
CANADA / JUDGMENT

Graydon v. Michel

2018 BCCA 449

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 449 Graydon v. Michel

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Graydon v. Michel,

2018 BCCA 449

Date: 20181130

Docket: CA44543

Between:

Sean Graydon

Respondent

(Appellant)

And

Danelle Michel

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Savage

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated

May 30, 2017 (Graydon v. Michel, 2017 BCSC 887,
New Westminster Docket E51918).

Counsel for the Appellant:

P. Mennie

Counsel for the Respondent:

R. Dueckman

Place and Date of Hearing:

Vancouver, British Columbia

January 3, 2018

Written Submissions received:

January 8, February 2 and 13, 2018

Place and Date of Judgment:

Vancouver, British Columbia

November 30, 2018

Written Reasons of the Court

Summary:

The appellant Ms. Michel seeks a retroactive variation in child support payments under the Family Law Act on the ground that the income of the respondent Mr. Graydon was in excess of the amounts assumed for the original support order. By the time the application was brought, the subject of the support order was no longer a child within the meaning of the Act. A trial judge gave effect to the application and made a retroactive variation in the support order. An appeal to the Supreme Court of British Columbia was allowed on the ground that the trial judge did not have the jurisdiction to vary a child support order after the subject of the order was no longer a child. Held: Appeal dismissed. The trial judge did not have the jurisdiction to make the variation, as the subject of the child support order was no longer a child at the time the application to vary was made.

Reasons for Judgment of the Court:

- [1] The central issue in this appeal is whether a court has the jurisdiction under the Family Law Act, S.B.C. 2011, c. 25 ("FLA") to order a retroactive variation of a child support order after the child has ceased to be a child within the meaning of that Act.
- [2] This issue has recently been resolved in the negative by the decision of this Court in Dring v. Gheyle, 2018 BCCA 435. Accordingly, the appeal must be dismissed.

Background

- [3] The parties lived in a common law relationship from 1990 to 1994. Their child, who I will refer to as A.G., was born in December 1991. After the relationship ended, A.G. lived with her mother, Ms. Michel. Child support was initially dealt with by an order made in Provincial Court on November 3, 1998. On March 29, 2001, that order was varied by a consent variation order under which Mr. Graydon was to pay child support in the amount of \$341 per month (the "2001 Order").
- [4] The 2001 child support order was based on a Federal Child Support Guidelines, SOR/97-175 ("Guidelines") income of \$39,852 per year. Although Ms. Michel asked Mr. Graydon to agree to an annual review of child support, he declined to do so and in fact no review was conducted during the period that A.G. was a child.
- [5] In March of 2012, when A.G. was 20 years old, Mr. Graydon applied for an order cancelling the child support order on the ground that "[A.G.] has reached the age of majority, completed a certificate program and is working." Provincial legislation then in force, the Family Relations Act, R.S.B.C. 1996, c. 128, defined a "child" as a person who is under 19 years of age, as does the FLA (subject to provisions under s. 146 that have no application to this case).
- [6] By the time Mr. Graydon's application reached the Court, Ms. Michel had begun to suspect that Mr. Graydon had been underpaying child support, on the basis that his Guidelines income was greater than the \$39,852 that had been assumed in March 2001. The trial judge found that Ms. Michel had intended to apply for a retroactive variation of child support in 2009 but had suffered a severe injury that had delayed the application.
- [7] An added complication was that Ms. Michel was on social assistance, and pursuant to the provisions of the Employment and Assistance Act, S.B.C. 2002, c. 40 had assigned her right to seek further assistance from Mr. Graydon to the Minister responsible for the administration of that Act. When Mr. Graydon's application came before the Provincial Court, it was counsel for the Minister who acted on Ms. Michel's behalf.
- [8] Mr. Graydon's application was resolved through a consent order issued by Judge Woods of the Provincial Court on May 15, 2012 (the "2012 Order"). The 2012 Order was specified to be an interim order. It reads in relevant part as follows:

THIS COURT ORDERS that the obligation of SEAN GRAYDON to pay child support for the child, [A.G.] born [December 1991], terminates as of April 30, 2012;

THIS COURT FURTHER ORDERS that this Order is made on a without prejudice basis to any claims for retroactive child support that may be pursued by the Respondent, DANELLE MICHEL, as against the Respondent, SEAN GRAYDON

- [9] The first paragraph of this order is reasonably clear. After April 30, 2012, Mr. Graydon had no further obligation to make child support payments in respect of A.G. The second paragraph is less clear, but on its face it purports to preserve whatever right Ms. Michel had to make a claim for retroactive child support payments notwithstanding the termination of the ongoing payment requirements. The assignment of maintenance rights to the Minister is not explicitly addressed in the 2012 Order.
- [10] The legislative scheme requiring persons receiving income assistance to assign their maintenance rights was repealed in 2015.
- [11] On January 23, 2015, Ms. Michel filed an application for an order in these terms:
- An order that the order made March 29, 2001 as amended by the order of Judge Woods made on May 15, 2012 be varied to provide that Sean Graydon pay Danelle Michel increased child support retroactively during the period from April 2009 to April 2012.
- [12] The statutory basis under the FLA for Ms. Michel's application was s. 152 of the FLA, which reads in relevant part 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.
- [13] Subsequently, Ms. Michel obtained an order permitting her to amend her application to request retroactive child support back to 2001.
- [14] Mr. Graydon contested the jurisdiction of the Court to make such an order, arguing that "[A.G.] for some time has not been a child of the marriage."

The Trial Decision

- [15] The application for retroactive child support payments was heard in the Provincial Court on September 26, 2016. By this time, A.G. was 24 years of age.
- [16] The trial judge heard evidence from the parties and concluded that the 2012 Order had been an "interim order which permitted Ms. Michel to be able to apply for retroactive child support." He reviewed Mr. Graydon's financial information and concluded that with the exception of the year 2004, Mr. Graydon received income materially in excess of the \$39,852 used as Guidelines income for the 2001 Order.
- [17] He then reviewed the four factors relevant to making a retroactive support order as set out in *D.B.S. v. S.R.G.*, 2006 SCC 37. First, he concluded that having in mind the assignment of Ms. Michel's maintenance rights to the Minister and other evidence he had heard, Ms. Michel had "not unreasonably delayed bringing her application for retroactive child support in January 2015."

- [18] Second, he considered Mr. Graydon's conduct, pointed out that Mr. Graydon had to his credit made the support payments required under the 2001 Order, but also had profited by not paying adequate child support over the 12 years in which the 2001 Order had been in effect.
- [19] Third, he considered the circumstances of A.G. and observed that she "lived in poverty for many years and may not have had to if Mr. Graydon had paid child support in accordance with his annual income as it fluctuated."
- [20] Finally, he considered whether a retroactive order would impose hardship on Mr. Graydon and concluded on the evidence he had heard that it would not. Accordingly, the trial judge made a retroactive order, but he did so not for the three years Ms. Michel had originally requested, but for the full 12 years the 2001 Order had been in effect. The trial judge commented that he considered Mr. Graydon had been put on notice in 2001 by the delivery of a draft separation agreement in which Ms. Michel had proposed that there be an annual review of the support amount.
- [21] The result was an order that Mr. Graydon pay an additional \$23,000 in retroactive child support payments stretching back to the 2001 Order. Mr. Graydon appealed to the Supreme Court of British Columbia.

The Supreme Court Appeal Decision

- [22] On appeal, the central issue was whether the Court had the jurisdiction to make the retroactive child support award in circumstances where the child was no longer a "child" within the meaning of the FLA at the time the application was made. The Supreme Court appeal judge held that the Court did not have jurisdiction to make a retroactive child support order in those circumstances and allowed the appeal. She came to this conclusion in the following way.
- [23] First, she analysed the D.B.S. judgment that had been considered briefly by the trial judge and set out paras. 88 and 89 of that judgment:
- [88] The situation under the Divorce Act is more complex. Under s. 15.1(1), an order may be made that requires a parent to pay "for the support of any or all children of the marriage". The term "child of the marriage" is defined in s. 2(1) as
- a child of two spouses or former spouses who, at the material time,
- (a) is under the age of majority and who has not withdrawn from their charge, or
 - (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

The question then arises when the "material time" is for retroactive child support awards. If the "material time" is the time of the application, a retroactive child support award will only be available so long as the child in question is a "child of the marriage" when the application is made. On the other hand, if the "material time" is the time to which the support order would correspond, a court would be able to make a retroactive award so long as the child in question was a "child of the marriage" when increased support should have been due.

[89] In their analysis of the Guidelines, J. D. Payne and M. A. Payne conclude that the "material time" is the time of the application: *Child Support Guidelines in Canada* (2004), at p. 44. I would agree. While the determination of whether persons stand "in the place of ... parent[s]" is to be examined with regard to a past time, i.e., the time when the family functioned as a unit, this is because a textual and purposive analysis of the Divorce Act leads to this conclusion; but the same cannot be said about the "material time" for child support applications: see *Chartier v. Chartier*, [1999] 1 S.C.R. 242, at paras. 33-37. An adult, i.e., one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made. This is true, whether or not this adult should have received greater amounts of child support earlier in his/her life. Child support is for children of the marriage, not adults who used to have that status.

[Emphasis added by the Supreme Court appeal judge.]

[24] Second, the Supreme Court appeal judge pointed out that this Court had stated that the principles articulated in *D.B.S.* applied to the analogous Family Relations Act (since repealed).

[25] Finally, she addressed the application of the *D.B.S.* principles to the current Family Law Act and commented:

[62] Although s. 150 of the FLA does not restrict the date for which the court may order child support and s. 152 permits the court to make retroactive orders, this passage [in *Brown v. Kucher*, 2015 BCSC 1258] does not address the restriction that the child for whom support is being sought must still be a "child" at the time of the application in order to have standing.

[63] With all due respect to the learned trial judge, I find that this is an error in law. Section 150 of the FLA does not provide grounds for ordering support for a person who is not a child of the marriage.

[26] The Supreme Court appeal judge then considered the "without prejudice" language in Judge Woods' 2012 Order and concluded that it did not affect her conclusion as to the jurisdiction of the Court:

[77] The inclusion of the words "without prejudice" in Judge Woods' order did not mean that there was no time limit for the respondent to bring her application for retroactive child support. It meant that the issue of retroactive child support had not been determined by Judge Woods and so if she brought the application it would not be dismissed on a *res judicata* basis. It did not mean that she had leave to bring a retroactive child support

application after Alyssa ceased to be a child of the marriage. Her mentioning retroactive child support at the hearing before Judge Woods was not an application. It was effective notice but it was not an application. Effective notice is not sufficient to preserve a limitation period.

[27] Ms. Michel has appealed this judgment in an effort to restore her retroactive judgment.

Analysis

[28] The central question is whether the trial judge had the jurisdiction to order a retroactive variation of the child support order notwithstanding that at the time of the application, A.G., who was the subject of the child support order, no longer met the definition of "child" in the Family Law Act.

[29] This jurisdictional question has been the subject of much debate throughout Canada, with different appellate courts coming to different answers to the question. With this in mind, this Court recently sat as a five-member division to consider the issue. In *Dring v. Gheyle*, this Court decided by a majority that the Family Law Act did not confer jurisdiction on a judge to retroactively vary child support orders where the formal legal procedure triggering jurisdiction to vary is first commenced after the subject of the order has ceased to be a child under the statutory definition.

[30] That being so, the judgment of the Supreme Court appeal judge is correct, and this appeal must be dismissed.

"The Honourable Mr. Justice Willcock"

"The Honourable Mr. Justice Savage"

"The Honourable Mr. Justice Hunter"

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