

CANADA / JUDGMENT

Hinz v. Davey

2021 BCSC 1699

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Supreme Court of British Columbia

DECIDED

27 August 2021

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2021 BCSC 1699 Hinz v. Davey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hinz v. Davey,

2021 BCSC 1699

Date: 20210827

Docket: E161272

Registry: Vancouver

Between:

Paulette Ann Hinz

Claimant

And

Matthew Robert Davey

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

In Chambers

Counsel for Claimant:

K. Sugiyama

Appearing on his own behalf:

Matthew Davey

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 20, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 27, 2021

- [1] The parties began a common law relationship in 2011 and have a daughter who is now 9. In 2018, they entered into a separation agreement that required the respondent, Mr. Davey, to pay child and spousal support, but he says the business that provided his income at the time has since been destroyed by the global COVID-19 pandemic. He seeks a new order for child support at a much reduced level, retroactive variation of the previous agreement and cancellation of arrears.
- [2] The separation agreement, dated September 6, 2018, provided for combined spousal and child support of \$10,000 a month, with that amount to be reviewed after three years. That three year period is now expiring. The claimant, Ms. Hinz, is not asking for continued payments at that level or for continued spousal support. However, she seeks ongoing child support of \$1,590 a month. That figure is based on the Federal Child Support Guidelines, SOR/97-175 [Guidelines] for a payor parent with an annual income of \$180,000. Mr. Davey says his current income is in fact only \$27,415 and he agrees to pay only \$250 a month.
- [3] Mr. Davey owned an operated a company based in New Zealand that provided online ticketing and event management in that country and in Australia. For most of the relationship, the family lived primarily in British Columbia, although Mr. Davey travelled frequently. Mr. Davey now lives in Australia while Ms. Hinz and their daughter live in Nanaimo, B.C.
- [4] Mr. Davey says that at the time the separation agreement was signed, his business was doing well and he was drawing an annual salary equivalent to \$180,000 CDN. He made the agreed upon \$10,000 monthly support payments until March, 2020.
- [5] However, he says that with the onset of the COVID-19 pandemic in March, 2020, the company's revenue disappeared, except for a small amount of emergency support provided by the government of New Zealand. Events for which it had previously sold tickets were cancelled, requiring refunds. At that point, Mr. Davey says his income was reduced to the annual equivalent of approximately \$27,500 CDN.

- [6] In June, 2020, a client of the company obtained a New Zealand Court order freezing its bank accounts. In August 2020, the company went into receivership and Mr. Davey says the receiver-manager ultimately terminated his employment. In October, 2020, the New Zealand Court appointed liquidators. Mr. Davey says he is also facing a claim from a bank of more than \$3 million on a personal guarantee.
- [7] Mr. Davey says that, when the pandemic struck, he was no longer able to pay the \$10,000 monthly support payments required by the separation agreement. He paid \$5,000 in April, 2020, \$3,500 in May and \$1,500 in June. There have been no payments since and arrears are now more than \$140,000.
- [8] Mr. Davey says he has continued to earn about \$27,500 CDN per year by "picking up small pieces of work where I can find them" and expects to file a New Zealand tax return, not yet due, showing income in that amount for the fiscal year ending to March 31, 2021. Australia, where he currently lives, has closed its borders due to the pandemic.
- [9] The issues are therefore:
- 1) What amount of child support should Mr. Davey now pay?
 - 2) Should reduced child support be made retroactive and, if so, to what date?
 - 3) Should arrears be cancelled or reduced?
- [10] There are many statements in the jurisprudence to the effect that courts should be reluctant to vary agreements between parties, which are presumed to reflect their intentions and expectations, including mechanisms to reflect a change of circumstances. *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 79; *Sidhu v. Chima* 2020 BCSC 768 at para. 42. However, parties cannot be presumed to have anticipated or provided for the possibility of a global pandemic and its associated economic consequences.
- [11] I am satisfied, based on the evidence put forward by Mr. Davey, that his business was in fact destroyed by the pandemic with an accompanying drastic reduction in his personal income. That is a material change of circumstances that the parties could not have anticipated or planned for.
- [12] I also find that Mr. Davey, based on his experience and previous record of success, will likely be able to increase his income from its current low level, either through a new business venture or through employment. However, I find it would be unreasonable, in the current circumstances, to expect him to have yet done so or to assume he can do so immediately. There is no evidence on which to find that he is intentionally under-employed or unemployed within the meaning of s. 19 (1)(a) of the Guidelines and no basis on which to impute income at his former annual level of \$180,000.
- [13] The court's jurisdiction to vary an agreement for child support is found in s. 148 (3) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] which reads:

(3) On application by a party, the court may set aside or replace with an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150.

[14] One of the matters set out in s. 150 is that child support must be determined in accordance with the Guidelines.

[15] The language of s. 148(3) is different from s. 152(1), which deals with the court's jurisdiction to vary a child support order. That section reads:

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

[16] The Guidelines are based on the principle that the family as a whole -- including the child -- will share the rising and falling fortunes of the payor parent, just as they would have before the separation. Because child support is tied to payor income, which may fluctuate, a child support order or agreement reflects a snapshot in time and may periodically need to be changed to be brought in line with financial realities. *Colucci v. Colucci*, 2021 SCC 24 at para. 28:

[17] Although these parties have a separation agreement that provided for spousal and child support of \$10,000 a month, the agreement states:

3.1 The parties agree that the basic monthly child support and spousal support for the next three year period will be as per paragraph 1.4 after which time it will be reviewable by either party.

[18] That three year period expires in September, 2021, and the agreement is silent on the amount of support after that, other than to make it reviewable. In relation to the current and ongoing level of child support, this application is really in the nature of an original application for child support rather than one for variation of an agreement. The issue of variation only becomes relevant to the question of retroactivity, which will be discussed below.

[19] I have found that Mr. Davey's income has been drastically reduced by the failure of his business a direct result of the pandemic. I accept that his income, for the moment, is limited to the approximate annual amount of approximately \$27,500.

[20] However, he is making monthly loan payments of \$1,138 to a Canadian bank for a vehicle currently in storage in Victoria, B.C. He is also making monthly payments totalling \$442 to two storage companies in Victoria, a substantial portion of which presumably relates to that vehicle.

- [21] Mr. Davey gives no evidence of any plans to resume living in British Columbia or any prospect of that personal property being moved to Australia. It has been his choice to continue to incur those expenses rather than dispose of property that he has no immediate ability to use. He cannot be permitted to give those expenses priority over his obligations to his child.
- [22] I therefore add those payments, totalling \$1,580 per month, to his Guidelines income. When that amount is added, his annual guideline income is \$46,460. The resulting monthly payment required by the guidelines is \$437 and I order Mr. Davey to pay that amount beginning September 1, 2021.
- [23] Mr. Davey will provide Ms. Hinz with a copy of his New Zealand tax return when it is filed and all future tax returns filed in any country within 30 days of their filing. He will also advise Ms. Hinz, at least once every six months, of efforts he is making to find employment or to otherwise increase his income, with any supporting documentation that exists.
- [24] Mr. Davey must understand that, in the absence of diligent efforts on his part, Ms. Hinz may at some point be able to ask the court to impute a higher income to him. He should also understand that, although his preference is to build a new business, he may not be able to turn down reasonable employment opportunities without risking imputation of that potential employment income.
- [25] Mr. Davey also seeks a retroactive decrease in the support he was required to pay under the separation agreement. The matters the court must consider on such an application were recently summarized by the Supreme Court of Canada in *Colucci* at para. 113.
- (1) The payor must meet the threshold of establishing a past material change in circumstances. The onus is on the payor to show a material decrease in income that has some degree of continuity, and that is real and not one of choice.
 - (2) Once a material change in circumstances is established, a presumption arises in favour of retroactively decreasing child support to the date the payor gave the recipient effective notice, up to three years before formal notice of the application to vary. In the decrease context, effective notice requires clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change and allow the recipient parent to meaningfully assess the situation.
 - (3) Where no effective notice is given by the payor parent, child support should generally be varied back to the date of formal notice, or a later date where the payor has delayed making complete disclosure in the course of the proceedings.
 - (4) The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The D.B.S. factors (adapted to the decrease context) guide this exercise of discretion. Those factors are: (i) whether the payor had an understandable reason for the delay in seeking a decrease; (ii) the payor's conduct; (iii) the child's circumstances; and (iv) hardship to the payor if support is not decreased (viewed in context

of hardship to the child and recipient if support is decreased). The payor's efforts to pay what they can and to communicate and disclose income information on an ongoing basis will often be a key consideration under the factor of payor conduct.

- (5) Finally, once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the Guidelines.

[26] Ms. Hinz says that any retroactive reduction can only be to April, 2021, which she says was when she received effective notice. Mr. Davey says Ms. Hinz was made generally aware of his collapsing financial position from the outset of the pandemic in March, 2020 and he relies on that as the date of effective notice.

[27] However, Ms. Hinz also argues that the court has no jurisdiction under the FLA to retroactively vary an agreement, as opposed to an order. That arises from the different wording of ss. 148(3) and 152(1). The latter section, dealing with orders, specifically refers to retroactivity, while the former, dealing with agreements, does not. In *R.M. v. N.M.*, 2014 BCSC 1755, Justice Armstrong said at paras 146 and 149-150.

[146] Nothing in s. 148 or s. 150 authorizes the Court to prospectively or retroactively change a child support order. Section 152 allows the Court to make changes to orders retroactively but not to agreements about child support. The same option is not available in s. 148 dealing with agreements about child support.

[149] The Agreement is an agreement under s. 148 of the Act. It was made after separation and can be replaced if the Court determines that it would make a different order on consideration of the matters as set out in s. 150.

[150] I find that the order can be made under s. 148 on a prospective basis only; the Court does not have the power to retroactively replace part of the Agreement with respect to child support.

[emphasis in original]

[28] Those statements were cited and agreed to by Justice G.P. Weatherill in *Chutter v. Chutter*, 2016 BCSC 2407 at paras. 93-94.

[29] Notwithstanding the unforeseeable change of circumstances that occurred in this case, I am bound by this court's previous interpretation of the relevant statutory provisions: *Hansard Spruce Mills (Re)*, [1954] 4 D.L.R. 590 (B.C.S.C.). I therefore find that the agreement cannot be varied retroactively and therefore do not need to deal with the question of effective notice.

[30] Mr. Davey's application to cancel or reduce arrears is distinct from his application for retroactive variation of the agreement but follows from the dismissal of that application. The court in *Colucci* said at para. 133

133 Although applications for rescission raise different considerations than those for a retroactive decrease of support based on a change in circumstances, in practice, both will frequently arise together. While a payor may simply ask for accumulated arrears to be forgiven on the basis of a current and ongoing inability to pay without challenging the accuracy of the underlying order, rescission applications will normally arise when the request to retroactively decrease arrears is unsuccessful or results in only a partial reduction of the arrears

[31] At para. 138 of Colucci, the court confirmed a long line of authorities stating a presumption against cancellation of arrears or any part of them.

138 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. Present inability to pay does not, in itself, foreclose the prospect of future ability to pay, although it may justify a temporary suspension of arrears. This presumption ensures rescission is a last resort available only where suspension or other creative payment options are inadequate to address the prejudice to the payor. It also encourages payors to keep up with their support obligations rather than allowing arrears to accumulate in the hopes that the courts will grant relief if the amount becomes sufficiently large. Arrears are a "valid debt that must be paid, similar to any other financial obligation", regardless of whether the quantum is significant.

[Emphasis added, citations omitted]

[32] I am satisfied that Mr. Davey is currently unable to pay the arrears or any portion of them and that this is a proper case for temporary suspension of their enforcement. But I cannot find on the present evidence that he will never be able to pay. Given the amount of arrears and the circumstances under which they accrued, this may ultimately be one of the rare cases where cancellation or substantial reduction becomes appropriate, but that assessment will only be possible when Mr. Davey's future and long-term financial prospects become clearer.

[33] In summary, I order:

- Mr. Davey will pay child support of \$437 per month, commencing September 1, 2021.
- Mr. Davey will provide Ms. Hinz with updated financial and other information as described in para. 23 above.
- The application for retroactive reduction of support payable under the September, 2018, agreement is dismissed.
- The application for cancellation of arrears is dismissed, without prejudice to future applications.
- Enforcement and collection of arrears is suspended. The suspension will remain in force for one year, unless extended by further order.
- In view of the divided success, each party will bear their own costs.

[34] At the hearing of this application, I also ordered that Mr. Davey be given three opportunities a week for video communication with the child. The parties will have liberty to apply if they are unable to agree on a schedule.

"N. Smith, J"

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