

CANADA / JUDGMENT

B.J. v. V.L.

2022 BCSC 1496

COURT

Supreme Court of British Columbia

DECIDED

26 August 2022

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2022 BCSC 1496 B.J. v. V.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.J. v. V.L.,

2022 BCSC 1496

Date: 20220826

Docket: E21927

Registry: New Westminster

Between:

B.J.

Claimant

And

V.L.

Respondent

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

The Claimant appearing in person, by teleconference:

B.J.

The Respondent appearing in person, by teleconference:

V.L.

Place and Date of Hearing:

New Westminster, B.C.

August 2, 2022

Place and Date of Judgment:

New Westminster, B.C.

August 26, 2022

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I. Introduction

- [1] The respondent Ms. L. applies for an order pursuant to s. 152 and/or s. 174 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] to retroactively vary a child support order made in these proceedings on August 12, 2010 by Justice Truscott, (the "Order"), and to cancel the accumulated arrears under the Order. She seeks an order that she pay child support in proportion to her future income pursuant to the Federal Child Support Guidelines, SOR/97-175 [Guidelines].
- [2] The Order required Ms. L. to pay \$284 per month for child support of the parties' two children, commencing May 1, 2010, based upon an imputed income of \$18,000.
- [3] Ms. L. has made no voluntary payments of child support pursuant to the Order. Child support has been paid only through the Family Maintenance Enforcement Program ("FMEP") and via court orders re-directing some of the monies she received from the claimant, Mr. J., for division of property and lump-sum spousal support in these proceedings.

- [4] The parties were married in September 2001 and separated in April 2005. There are two children of the relationship: J., born in June 2002, and L., born in April 2005. J. is now 20 years of age. L. is now 17 years of age.
- [5] After July 1, 2021, once J. had reached the age of majority, the FMEP no longer enforced payment of child support for her. FMEP continues to enforce the Order to the extent of \$129 per month for the benefit of L.
- [6] According to FMEP records, Ms. L. is in arrears in the amount of \$7,525.95.
- [7] Ms. L.'s position is that she has never been capable of earning the \$18,000 income that was imputed to her in the Order. She claims that she is incapable of being employed as a result of mental and physical ill-health.
- [8] She now receives \$1,235.42 per month in disability payments from the Province of B.C., as a Person with Disabilities ("PWD") pursuant to the Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41. She has received PWD benefits since 2015. Prior to that, including when the Order was made in 2020, she received government income assistance under the Employment and Assistance Act, S.B.C. 2002, c. 40, or in colloquial terms, social assistance or welfare.
- [9] Ms. L.'s child support arrears are currently \$7,525.95. She contends that she has paid money to the children directly, which totals \$7,580 (as I calculate it). She contends that these payments should be counted as child support. She also contends that she has regularly given the children gifts of clothing, food, and other items, which she values at \$100 to \$300 per month.

II. Background

- [10] The parties have been before this Court many times. Some of the prior proceedings, decisions, and orders are relevant to the present application, therefore I will summarize these. What follows is by no means a complete chronology or record of all of the previous court proceedings.
- [11] Justice Masuhara presided over a 15-day trial in 2007, dealing with parenting issues, division of property, and Ms. L.'s claim for spousal support. At the time, the children were aged five and two. Masuhara J. noted that at the time, Ms. L. was on welfare, but she occasionally earned extra income by being an "extra" in television and movie productions. Reasons for judgment of Masuhara J. were issued August 24, 2007 and are indexed under 2007 BCSC 1284 [2007 Trial Reasons]. Ms. L.'s efforts to appeal the decision were not successful: 2008 BCCA 290; 2008 BCCA 364.
- [12] Ms. L. represented herself for the first 10 days of the trial. She was represented by counsel thereafter.

- [13] At the trial, Ms. L. alleged that Mr. J. had sexually abused their eldest daughter and that he had been violent with Ms. L. Masuhara J. rejected these and other allegations, noting that Ms. L. was prone to colouring the actions of Mr. J. in the most negative light. Although Masuhara J. noted a number of "legitimate concerns" about Ms. L.'s parenting ability (2007 Trial Reasons, para. 39), ultimately, he ordered joint guardianship, joint custody, and primary parenting with Ms. L. Mr. J. was to have access to the children on alternate weekends.
- [14] As to child support, only Mr. J.'s income was relevant. Masuhara J. imputed his income as a drywaller at \$50,000 per annum.
- [15] The only substantial asset was the family home in Maple Ridge. The marriage relationship was short (six years) and Ms. L. had not made any financial contribution to the acquisition of the home, directly or indirectly. The equity in the home was divided 80/20 in favour of Mr. J., pursuant to s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128. Ms. L. received spousal support in a lump sum amount of \$44,150. The total amount Mr. J. was to pay Ms. L. for spousal support and for the division of property was \$220,750.
- [16] Masuhara J. seized himself of parenting issues between the parties, but not financial issues.
- [17] Masuhara J. presided over a second multi-day trial relating to parenting issues between the parties in 2009 and 2010. The court issued reasons for judgment dated April 19, 2010, indexed at 2010 BCSC 514 [2010 Trial Reasons]. Mr. J. sought variation of the parenting orders made previously. On March 24, 2009, the children had been apprehended by the Director of Family and Child Services. The director's delegates with the Ministry of Children and Family Development ("MCFD") were concerned about emotional harm to the children based on Ms. L.'s conduct and its impact upon the children, including repeated complaints of abuse against Mr. J., coaching of the children regarding abuse against them, and other parenting behaviours (2010 Trial Reasons, para. 52). The children were placed with Mr. J. MCFD retained Dr. Elterman to update a report that he had previously prepared for MCFD having to do with parenting issues.
- [18] The court determined:
- a) Ms. L.'s continued concerns about Mr. J.'s parenting were unsubstantiated;
 - b) the court rejected Ms. L.'s contention that she was the subject of bias or discrimination by MCFD based upon her being Romanian or having an accent (2010 Trial Reasons, para. 98);
 - c) placing the children in Mr. J.'s care had improved the situation: 2010 Trial Reasons, para. 121;
 - d) Ms. L. did not support Mr. J. in having a real parenting role: 2010 Trial Reasons, para. 125;
 - e) there was considerable animosity between the parents (2010 Trial Reasons, para. 4); and

- f) Ms. L.'s parents also harboured strong animosity towards Mr. J.: 2010 Trial Reasons, para. 125.
- [19] The court concluded that there had been a material change in circumstances and ordered that guardianship, custody, and residence of the children were to be with Mr. J. Co-parenting was not viable. The court made the following additional orders:
- a) A "review of the parenting arrangements" which could be in order when Ms. L. had demonstrated her acknowledgement that her conduct contributed to the discord between the parents and had been harmful to the children's relationship with their father: 2010 Trial Reasons, para. 127;
 - b) supervised access by Ms. L., in accordance with the previous direction of MCFD, was continued;
 - c) termination of Mr. J.'s requirement to pay child support to Ms. L., finding that the question of Ms. L.'s obligation to pay child support would need to be dealt with separately; and
 - d) staying Mr. J.'s obligation to pay the \$220,750 ordered on August 24, 2007, pending determination of a defamation action Mr. J. had brought against Ms. L.
- [20] On June 30, 2010, Mr. J. applied for payment of child support by Ms. L. As noted, Truscott J. made the Order August 12, 2010. No reasons for judgment are available in relation to the Order.
- [21] Ms. L. applied to vary the Order. Her application was heard by Masuhara J. on July 29, 2011. Reasons for judgment were issued August 9, 2011, and are indexed at 2011 BCSC 1079.
- [22] Ms. L. sought to reduce her child support obligations to zero. Masuhara J. noted that Ms. L. had been on income assistance since the litigation started in 2005, and apparently had last held full-time employment in 1990. Ms. L. relied upon a note from her family doctor, who stated that she was "treated for a mood condition due to stress, rendering her unable to work gainfully currently". Masuhara J. noted that Ms. L. had not sought out work for years, and had not produced any tangible evidence to support her inability to work beyond the limited documents before the court. She had not presented evidence to show she had made efforts to seek training or education towards gainful employment, or had attempted to find employment. The court found no material change in circumstances and denied Ms. L.'s application. The court noted that Ms. L. had made no payments of child support.
- [23] In further reasons for judgment issued December 21, 2012 (indexed at 2012 BCSC 1961), the court again noted that Ms. L. had not paid child support, and that she was required to do so.

- [24] In a judgment issued January 30, 2013, indexed at 2013 BCSC 131, Masuhara J. dealt with Ms. L.'s application to vary the parenting arrangements. Ms. L. sought joint custody and joint guardianship with primary residence to remain with Mr. J., and elimination of supervision of her parenting time. Her application was dismissed, except that the supervised access was to be increased progressively.
- [25] Masuhara J. reviewed the parenting arrangements again in 2014, indexed at 2014 BCSC 895 [2014 Reasons]. He ordered an increase in supervised access, and expressed hope that supervision could become unnecessary in the future if Ms. L.'s conduct improved.
- [26] Masuhara J. again noted that Ms. L. had continued to fail to pay child support. The arrears stood at \$7,668. Ms. L. said that the imputation of income to her of \$18,000 was unrealistic. The court noted, however, that she was able to travel to Europe and had provided cash gifts to the children as well as purchasing expensive electronic gifts for them. Masuhara J. noted that "despite these expenditures, she will not make regular support payments" (2014 Reasons, para. 28). He stated:
- [28] [Ms. L.'s] response as to why she has not paid child support is that custody and guardianship should be reversed and then [Mr. J.] could pay her support, thereby securing financial support be paid to the children.
- [27] Ms. L. filed a further application April 12, 2017, seeking variation of the Order. The application has never been heard on the merits.
- [28] Ms. L. obtained legal counsel, who filed a new application on her behalf on May 5, 2021, to retroactively vary the Order and cancel arrears.
- [29] On August 13, 2021, I ordered that Ms. L. was required to respond to the new or late-filed application response materials of Mr. J. by August 27, and I ordered that her application be heard November 2, 2021. I also ordered that the hearing of her application proceed before Mr. J.'s application for an order of contempt for failure to pay child support.
- [30] The parties appeared before Justice Norell on November 2. Part way through the hearing, counsel for Ms. L. requested an adjournment on the ground of new information, which was that Ms. L. had recently filed for bankruptcy. The hearing was adjourned.
- [31] Ms. L. filed an amended notice of application November 19, 2021. The amended notice of application added a reference to the fact that Ms. L. filed an assignment into bankruptcy on September 30, 2021, and added references to five further affidavits that Ms. L. wished to rely upon. This is the application presently before the court.

- [32] On January 17, 2022, the Chief Justice assigned this case to me for judicial management. Counsel for Ms. L. withdrew, and Ms. L. resumed representing herself February 17, 2022. At a judicial management conference on March 1, 2022, I directed that Ms. L.'s application be scheduled to be heard by me and that no new application materials could be filed before the application was heard. Scheduling difficulties led to delay in setting the hearing for the application, which was heard on August 2, 2022.

III. The Present Application

- [33] This application was heard by teleconference. On the teleconference, a Mr. Popois Jeffries appeared. He identified himself as an advocate for Ms. L. He asked that I refer to him as Popois. Popois informed me that he is not a lawyer. He did not have access to the voluminous application materials, and was not familiar with them, other than what he had been told by Ms. L. He informed me that he is the head of an Indigenous organization, the Peoples of the Salmon, and that Ms. L. and her children had been adopted as members of that organization. (Ms. L. is Romanian, and has lived in Canada since 1988.) As I understood him, Popois asserted that under Indigenous law, he is entitled to represent a person in court. I declined to grant Popois a right of audience. I referred to the principles set out in *Vernrose Holdings Ltd. v. Pacific Press Ltd.* (1978), 88 D.L.R. (3d) 523, 7 B.C.L.R. 298 (C.A.) and applied in many decisions since, including my decision in *Renyard v. Renyard*, 2014 BCSC 2649.
- [34] Ms. L. has continued to fail to make any payments of child support.
- [35] Ms. L.'s arrears of child support stood at \$6,671.22 as of July 1, 2021. At that point, as noted, FMEP reduced the amount of child support that it enforced from \$284 per month to \$129 per month, for one child only. As I have said, as of August 2, 2022, the arrears stood at \$7,525.95.
- [36] Mr. J. enrolled with the FMEP in January 2017. At that point, the arrears were \$13,632. All payments since then have been under compulsion. FMEP has been attaching Ms. L.'s federal GST or tax rebates. So for example, the most recent FMEP record shows receipt of \$156.76 for the month of June 2021, from the federal government.
- [37] Prior to enrolment, some child support debt was paid out of Ms. L.'s award for property and lump sum spousal support. On April 18, 2012, Masuhara J. ordered child support arrears of \$5,964 to be deducted from the payment to be made by Mr. J. He also ordered \$3,408 to be held in trust for child support. That amount together with interest was paid out of court to Mr. J. pursuant to a court order made March 22, 2016.
- [38] After enrolment with FMEP, Ms. L.'s arrears continued to grow. The entire amount of arrears was paid January 10, 2019, in the amount of \$19,679.70. This payment came from FMEP attachment or garnishment of an ICBC award.

- [39] Ms. L. argues that she did not earn \$18,000 per annum in 2010 when the Order was made, and has never earned that income since that time. She alleges that she is incapable of earning that amount of income, on medical grounds. She says that she has been diagnosed with post-traumatic stress disorder, depression, anxiety, insomnia, and low mood. She has also had operations for breast cancer, skin cancer, and a nasal septal deviation surgery. She contends that she has no means to generate an income to pay the outstanding arrears.
- [40] Ms. L. was receiving welfare and working intermittently at the time the Order was made. She contends that between 2010 and 2015, her total annual income ranged from \$4,395-\$10,090.
- [41] In her notice of application filed May 5, 2021, she contends that she paid cash amounts to the children during the supervised visits, totaling \$6,080. Her affidavits state that the amount she paid was \$6,380. At the hearing before me on August 2, she contended that a further \$1,200 was paid in April and June 2022 (\$600 to each child). Thus, she contends that she has paid the children, directly, the sum of \$7,580, to date.
- [42] As noted, Ms. L. contends that the cash payments she has made, and the gifts, should all be taken into account, and the arrears should be cancelled. She also contends that she should have no further obligation to pay child support for the parties' younger child, L., who is now 17.

IV. Legal Principles

- [43] The Order of August 12, 2010 does not stipulate whether it is made under the Divorce Act., R.S.C., 1985, c. 3 (2nd Supp.) or the Family Relations Act. However, Mr. J.'s notice of application filed with the court June 30, 2010, which sought payment of child support by Ms. L., relied upon the Family Relations Act. Accordingly, I can infer the Order was made under the Family Relations Act, the predecessor legislation to the current legislation, the FLA.
- [44] In any event, the principles relating to retroactive variation and/or cancellation of child support arrears are substantially the same under either statute.
- [45] Ms. L.'s application is brought pursuant to ss. 152 and 174 of the FLA.
- [46] I recently reviewed the principles relating to such applications in *Kelly v. Martel*, 2022 BCSC 756 [Kelly], where I referred to the recent decision of the Supreme Court of Canada in *Colucci v. Colucci*, 2021 SCC 24 [Colucci]. In Kelly, I stated as follows:
- [42] Mr. Martel's application is governed by the applicable provisions of the Family Law Act, S.B.C. 2011, c. 25 [FLA], ss. 152 and 174. Those sections are as follows:

152 (1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
- (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

- (2) For the purposes of this section, the court may consider
- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

[43] The principles applicable to applications to retroactively reduce, or cancel, accumulated child support were recently reviewed in depth by the Supreme Court of Canada in *Colucci v. Colucci*, 2021 SCC 24 [Colucci].

[44] Although *Colucci* was decided under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the principles applicable are substantially the same under the FLA.

[45] As the court explains in *Colucci*, there are two types of applications, which (as in this case) are often brought at the same time. The first is for a retroactive variation of a child support order. This is the type of application referred to in s. 152. The court in *Colucci* explains that an application for retroactive variation is based upon a material change in circumstances, most often a material change in income. If the payor gives effective notice, which includes financial disclosure sufficient for the payee to evaluate the circumstances, there is a presumption that retroactive variation may take place to the date of effective notice, up to

three years prior to the date of the formal application. However, the court retains a discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair; in such cases, the factors from *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.] are relevant.

- [46] The second type of application is a "rescission" application. As the court explains in *Colucci*, these applications differ from retroactive variation applications. This, I observe, is reflected in the differences between ss. 152 and 174 of the FLA - s. 174 refers to reduction or cancellation of arrears, while s. 152 refers to "change" or in other words, variation of a prior order. A rescission application is one where the prior order corresponds with the payor's income, but the payor is seeking cancellation. It is a form of hardship application, not based upon a past material change of circumstances justifying a retroactive decrease (*Colucci* at para. 134).
- [47] *Colucci* notes that courts across the country "have taken a highly restrictive approach to the availability of rescission or suspension of child support based solely on current and ongoing inability to pay": para. 136. The court cites *Semancik v. Saunders*, 2011 BCCA 264 [*Semancik*], among other cases.
- [48] As the court notes "these cases demonstrate that any discretion to grant relief in this context is narrow": *Colucci* at para. 136. There is a presumption against rescinding any part of the arrears: para. 138.
- [49] At paragraph 140, the court in *Colucci* notes that a court has a broad range of available options when faced with a proven payor hardship, including temporary suspension, periodic payments "or other creative payment options". Rescission is a "last resort in exceptional cases, such as where the payor suffers a 'catastrophic injury'": para. 141.
- []
- [70] Although s. 174 does not refer to the necessity of establishing a material change in circumstances, a number of authorities state that such a finding is required: see e.g., *Semancik*; *MacCarthy v. MacCarthy*, 2015 BCCA 496.
- []
- [72] As *Colucci* emphasizes, the applicant must establish that he cannot pay presently, and that he cannot pay in future. This was also emphasized in *Earle v. Earle*, 1999 BCSC 283, 1999 CanLII 6914 (B.C.S.C.), and the many cases that have applied it. He must establish that it would be "grossly unfair" not to cancel arrears.
- []
- [79] As *Colucci* further emphasizes, cancellation should not be ordered lightly. The standard should be stringent. Child support orders are to be taken seriously. The rule should not allow or encourage debtors to wait out their obligations: *Colucci*, para. 141.

- [47] Child support payors are not entitled to disregard child support orders and make payments directly to their children: *Wensel v. Rhodes*, 2012 BCCA 245, at paras. 13-17; *Earle v. Earle*, 1999 BCSC 283, 1999 CanLII 6914 (B.C.S.C.) [Earle], at para. 42.
- [48] Masuhara J. made a similar point in his reasons for judgment issued January 30, 2013, indexed at 2013 BCSC 131. He stated:
- [19] In addition, Ms. L's failure to pay child support since May 2012 is a serious issue with her application. Child support is money paid for the benefit of the children to improve their living conditions. Ms. L argues that she has not paid child support because she buys the children a number of presents each month. This misses the point of child support. Child support reflects a parent's obligation to provide for their children's necessities. Gifts for the children do not displace that obligation.
- [49] In making her application, Ms. L. asserts that a material change in circumstances has occurred since the making of the Order. She therefore relies on s. 152(2)(a) of the FLA. As I noted in *Kelly* at para. 70, although s. 174 does not refer to the necessity of establishing a material change in circumstances, a number of British Columbia authorities state that such a finding is required.
- [50] An application for a variation order is not an appeal of the original order. The previous order is presumed correct, and must not be reviewed during the variation proceeding: *Willick v. Willick*, [1994] 3 S.C.R. 670, 1994 CanLII 28 (S.C.C.).
- [51] An applicant seeking retroactive variation based upon a material decrease in income must show that the decrease in income is significant, has some degree of continuity, and is real and not one of choice: *Colucci*, para. 61.

V. Analysis

A. Variation

- [52] To a large degree, Ms. L. challenges the correctness of the Order. However, as noted, an application to vary is not an appeal of the original order, which is presumed to be correct.
- [53] Although no reasons for judgment are available with respect to the Order, I can readily infer that *Truscott J.* imputed income to Ms. L. of \$18,000 per annum on the basis of his conclusion that she was capable of paying child support commensurate with that level of income. It was a low level of income, probably equal to or less than a person could earn at minimum wage even then. The fact that Ms. L. was receiving welfare and working very little if at all, and that she had not had regular employment for many years, were matters of record. These facts were set out in the trial decisions of *Masuhara J.* Commensurate with the low level of income imputed to Ms. L., the amount of child support payable under the Order, \$284 per month, was very low. The amount has never been increased since the Order was made.

- [54] At the current minimum wage of \$15.65 an hour, \$18,000 is well below what a minimum-wage earner could earn in a year.
- [55] Although income is most commonly imputed to a payor on the basis of the court's determination of the payor's capacity to earn income through employment, the court is not limited to a consideration of income alone when determining child support. It may also consider financial means. The court may take into consideration assets acquired upon the division of marital property, as no issue of double dipping arises: *Hathaway v. Hathaway*, 2015 BCSC 1485, at para. 59.
- [56] When the Order was made, the court would have been aware that Ms. L. was still owed a substantial amount of money pursuant to the decision of Masuhara J. made August 24, 2007. Those funds were not paid out to Ms. L. until 2012, when she received approximately \$149,000, after reduction for payments of substantial court costs awarded against her. She has not accounted for that payment, which dwarfs her child support obligations.
- [57] The record amply demonstrates that Ms. L. has simply refused to make payments to Mr. J. She refuses to accept that she is obliged to do so. As noted, in her view, the payments that she says she has made to the children directly, and the gifts she has given them, supplant and discharge her obligation to comply with the Order.
- [58] In her October 11, 2021 affidavit, she says "I paid child support directly to the children when I had the financial means to do so". She explains her reasoning as follows: "I gave the money directly to my children because they told me that their father does not give them any money. I have always been concerned about money getting to my children if I gave it to the father of my children".
- [59] Masuhara J. told Ms. L. in 2013 that she was obliged to pay child support to Mr. J. as directed by the court order, and that gifts to the children do not discharge her obligations.
- [60] As I have stated, a child support payor is not entitled to disregard a court order for child support, nor to substitute the obligation to pay child support to the child's custodial parent with payments to the child or gifts to the child.
- [61] The record shows that Ms. L. has always had the means to pay child support pursuant to the Order. Payments made involuntarily through court orders and FMEP enforcement efforts have reduced the arrears to their current value of only \$7,525.95. This is approximately the same as the amount that Ms. L. asserts she has given directly to the children, of \$7,580, and in addition Ms. L. asserts that she usually spends around \$100-\$300 a month to purchase gifts for the children.
- [62] In summary, I am not satisfied that Ms. L. has not established a past material change in circumstances that would justify retroactive variation of the Order.
- [63] Even without considering her ability to earn income from employment, Ms. L. has not shown that she lacked the means to comply with the Order.

- [64] Her contention that she could not and cannot pay child support pursuant to the Order on medical grounds is unpersuasive.
- [65] Ms. L.'s claims that she cannot work must be assessed in the context of her staunch refusal to pay child support to Mr. J. This compels me to very critically examine the evidence she relies upon.
- [66] I note that the evidence Ms. L. puts forward now to support her contention that she is unable to work due to her health is similar to that put before Justice Masuhara in 2011. There is minimal evidence of any effort on her part to find employment. Instead, she relies upon the asserted medical disability.
- [67] The medical evidence is unpersuasive. Ms. L. relies primarily upon a brief letter from her family doctor, Dr. Yousif, dated March 23, 2021, provided at the request of Ms. L.'s former legal counsel.
- [68] The report is inadmissible, since it does not contain the certification required pursuant to Rule 13-2(2) of the Supreme Court Family Rules, B.C. Reg. 169/2009, confirming her awareness that she has a duty to assist the court and is not to be an advocate for any party, and that she has made the report in conformity with that duty. The doctor would have had difficulty in making that certification: The letter contains advocacy by the doctor for Ms. L. as her patient. It is clear that the doctor is very sympathetic to her patient. She is not an impartial expert.
- [69] The doctor states that Ms. L. is unable to work due to two surgeries for breast cancer, surgery for nasal septal deviation, skin cancer surgeries, chronic anxiety, low mood, depression, and insomnia. Standing alone, the list of maladies is daunting, but there is little in the way of a factual basis for the opinions. Dr. Yousif notes that she has sent Ms. L. for a specialist opinion. No information is available as to the result of that. The opinion that Ms. L. is unable to find work is conclusory.
- [70] Rather than addressing only Ms. L.'s employability, the doctor includes an appeal that her case be reviewed, and that she receive permission to see her children without supervision. This extraneous comment, the lack of impartiality, and lack of factual support in the letter makes it impossible for me to give any weight to the letter.
- [71] Ms. L. relies on the fact that she was approved for PWD benefits in 2015; however, no evidence is adduced as to the basis for that application.
- [72] Ms. L.'s current income is not far off the income that was imputed to her in 2010. In her financial statement, Ms. L. states that her income for the purposes of the Guidelines is \$14,825.04. However her tax return for 2020 shows a line 150 income of \$17,388.
- [73] Ms. L. is now 58 years of age. She lives together with her mother, who owns the townhouse or apartment that they live in. Her expenses are modest. She pays her mother \$600 per month in rent.

[74] In summary, I am not satisfied that Ms. L. could not have paid child support commensurate with the income level stipulated in the Order, in accordance with her obligation as a parent to support her children. No past material change in circumstances has been demonstrated, and no retroactive variation of the Order can be made. Her income now is at or near the amount of the Guidelines income stipulated in the Order, so no change is warranted.

B. Cancellation

- [75] Ms. L.'s application to cancel arrears fails for largely the same reasons as I have already expressed: She has not established that it would be grossly unfair for her to pay the arrears. She has not established that she could not have paid the child support ordered. An order for payment over time could perhaps be considered, but Ms. L. has not requested such an order, and I have no reason to think it would be obeyed.
- [76] It would not be appropriate to grant credit for the cash payments Ms. L. claims to have made. Had Ms. L. paid the child support to Mr. J. as she was ordered to do, she would not be in arrears. By seeking to have this Court retroactively vary or cancel the arrears, she is in effect asking the court to sanction her decision to ignore the court order, and her decision to pay money to the children directly, as gifts, and to spend money on gifts for them.
- [77] There is no evidence that the money Ms. L. paid to the children was intended to be used to defray Mr. J.'s child support costs, or was so used. Ms. L. did not want the money to go to Mr. J. J. has sworn an affidavit in which she states that her mother would give them money from time to time but told them to spend it on whatever they wanted and to keep it hidden, so that only they could use it.
- [78] Ms. L.'s assignment into bankruptcy has no effect upon her existing or ongoing child support obligations: Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, ss. 69.3, 69.41, s. 121(4), s. 178(1)(c); J.S. v. S.S., 2018 BCSC 355, at para. 223. In that decision, Justice Shergill stated:
- [223] The duty to pay child support is an independent obligation recognized by the courts. Pursuant to section 178 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (BIA), spousal and child support obligations survive a bankrupt's discharge from bankruptcy. Further, support enforcement is neither stayed nor impeded by a bankruptcy (BIA section 69.41). Since the discharge from bankruptcy has resulted in a clearing of all his other debts, Mr. S. has no impediments to being able to pay the child support accrued to date.
- [79] Ms. L. states in her affidavit sworn November 18, 2021 that she filed for bankruptcy because she took out a line of credit from TD Canada trust to pay legal fees and could not afford interest payments. Her financial statement of May 3, 2021 states that her only debt is \$15,000 owing on the TD line of credit.

VI. Other Matters

- [80] Much of Ms. L.'s materials in support of her application focus upon her inability to see her children other than through supervised access. She also states that she has been unable to see the children at all, even with supervision, since October 2020. Ms. L. complains that Mr. J. has breached the court orders allowing her access to the children. These are separate matters, not relevant to this application. Lack or even denial of access has no bearing upon a parent's obligation to pay child support: Earle, at para. 41.
- [81] I observe that J. is now an adult and can see her mother anytime she wishes, of course. In practical terms, the same is true for L., who is now 17 years of age.

VII. Conclusion

- [82] Ms. L.'s application is dismissed. As the successful party, Mr. J. is entitled to costs of the application.

"Verhoeven J."

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Prepared on 28 October 2026 · Esheria