
CANADA / JUDGMENT

Brar v. Brar

2021 BCSC 748

COURT

Supreme Court of British Columbia

DECIDED

23 April 2021

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2021 BCSC 748 Brar v. Brar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brar v. Brar,

2021 BCSC 748

Date: 20210423

Docket: E32409

Registry: New Westminster

Between:

Kalwinder Singh Brar

Claimant

And

Jatinder Kaur Brar

Respondent

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

V. Van Sickle

Counsel for the Respondent:

S. Ahuja

Place and Date of Hearing:

New Westminster, B.C.

March 11, 2021

Place and Date of Judgment:

New Westminster, B.C.

April 23, 2021

Introduction

- [1] This is a matrimonial proceeding. In her notice of application, the respondent, Ms. Brar, seeks a number of orders: relating to the production of financial information in furtherance of the claim for an order "setting aside paragraphs 2 and 10 of the Final Order pronounced September 3, 2009" (the "Order"); and establishing the amount of support payable by the claimant for the parties' two children. Paragraphs 2 and 10 relate to child support and the sharing of s. 7 expenses for the parties' two children.
- [2] She further seeks an order that "the Claimant pay child support and section 7 expenses, retroactive to October 1, 2009 to date, payable forthwith".
- [3] During submissions, it became apparent that the application was a variation of the Order, which provided that each party would be jointly responsible for the costs of the parties' two children, Imara and Heena, given the shared parenting arrangement and similar incomes of the parties as contemplated at that time.
- [4] The respondent did not suggest that I set aside any part of the Order. Nor did the claimant suggest I should not rule on the essence of the respondent's application, which regarded the retroactive adjustment of the support provisions in the Order based upon a material change in the circumstances.
- [5] With that said, the claimant opposes any retroactive variation extending beyond the date upon which this application was filed. In his cross application, the claimant seeks reduction or cancellation of any arrears accumulated under the Order that required him to pay the respondent \$500 monthly as his share of the cost of a nanny and for other extraordinary expenses.
- [6] According to the respondent, the claimant never paid any amount for the nanny. The claimant says that he paid for several months following pronouncement of the Order, but ceased paying when he learned the nanny was no longer employed. However, the claimant took no steps to vary the Order to reflect that change. Arrears have accumulated since the Order was pronounced (or shortly thereafter), and now total almost \$60,000.

Background

- [7] The parties were married on May 9, 1998. They have two children, Imara and Heena, born on October 2, 1999 and April 5, 2004, respectively.
- [8] The respondent's application was filed November 25, 2019, by which date she concedes that, Imara, by then 20, was no longer a child of the marriage.
- [9] Nonetheless, the respondent seeks retroactive support based upon the claimant's income, under the Federal Child Support Guidelines, S.O.R. 97/175 [Guidelines], based upon the table amount for the years 2009 through October 2018 for two children and, thereafter, only for the youngest child, Heena.
- [10] The parties separated finally in 2008 and, by consent, entered into the Order in 2009 which is the subject of this application. The Order was prepared by the claimant's counsel and the respondent was unrepresented throughout the proceedings.
- [11] The Order proceeded as a desk order which according to its terms, provided for a divorce and that the parties would have joint custody of their children with shared residency on a relatively equal basis.
- [12] Each party was to remain the guardian of the children and share parental responsibilities.
- [13] More importantly, the parties agreed in para. 10 of the Order, as follows:

AND UPON the Plaintiff, Kalwinder Singh Brar, Payor, having been found to have a guideline income of \$40,000.00 and the Defendant Jatinder Kaur Brar, Recipient, having been found to have a Guideline income of \$40,000.00.

Each parent has an obligation to pay the other, based upon their respective guideline incomes \$610.00 per month which is completely offset for a net payment of \$0.00.

- [14] Paragraph 11 of the Order reads:

The Plaintiff, Kalwinder Singh Brar, shall pay to the Defendant, Jatinder Kaur Brar, the sum of \$500.00 per month as his share of the costs for the nanny and any extraordinary expenses incurred by the Defendant for the care of the children.

- [15] The Order also stated each party would maintain the children as beneficiaries of their respective medical plans.
- [16] The Order is silent as to whether it was made under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] or the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. Both pieces of legislation were relied upon in the originating pleadings.

- [17] The parties each acknowledge that the custodial arrangements envisioned in the Order never came to pass. The claimant says this is because the respondent prevented him from seeing the children. The respondent says the claimant showed no interest in the children and made no effort to implement the parenting regime contained in the Order.
- [18] The claimant deposed that he paid the \$500 monthly amount for the nanny hired by the respondent until he learned that the nanny was no longer engaged to look after the children. The respondent says that the claimant never paid anything and she could not afford the nanny.
- [19] Until this application was filed and served on the claimant in December 2019, the claimant did not pay support for either child. The parties agree that, from time to time, he made payments on behalf of or directly to either of the children as they became older and he regained with them in 2016. However, those payments are not suggested to be on account of child support, but rather, contributions towards specific expenses related to one of the children or an activity.
- [20] The respondent did not pursue the claim for retroactive unpaid s. 7 expenses in submissions.
- [21] It is agreed between the parties that, sometime in 2011, the respondent approached the claimant asking him for money. At the time, the respondent admits to a drug dependency upon non-prescription drugs. The claimant says he offered to pay for whatever the children needed, but to pay it directly to the children as he feared that the respondent might appropriate the funds to buy drugs. Despite this assertion, nothing was paid to the claimant or directly on behalf of the children.
- [22] Thereafter, the claimant says that the respondent essentially disappeared with the children after her family learned of her addiction issues. He says he attempted to locate the respondent and the children from time to time, but was unable to do so until sometime in 2016 when his mother was able to make contact with the maternal grandmother of the children and locate the respondent. Lines of communication were reopened and the claimant began to periodically see the children and communicate with them through text or telephone.
- [23] The respondent acknowledges that she made no efforts to contact the claimant from approximately 2011 until sometime in 2016, but notes she retained the same email address and made no conscious effort to "disappear". The children continued at the same schools they were attending at the time of separation.
- [24] There were no further requests for support until sometime in 2017, according to the respondent. The claimant says he became aware of the "request" through service of this application in either late November or December 2019.

- [25] The respondent's income has been more or less steady. She works in healthcare as a nursing clerk. Currently, her income is approximately \$40,000.
- [26] The claimant has been both a salesperson and a credit officer for various automotive retail outlets. His income has varied from a high of over \$130,000 to, what his current income is stated to be, around \$30,000. His income has been impacted by COVID-19. His estimate of his ongoing capacity is in the order of \$60,000 annually, once normality is returned to the auto industry.

Position of the Parties

- [27] The respondent argues that the acknowledged request for payment of support in 2011 put the claimant on notice of her intention to seek support for the children and, accordingly, retroactive support should be calculated back to the date of the Order based upon the claimant's earnings from his income tax returns. No evidence was advanced in support of the claim for retroactive extraordinary expenses and, while noting the accumulation of substantial arrears under para. 11 of the Order, the respondent does not seek enforcement of same if successful in her application for retroactive support from the date of the Order.
- [28] The parties disagree as to what the claimant's income is over the various years as he has deducted expenses from his commission income.
- [29] The claimant argues that there should be no retroactive support for Imara given that she was not a child of the marriage at the time of the application. Further, he argues that based upon principles enunciated in *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.], the notice of application was the first effective notice to the claimant that child support was being sought on behalf of the remaining child of the marriage, Heena.
- [30] The claimant commenced paying support on January 1, 2020, following service of the notice at the end of 2019. His support was based on an income of \$60,000, which is the income he presumed he would make before the impact of COVID-19 sank in. He now argues he has overpaid because of his reduced income, and any overpayment should be credited to the accumulated arrears that I might find owing for one or both of the children.
- [31] Acknowledging that he did not comply with the terms of para. 11 of the Order, the claimant seeks cancellation or reduction of the accumulated arrears, arguing it would be grossly unfair to require him to pay for a nanny who was not engaged except for a few months following the parties' separation.

Legal Principles

- [32] I begin by noting that the Order, as it is silent as to the governing legislation, is presumed to be made under the DA: *Hansen v. Mantei-Hansen*, 2013 BCSC 876 at paras. 89-90. If I am wrong in that conclusion, the applicable principles under the Family Law Act, S.B.C. 2011, c. 25 [FLA], which is the successor to the FRA, lead to the same conclusion.

[33] Section 17(1) of the DA reads:

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively,

- (a) a support order or any provision of one, on application by either or both former spouses;
- (b) a parenting order or any provision of one, on application by
 - (i) either or both former spouses, or
 - (ii) a person, other than a former spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent; or
- (c) a contact order or any provision of one, on application by a person to whom the order relates.

[34] The corresponding section of the FLA, s. 152, reads:

- (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.

[35] It is important to note this is a variation application to the terms of an existing order, and not an order made in the first instance.

Can the Court Order Retroactive Support for Imara Given her Status as an Adult?

[36] Given the respondent's concession that Imara is no longer a child of the marriage who is entitled to support either now or when the application was filed, the question arises as to whether I am able to retroactively reassess the claimant's obligation not only for Heena to the appropriate date, but, as well, for Imara for the years she remained entitled to receive support.

[37] The claimant, in opposing a retroactive assessment of his obligation to pay support for Imara, relies upon passages in D.B.S. as support for the proposition that retroactivity is available only when the person for whom support is sought remains a child of the marriage entitled to support at the time the application was brought.

- [38] In *Michel v. Graydon*, 2020 SCC 24 [Michel], the Supreme Court of Canada refined the law as it relates to retroactive applications.
- [39] In *Michel*, the applicant applied under s. 152 of the FLA to retroactively vary child support from 2001 to 2012 to reflect the respondent's actual income during the period of time he was underpaying based on his income. The application was allowed at the trial level, but overturned in the Court of Appeal.
- [40] In the Court of Appeal, *D.B.S.* was cited as authority for the proposition that an application for retroactive child support under the DA had to be made while the child remained "a child of the marriage" and applied the same principle to retroactive variation proceedings under the FLA.
- [41] The payee appealed. In the Supreme Court of Canada, it was held that the payor, Mr. Graydon, was required to pay the difference between what he paid and what ought to have been paid despite the fact that the intended recipient was no longer a child of the marriage entitled to support at the time the application was brought.
- [42] In *D.B.S.*, if a distinction is needed, the application was brought under s. 15 of the DA for an order in the first instance. Both in *Michel* and here, a variation, not an order in the first instance, is sought. Whether pursuant to s. 17(1) of the DA or, alternatively, s. 152 of the FLA as was the case in *Michel*, it is now settled there is no requirement that the person on whose behalf the application brought remain a child of the marriage at the time the application is filed.
- [43] Accordingly, I conclude, based on *Michel*, I have the jurisdiction to entertain an application to retroactively vary the support payable by the claimant both as it relates to Heena and Imara. Imara's entitlement is conceded to conclude in October 2018 when she reached 19 and was no longer, for the purposes of either section of the applicable legislation, a person entitled to receive support.

Is Retroactive Variation Appropriate and, If So, Commencing When and In What Amount?

- [44] *Michel* at paras. 60-61 emphasizes that child support is the right of the child and is calculated based upon the income of the payor parent. Further, retroactive awards are not truly "retroactive" since they hold the payor to the legal obligation that they have always had to pay support commensurate with their income. Retroactive awards ought not be confined to exceptional circumstances or rare cases.
- [45] All of those principles were recognized in the test set out in *D.B.S.* In determining whether to make a retroactive award, *D.B.S.* notes the court should not apply a formulaic approach but, rather, achieve a holistic resolution of the matter dependent on the facts of each particular case and having regard to the following:
1. the reason for the recipient parent's delay in seeking child support;

2. the conduct of the payor parent;
 3. the past and present circumstances of the child, including the child's need at the time the support should have been paid; and
 4. whether the retroactive award might entail hardship.
- [46] With that said, a retroactive award must be balanced against the payor's interest in certainty. Typically, courts award child support from the date of effective notice (i.e. when the recipient has signalled to the payor that an adjustment in child support should be made), in order to strike a balance between certainty and flexibility: D.B.S. at paras. 122-123.
- [47] Effective notice does not require that the recipient parent commence legal action, but rather broach the topic with the payor. Once that event has occurred, the payor parent can no longer assume that the recipient is satisfied with the status quo: D.B.S. at para. 121.
- [48] However, if there is a prolonged period of inactivity after the date of effective notice, it will usually be inappropriate to apply the date of retroactivity far into the past, as this harms the payor's interest in certainty. As a rule of thumb and not as a matter of law, the Court states that the retroactivity of a support award ought not to extend more than three years: D.B.S. at para. 123.
- [49] Further, where the payor parent has engaged in blameworthy conduct, the date when circumstances change materially will be the presumptive commencement of the retroactivity, and not the date of effective notice: D.B.S. at para. 124; Michel at para. 36.
- [50] In Michel, support was adjusted retroactively to the date the payor knew that the amount he was paying was under the Guidelines amount (i.e. the time the consent order was made). The date of effective notice was not relevant because the payor was fully aware of the impoverished circumstances under which the recipient spouse and his children were living.
- [51] Hardship caused to the payor by the retroactive change in his/her support obligation is an important focus of the four-part inquiry from D.B.S. In Michel, I should note, the Court found the payor had the capacity to pay the retroactive award.
- [52] Here, it is acknowledged that at least on one occasion in 2011, the respondent broached the subject of support payable by the claimant. At the time, he was paying nothing despite the Order requiring him to pay \$500 per month. The claimant excuses his non-payment by noting the nanny was no longer engaged. The parties disagree as to whether any payments were made under the Order and, on the material before me, I am unable to resolve that conflict in the evidence.
- [53] However, it is notable that the claimant took no steps towards varying the Order upon what he considered to be a material change in circumstances.

- [54] Further, it is clear that the claimant was aware of the changing nature of his obligation as he was not sharing the parenting of the children. He explains this by virtue of the respondent's reluctance to allow him to adhere to the parenting arrangement set forth in the Order. However, he took no steps to implement the terms of the Order through enforcement proceedings and, at the same time, implicitly questioned the respondent's fitness based upon her acknowledged drug dependency.
- [55] Imara filed an affidavit, well past the time provided under the Supreme Court Civil Rules, explaining the impact of non-payment upon her standard of living while growing up. The claimant objected to its admissibility stating that it ought to have been filed with the original application. While I heard submissions based upon the late-filed affidavit, given the position of the respondent that Imara is not and has not been a child of the marriage for support purposes since attaining 19, it plays no role in the conclusion I reached and thus I do not permit its admission under Rule 8-1(14): *First National Financial GP Corporation v. 0734763 B.C. Ltd.*, 2020 BCSC 1349 at paras. 59-62.
- [56] Hence, I go on to examine the factors in D.B.S.

Is There a Reasonable Reason for the Recipient's Delay in Seeking Child Support?

- [57] The thrust of the respondent's argument is that, having raised the matter of support in 2011 and having taken no further steps until she renewed her request in or about 2017 (which is denied by the claimant), retroactivity to the date of the Order or at the latest 2011 is warranted.
- [58] The respondent provided little explanation for leaving the matter until 2019. She knew from 2009 onward that her income was overstated in the Order and, as well, the shared parenting arrangement entitling the parties to set-off support to one another based on the misstated incomes was not occurring.
- [59] While the respondent's affidavit material references fear of psychological violence or threats of violence since the parties separated in 2008, there is little other than bare assertions as why she feared approaching the claimant for payment of support. Indeed, she did so in 2011.
- [60] Thereafter, despite the claimant's inaction, no steps were taken until 2019 during the filing of the application.
- [61] The respondent bears the onus of establishing she continued to seek support, and said she did in 2017. The claimant denies that. In the absence of some written communication evidencing a further request, I am unable to prefer her evidence over his. Thus, I find that apart from the admitted communication in 2011, the respondent did not put the claimant on notice again until service of the application.

- [62] As was noted in *Brown v. Kucher*, 2016 BCCA 267 [Brown], the Court of Appeal upheld a trial judge's decision allowing an appeal from the Provincial Court, where the result was a retroactive support back to the date of the child's birth. The circumstances in *Brown* are remarkably different, given their lengthy separation from 1995 until 2013.
- [63] In allowing the appeal from the Provincial Court, Madam Justice Fisher (as she then was) noted that the trial judge had paid too much deference to the reasons for delay and improperly assessed Mr. Brown's inaction as blameworthy conduct that deprived him of any expectation of certainty.
- [64] Further, Madam Justice Fisher noted that the trial judge failed to consider the benefit that the child would receive from an award given her present age, and failed to properly consider the hardship that would be imposed upon the payor given his financial circumstances.
- [65] Those circumstances, I find, are remarkably different than here.
- [66] While no explanation is proffered for the delay between 2011 and the bringing of the application in 2019, the claimant knew throughout that he had two children for whom he was paying no support despite an existing order of the court requiring a payment of \$500 monthly. Whether that payment was dedicated towards the children's day-to-day support or the cost of a nanny seems immaterial given the claimant's vastly improved financial circumstances since 2009.
- [67] While sympathetic to the respondent's position that she raised the issue of support on at least one occasion, that, in my view, fails to adequately explain the further eight year delay in bringing forth the application.
- [68] That said, the unsatisfactory explanation for delay is but one of four factors informing the result.

Is the Behaviour of the Claimant Blameworthy?

- [69] The second factor in *D.B.S.* is to consider the conduct of the payor parent. Here, I find Mr. Brar's behaviour blameworthy as follows:
1. He knew, from the onset, the shared parenting arrangement was not in place and, accordingly, based upon his income stated to be \$40,000, support for his two children was owing; and
 2. He failed to comply with an existing court order requiring him to pay \$500 monthly or take any steps to vary when circumstances changed.
- [70] Paragraph 11 of the Order makes clear that the \$500 monthly award was for the claimant's "share of the costs for the nanny and any extraordinary expenses incurred by the Defendant for the care of the children" (emphasis added).

- [71] It is not for the claimant, in my view, to parse out the words of the Order and suggest that, upon learning the nanny was no longer engaged (perhaps, unsurprisingly, given he was not paying support), he was entitled to ignore payments required under a court order which were for the benefit of his children.
- [72] Further, it would have become apparent to the claimant in years past that as his income grew, at one stage to as high as \$130,000 (rounded), the situation had dramatically changed.
- [73] By 2016, the year in which he says he regained contact with the respondent, his income was \$132,766. The year before, it was \$82,905.
- [74] Paragraph 10 of the Order made clear that each parent had the obligation to pay the other parent support based upon their respective Guidelines income. In 2009, based upon the information in the Order, the offset provided for no payment.
- [75] In following years, the claimant failed to recognize the changing nature of the stated obligation, in that: (1) the parenting arrangement was not a shared parenting arrangement entitling him to a set-off; and (2) his income far exceeded that which it was stated to be in the Order, resulting in a change in the quantum of his obligation.
- [76] While it is acknowledged he paid something, towards what was likely extraordinary expenses for the children (approximately \$6,000) after reunification with them, such was hardly on account of Guidelines child support.
- [77] The claimant's behaviour was blameworthy.

The Third Consideration under D.B.S

- [78] The third consideration under D.B.S. is the past and present circumstances of the child, including the child's or children's needs at the time the support should have been paid.
- [79] The respondent has described her modest circumstances since the date of separation. As noted, I pay no heed in the assessment of the children's needs to the affidavit of Imara because of its late filing and the availability of that information as at the date the notice of application was filed.
- [80] That said, I accept that the denial of support, for the almost 10 years from the date of the Order to the date upon which at the claimant began to pay support for Heena, resulted in a diminished lifestyle and hardship to both the respondent and the two children.
- [81] A comparison of their two incomes over that period of time leads to no other conclusion. The respondent was supporting a family of three and later, at an unspecified time, four. During some periods post-separation, she was in a common-law relationship, and sometimes not. Her income has never exceeded \$43,000.

- [82] The claimant's income, historically, has been in excess of \$60,000 with several exceptions, 2011 and 2012. His salary reached a high of \$130,000 (rounded) in 2016, but says that, because of this application, it has recently drawn back to the \$40,000 range.
- [83] He is a car salesman and, in part, his lower income in 2020 is a function of COVID-19.
- [84] In his Form 8 financial disclosure, he estimated his ongoing income to be at \$60,000 annually, and began paying support for Heena based on that sum in January 2020.
- [85] He explains his two highest years of income was when he was working in the credit department of another dealership. That job is no longer available to him and has not been since 2016.
- [86] In any event, there is no doubt that the children have undergone hardship as a result of the availability of funds, which otherwise ought to have been available to them (\$127,000 according to the respondent) over the course of their growing up.

Whether a Retroactive Award Will Entail Hardship

- [87] I have no doubt, based upon the claimant's financial disclosure, an award in the range suggested by the respondent will entail hardship for the claimant. Noting his current income and his asset disclosure, it is not readily apparent that the claimant has the ability to pay anything meaningful by way of a retroactive award.
- [88] That said, the respondent notes the claimant's current circumstances, which to some extent, belie his assertions of modest assets. He is currently building a house that he says is beneficially owned for his parents despite the fact it is in his name. His parents filed affidavits to that effect, but supplied no documentation supporting the assertion that it was their funds that paid for an original condominium purchase that was later sold to fund the purchase of land and house construction.
- [89] The claimant has remarried. His current spouse works, albeit she may be going on maternity leave soon. He has a new family with a child and another one on the way.
- [90] The claimant suggests that effective notice should be seen as at December 2019 and, as such, no retroactive award is appropriate. Alternatively, the claimant argues that if a retroactive award is found to be suitable, then I should adopt the default position in D.B.S. of going back only three years prior to the application and awarding retroactive support based on the amount the claimant ought to have paid commencing as at December 2016.
- [91] I have already determined that any retroactive award I were to make ought to include an allowance for Imara up to and including the date she reached 19.
- [92] Finally, in considering the respondent's application for retroactive support and the holistic approach to the matter of retroactivity suggested in D.B.S., I must consider, at the same time, the claimant's application to cancel the arrears accumulated under the Order. Assuming no payments were made on account of the \$500 monthly figure contained in para.

11 of the Order, and assuming a commencement date of October 1, 2009, approximately nine years (or \$54,000) of payments were missed until Imara became an adult. Assuming that the \$500 monthly amount was intended to be split equally between Imara and Heena, the remaining 15 months until the claimant began paying support for Heena in January 2020 results in a further \$3,750 of arrears for a total of \$57,750.

- [93] That said, the respondent acknowledges from the date variation is ordered, it would be double counting to include arrears under the existing order. In effect I would be adding \$500 to the amount determined to have properly payable from the date of variation onward.
- [94] The claimant seeks to cancel the entirety of the accumulated arrears based on the respondent's removal of herself and the children from contact with him. To do so, he must establish that it would be grossly unfair not to cancel the arrears: s. 174 of the FLA, which reads:

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.

[Emphasis Added.]

- [95] The Court in *Earle v. Earle*, 1999 BCSC 283 [Earle] at paras. 25-45 discusses the various factors that can, and cannot, be considered when reducing/cancelling arrears. The applicant must show that there is a material (i.e. significant and long-lasting) change in circumstances and that it would be grossly unfair not to cancel the arrears. Relevant here is that reducing or cancelling arrears because of financial hardship to the payor spouse can only be done if the court has reliable and accurate evidence that the payor spouse will be unable to pay arrears now and in the future because of financial difficulty. The Court in *Earle* states the following factors may be given limited weight: delay by the recipient spouse; new family

obligations; and a lack of legal representation. However, the following factors are immaterial: the recipient parent agrees not to seek enforcement of payment; other payments to the children were made; and a denial of access to the children.

- [96] Here there has been significant delay by the respondent in both the pursuit of what was owed under the order and variation of it.
- [97] I turn now to considering the interaction between the two applications and the role the 'holistic approach' suggested in D.B.S. has upon the outcome. For the reasons below, I find it is appropriate to order retroactive child support payments as of December 1, 2016, and to reduce the arrears accumulated under the Order (until November 2016) be reduced by 50%.
- [98] In deciding to order retroactive support payments effective December 2016 I have considered: the claimant's gross dereliction of his duty to support his children over ten years from the Order's pronouncement and his commencement of paying support for Heena; the unexplained delay of the respondent in pursuing support of the children save for a request in 2011; the hardship occasioned by the absence of support upon both children while growing up; and the apparent financial hardship that the claimant would face, due to his new family responsibilities, his modest assets, and his significant drop in income due to the COVID-19 pandemic.
- [99] As to the date of the variation, upon balancing a number of factors, including delay by the respondent and the fact the claimant did not her whereabouts or that of the children until approximately 2016, I choose the default position provided in D.B.S. of three years into the past (to December 2016). While notice was provided to the claimant, the passage of almost 9 years before further steps were taken militates against variation going back to 2011. Such would result in financial hardship to claimant beyond what is fair in the unique circumstances here.
- [100] I have calculated the appropriate support payments as follows: 2016 support, calculated based upon the claimant's 2015 income, results in a payment of \$1,282 for December 2016. For 2017, based upon his 2016 income, monthly support is \$1,945 per month for a total of \$23,340. From January 1 until October 31, 2018, based upon his 2017 income, the monthly amount is \$1,194 for a total of \$11,940. For the months of November and December 2018 when there is only support for one child, the monthly amount is \$735, for a total of \$1,470. For 2019, based on 2018 income for one child only, the monthly amount is \$694 for a further \$8,328. In sum, the total child support owed from December 1, 2016 until the end of 2019 is \$46,360.

- [101] Next, in considering whether it would be grossly unfair not to cancel or reduce the arrears, I decline to cancel the entirety of them noting the claimant took no steps to vary the order; presumably because he knew the state of affairs regarding the parenting and incomes was not as stated in the order. Nonetheless, given my conclusion that I must view the matter of retroactivity holistically, I conclude it would be grossly unfair to calculate the arrears in addition to varying support retroactively.
- [102] Accordingly, the arrears under the order accumulated from October 1, 2009 until November 30, 2016; 86 months or \$41,500. Thereafter, the monthly payments of \$500 are subsumed in the amount the claimant ought to have been paying based upon his income.
- [103] Applying the factors in Earle, I accept the claimant's evidence that he now has only modest assets, his income has suffered significantly (and involuntarily) due to the pandemic, and that he has a new family with, soon-to-be, two young children. I note the claimant made some payments when contact between himself and the children was restored but those were not on account of the table amount of support he ought to have been paying. Finally, I have also considered the arrears under the Order accumulated over a period of time that, for the most part, he was not in contact with the respondent or the children.
- [104] I am satisfied that the claimant will consider considerable hardship in the payment of the arrears as calculated. I have calculated the accumulated arrears from the date of the Order; September 2009, until variation on December 1, 2016, at \$43,000. I order that 50% of those arrears; \$21,500 be cancelled leaving arrears of \$21,500. I also order cancellation of interest and penalties owing.
- [105] Thus arrears of \$21,500 will be added to the amount owed the respondent as a result of the retroactive variation resulting in further 'arrears' in support payable from December 1, 2016 until the end of 2019 of \$46,360. I conclude that the proper result is to order that the claimant pay \$67,860.

Variation of Support for Heena

- [106] The claimant began paying monthly support for Heena based on his self-ascribed income of \$60,000 annually in January 2020; the month following service of the application. COVID-19 apparently reduced his earning capacity to, as he says, a gross income of \$39,588, and a net income of \$30,309.
- [107] While support should, in most instances, be calculated upon the previous year's Line 150 income of the payor, I am satisfied that the effects of Covid-19 upon the claimant's income warrant a different approach: *Sahota v. Sahota*, 2021 BCSC 470.
- [108] Based upon his income of \$30,309, I set support for Heena at \$282 per month commencing January 2020 and thereafter until varied. Any overpayment from the proper amount payable under the Guidelines shall be calculated and offset against the arrears set out above.

- [109] The parties are to exchange income tax returns annually commencing May 1, 2021 and thereafter, and support shall be adjusted annually to conform to the claimant's income as agreed or as determined by further court order upon application if the parties are unable to agree.

Document Production

- [110] The applicant did not press for further production of financial information, but rather, pursued variation of support based upon the information already provided. The respondent still seeks the claimant's historical banking records to determine whether the order for payment of arrears should be made forthwith.
- [111] I will make the order that the claimant produce the documents sought in paragraphs 4(c) and (d) of the notice of application on the condition the respondent pays the reasonable costs of production of the requested documents, if such need be ordered from the claimant's financial institution(s).

Summary of Orders

- [112] The application to vary the Order is allowed effective January 2020 as set out above. Based on an income of \$30,309, the claimant will pay the respondent \$282 monthly for the support of Heena and pay 60% of Heena's extraordinary expenses.
- [113] Support will be reviewed annually on May 1 of each year commencing May 1, 2021, and thereafter for as long as Heena remains a child of the marriage.
- [114] The application for further production of documents by the claimant is allowed in part as set out above.
- [115] The claimant's application to cancel arrears is allowed in part. Arrears are set at \$67,860 less the overpayment for Heena. The respondent's application for terms of payment of the arrears is adjourned generally pending the claimant's further document production.

Costs

- [116] Unless there have been offers exchanged that affect the matter of costs, the respondent has achieved substantial success in the application and is entitled to costs of one application.

"Harvey J."

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Prepared on 27 October 2026 · Esheria