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CANADA / JUDGMENT

## D.K.D.S. v. M.S.S.

2021 BCSC 2084

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COURT

Supreme Court of British Columbia

DECIDED

14 June 2021

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2021 BCSC 2084 D.K.D.S. v. M.S.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.K.D.S. v. M.S.S.,

2021 BCSC 2084

Date: 20210614

Docket: E94650

Registry: Kelowna

Between:

D.K.D.S.

Claimant

And

M.S.S.

Respondent

These Oral Reasons for Judgment have been amended to anonymize the parties and others for publishing purposes.

Before: The Honourable Madam Justice Francis

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant

(appearing by teleconference):

B.J. Hardwick

Counsel for the Respondent

(appearing by teleconference):

L. Teague

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 14, 2021

Place and Date of Judgment:

Kelowna, B.C.

### June 14, 2021

- [1] THE COURT: These reasons are being delivered orally. If a transcript is ordered, I may amend them for grammar and clarity, but the substance will not change.
- [2] This is an application brought by the respondent, M.S.S., for two types of relief. He seeks a retroactive decrease in child and spousal support and he seeks an order for rescission of arrears of child and spousal support.

### Facts

- [3] The parties began to live together in February 2002. They were married on June 30, 2003. They separated on November 1, 2011, and they were divorced in June 2015. They have one daughter, M., who was born in November 2006. The claimant also has a child from a prior relationship, D., who was born in 1995. The respondent stood in place of a parent to D. during the relationship and she was a child of the marriage for support purposes.
- [4] On June 5, 2012, the parties attended a JCC before Mr. Justice Barrow and entered into a consent order. That consent order provided that, based on the respondent's income of \$108,000 per year, the respondent was to commence monthly child support of \$1,592, and was to pay additional child support in the amount of \$487.34, which was 86% of special and extraordinary expenses. On July 12, 2012, the claimant filed an application for spousal support and, on September 12, 2012, Master Young ordered, on consent, that the respondent commence paying interim monthly spousal support in the amount of \$1,500.
- [5] M.S.S. never diligently paid support. He paid no support in 2012 according to FMEP records. His first payment of support of any kind was a payment in June 2013. It appears that in June 2013, he made one payment of \$50 and one payment of \$100. He continued to be delinquent in paying consistent support notwithstanding the fact that, during the first couple of years that the support orders were in place, he was employed full-time.

- [6] In the fall of 2013, M.S.S. was charged with sexually assaulting D. He was found guilty after a trial and was sentenced in April 2014. He lost his job in March 2015 and he has not worked since. He was declared bankrupt on May 27, 2015.
- [7] The first time M.S.S. applied to vary his support obligation was by way of an application filed on January 7, 2016 (the "First Application"). There were multiple adjournments of the First Application and it was never heard. On December 15, 2020, M.S.S. filed the application herein. This application is almost identical to the First Application.
- [8] As at the date of this application, the support arrears payable by M.S.S. exceed \$300,000.

#### Legal Authorities

- [9] This is an application for variation of arrears pursuant to s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act].
- [10] Earlier this month, the Supreme Court of Canada considered the law regarding retroactive support orders and rescission of arrears in *Colucci v. Colucci*, 2021 SCC 24.
- [11] At para. 30 of *Colucci*, the Court noted that there are three main categories of claim with respect to retroactive relief under s. 17 and the second two of those apply here, namely, the payor is seeking a retroactive decrease in support because of a past change in circumstances, and the payor seeks to rescind or suspend arrears because of current and future inability to pay.

#### Retroactive variation

- [12] At para. 46 of *Colucci*, the Court, referring to the earlier case of *D.B.S. v. S.R.G.*, 2006 SCC 37, noted that there are three interests which must be balanced to achieve a fair result in retroactive variation cases:

first and foremost, the child's interest in receiving the appropriate amount of support to which they are entitled; second, the interest of the parties and the child in certainty and predictability; and third, the need for flexibility to ensure a just result in light of fluctuations in payor income

- [13] At para. 57, the Court specifically considered the framework for dealing with retroactive decreases and noted that:

Any framework developed to accommodate retroactive variations of child support in response to decreased payor income must deal fairly with a wide range of factual situations, from payors who diligently paid the proper amount until they lost their employment or otherwise fell on hard times, to those who have made little effort to meet their responsibilities and are absent, intentionally underemployed or persistently delinquent.

- [14] I find it is clear from the payment history in this case that M.S.S. falls in the latter category. He failed to pay support on a regular basis even when he was fully employed and he has made little effort to meet his responsibilities to pay support.

- [15] At para. 61 of Colucci, the Court noted that to meet the threshold for a retroactive variation claim of a material change in circumstances, a decrease in income must be significant, it must have some degree of continuity, and it must be real and not one of choice. At para. 62, the court stated:

The payor must have disclosed sufficient reliable evidence for the court to determine when and how far their income fell, and to ascertain whether the change was significant, long lasting, and not one of choice. A decision to retroactively decrease support can only be made based on "reliable, accurate and complete information"

- [16] M.S.S. argues that as a result of his criminal conviction for sexually assaulting his stepdaughter, and his ongoing health issues, he has been unable to earn the Guideline income contemplated in the support orders. M.S.S.'s criminal conviction is clearly a situation of his own making. However, the crux of his application appears to be that his health problems have precluded him from working since he lost his job in March 2015.
- [17] M.S.S. has not tendered accurate, reliable, or complete evidence to support his claim that, since March 2015, he has been disabled from working. The only evidence he has tendered in this regard is by way of letters from his doctor, attached to an affidavit. Even if this evidence, which is hearsay, were accepted on its face, it does not actually state that M.S.S. is currently disabled from working. One doctor's letter briefly alludes to challenges M.S.S. may have finding work. This is not sufficient to meet the requirement of "reliable, accurate and complete information" set out by the Supreme Court of Canada in Colucci.
- [18] As such, I find that M.S.S. has not met the onus of showing that there has been a past material change in circumstances that would justify a retroactive variation to his support obligations.

## Rescission of arrears

- [19] In Colucci at para. 134, the Court stated that a claim for rescission is a form of "hardship" application in which there has been no past change of circumstance justifying a retroactive decrease in the support obligation. In other words, rescission calls for a different analysis than a retroactive variation, one which does not involve a backward-looking lens. The Court stated:
- [135] It follows that, under this third category of cases, the payor's ongoing financial capacity is the only relevant factor. The payor must therefore provide sufficient reliable evidence to enable the court to assess their current and prospective financial circumstances, including their employment prospects and any assets, pensions, inheritances or other potential sources of future capacity to pay.
- [136] Courts 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

- [137] This strict approach to rescission and suspension of arrears based on current inability to pay is justified. The interests of the recipient and child in certainty and predictability are paramount, as the payor has failed to comply with a court order or agreement without any "excuse for non-payment of support when it came due"
- [138] Accordingly, in this third category of cases, the payor must overcome a presumption against rescinding any part of the arrears. The presumption will only be rebutted where the payor parent establishes on a balance of probabilities that -- even with a flexible payment plan -- they cannot and will not ever be able to pay the arrears
- [20] In this case, the respondent has not established on a balance of probabilities that he is presently unable to pay arrears. He has not established that even if he were unable to pay his arrears at the present time, his inability to pay is long-lasting. As I have already noted, he has not satisfied me that he is presently not capable of being employed in any capacity, and he has certainly not satisfied me that he is not capable to being employed in the future. As a result, I decline to order that the respondent is entitled to rescission of arrears under s. 17 of the Divorce Act and I dismiss the application.
- [21] I did not hear any submissions about costs. Are there submissions about costs?
- [22] MS. HARDWICK: My Lady, on behalf of the claimant, I would seek costs of this as a half-day application on the basis that she was substantially successful and, given that there is no more sort of ongoing case at the present time, I would ask that they be payable forthwith.
- [23] THE COURT: Mr. Teague, do you have submissions on costs?
- [24] MR. TEAGUE: No, I do not.
- [25] THE COURT: All right, then, I am prepared to order that the claimant shall have her costs of this application on the basis that it was a half-day application payable forthwith.

"Madam Justice Francis"

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