. 42.

[66] There have as well been a number of cases at the trial level in which ODSP and other forms of social assistance received by the child have been taken into account in determining the appropriate support: *Magne v. Magne*, 1990 CanLII 11090 (MB KB), [1990] M.J. No. 274, 26 R.F.L. (3d) 364 (Q.B.); *Cossette v. Cossette*, [2003] O.J. No.

4928, 2003 CanLII 2086 (S.C.J.); *Liscio v. Avram*, 2009 CanLII 43640 (ON SC), [2009] O.J. No. 3406, 75 R.F.L. (6th) 176 (S.C.J.); *Welsh v. Welsh*, [1998] O.J. No. 4550, 79 O.T.C. 81 (Gen. Div.); *Blonski v. Blonski*, [2010] O.J. No. 1781, 2010 ONSC 2552 (S.C.J.). In *Henry v. Henry*, [2010] O.J. No. 5665, 2010 ONSC 6990 (S.C.J.), the court found that the receipt of ODSP income by one of the children made the Guidelines approach "not appropriate". See, also, *Vivian v. Courtney*, [2012] O.J. No. 6134, 2012 ONSC 6585 (S.C.J.).

[67] The table amount is predicated on the parents alone sharing responsibility for the financial support of their child. In the case of adult children with disabilities, the *ODSPA* commits society to sharing some responsibility for support. In my view, this makes the s. 3(2)(*a*) approach inappropriate, and s. 3(2)(*b*) should be applied to achieve an equitable balancing of responsibility between Antoni, his parents and society.

(5) *The s. 3(2)(b) analysis*

[68] As I have concluded that the father discharged the onus of showing the table approach was inappropriate, it is necessary to determine an appropriate amount of child support under s. 3(2)(*b*).

[69] The trial judge did not address this issue because he found the table approach was not inappropriate. Having regard to the disparity in the parties' incomes, it was unlikely that calculating the father's support payments under s. 3(2) (*b*) would result in a reduction. The Divisional Court majority agreed, at para. 42:

> Even if the adult child's expenses were capable of determination and shared by the parents after deduction of the full amount of the ODSP benefits now being paid, there is no basis to conclude that this would result in a support payment markedly different from the Table amount. The onus lay upon the father to justify a departure from the Table approach and the evidence he assembled did not do so.

[70] Justice Kiteley, on the other hand, would have drawn an adverse inference against the mother for failing to provide evidence of Antoni's expenses and would have deducted the full amount of the ODSP payments from the table amount, which she calculated at $1,000. She would have required the father to pay $186 per month, or about $2,200 per year, for Antoni's support.

[71] The difficulty in this case is that there is insufficient evidence of Antoni's condition, means, needs and other circumstances to enable this court to make a fully informed, tailor-made decision. The parties have failed to focus on these issues and have instead taken an all-or-nothing position, the father's position being that he is entitled to the benefit of all the ODSP payments and the mother's position being that all of the child support belongs to her and not to Antoni.

[72] There was no evidence to show how the mother uses the ODSP payments she receives as Antoni's trustee -- no evidence as to how much, if any, was paid to him or for his benefit or how much, if any, was used to reimburse her for the room and board she provided. Nor was there evidence of how she used the child support payments. There was no evidence of Antoni's expenses or how he used any portion of the ODSP payments. Nor was there evidence to support the trial judge's conclusion that Antoni was likely to be permanently unemployable. There was no evidence about his potential employability or his ability to supplement his income within the boundaries permitted by ODSP without affecting his support. Finally, and perhaps most significantly, there was no evidence of his disability-related needs, nor of the expenses incurred by the mother that were attributable to Antoni.

[73] Antoni's disability was not diagnosed until he was 18, many years after the original support order. The support, care and treatment of a 24-year-old with a serious psychiatric disability may require a greater financial contribution from his parents than the support of a young child or a teenager without a disability. As Pazaratz J. observed in *Blonski*, at para. 14, "we should not lose sight of the fact that, by definition, ODSP payments are intended to assist people with special needs". Recipients of ODSP may have special or extraordinary expenses which go beyond what either the table amount or income support may cover. It is possible, therefore, that the support calculation under s. 3(2)(*b*) will not be less than the table amount, even after taking into account the receipt of ODSP.

[74] While I am conscious that the parties have already invested a considerable amount in this dispute, the thrust of their evidence has been misdirected. It would not be fair to them, or more importantly to Antoni, for this court to attempt a back-of-the-envelope calculation of the amount of support under s. 3(2)(*b*). In such circumstances, it is appropriate for an appellate court to refer the matter to trial so the issue can be addressed on a complete record: see, for example, *Vivian v. Courtney.*

G. *Conclusion*

[75] For these reasons, I would allow the appeal and remit the matter for trial in order to determine the appropriate amount of support under s. 3(2)(*b*) of the Guidelines on a more complete record. The record will include updated financial information from both parties, a child support budget and a personal budget for Antoni. These budgets will include a description of the mother's use of the ODSP payments on Antoni's behalf, her use of the support payments she received from the father, and her proposed use of any additional payments she seeks.

[76] At the parties' request, costs may be addressed by written submissions, not exceeding five pages in length, together with a costs outline. The appellant shall file his submissions with the registrar within 15 days and the respondent shall have 15 days within which to reply.

Appeal allowed.

Notes

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[1] For the sake of convenience, I will generally refer to the appellant as the "father" and the respondent as the "mother".

[2] See, for example, *Canada v. Canada-Somers*, [2008] M.J. No. 164, 2008 MBCA 59.

[3] To address situations such as a child of a member of a benefit unit who is in shared custody, a member who is incarcerated or a member who is in hospital.