

CANADA / JUDGMENT

Kelly v. Martel

2022 BCSC 756

COURT

Supreme Court of British Columbia

DECIDED

26 April 2022

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2022 BCSC 756 Kelly v. Martel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kelly v. Martel,

2022 BCSC 756

Date: 20220426

Docket: E32077

Registry: Vernon

Between:

Robyn Maureen Kelly

Claimant

And

Dallas John Martel

Respondent

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment

The Claimant, appearing on her own behalf:

R. Kelly

Counsel for the Respondent:

R. Muto

Place and Date of Trial:

Vernon, B.C.

April 20, 2022

Place and Date of Judgment:

Vernon, B.C.

April 26, 2022

I. Introduction

- [1] The respondent, Dallas Martel, applies for retroactive reduction or cancellation of arrears of child support payable pursuant to an order of the Supreme Court made April 2, 2003 by Master Groves, as he then was, at a judicial case conference (the "Groves Order").
- [2] The notice of application was filed with the court February 8, 2018, more than four years ago.
- [3] The application was heard on March 5, 2018 by Justice G.P. Weatherill. Weatherill J. made an order that, as I understand it, was intended to allow Mr. Martel to continue to have a driver's license. Otherwise, he adjourned the application. According to Mr. Martel, the reason for the adjournment was to give him an opportunity to obtain medical evidence that would support his application.
- [4] Obtaining admissible medical evidence proved difficult. Eventually, Mr. Martel obtained a report from a psychiatrist, Dr. K.W. Stevenson, who has been treating him since July 2018.
- [5] The matter came before me as a one-day trial. The only witnesses were Mr. Martel, Ms. Kelly, and Dr. Stevenson.

II. Background Facts

- [6] The parties commenced a marriage-like relationship in June 1993. They have two children together, Jordan, born in 1996, and Taylor, born in 1999. Their children are now 25 and 22 years of age, respectively.
- [7] They separated October 15, 2002. These proceedings were commenced under the then applicable legislation, the Family Relations Act, R.S.B.C. 1996, c. 128, on February 18, 2003.
- [8] The Groves Order required that Mr. Martel pay \$816 per month for child support, based upon an income of \$60,000 pursuant to the Federal Child Support Guidelines, SOR 97-175 [Guidelines]. The order also provided for payment of \$120 per month for additional expenses, consisting of daycare costs for the two children, who were then six and three years of age.

- [9] At the time, Mr. Martel was working in Northern Alberta as a pipefitter. He qualified as a journeyman plumber and gas fitter in the 1990s.
- [10] Mr. Martel soon began defaulting on payments owing pursuant to the Groves Order. The claimant, Ms. Kelly, registered with the Family Maintenance Enforcement Program ("FMEP") in 2003.
- [11] Proceedings were commenced in the Provincial Court to enforce the child support order. On June 29, 2012, the Honourable Judge McKimm made an order that "pending any application to vary the arrears", the arrears of maintenance were fixed at \$99,043.48 as of June 28, 2012. The court also ordered that the arrears be retired by payment of \$184 per month commencing July 1, 2012. That payment was in addition to the existing obligation to pay \$816 per month pursuant to the Groves Order.
- [12] I observe that at \$184 per month, payment of the arrears would take about 45 years, with no interest. I infer that the amount was set with some reference to the court's assessment of Mr. Martel's ability to pay.
- [13] The order also provided:
- This court further orders that pursuant to Section 21(1)(b) of the Family Maintenance Enforcement Act, should Dallas John Martel default in payments as set out, he shall be imprisoned for a period of one day, for each default, with time to be served consecutively.
- [14] According to FMEP, as of December 14, 2021, Mr. Martel had a balance owing of \$140,173.45, including interest of \$33,990.66 and enforcement fees of \$3,200.
- [15] Counsel for Mr. Martel advises me that the Director of Maintenance Enforcement is aware of this proceeding. The Provincial Court enforcement proceeding is in abeyance, pending the outcome of this matter.
- [16] FMEP recognized some changes in Mr. Martel's obligations over time. The daycare expense discontinued, and the children reached the age of majority in September 2015 and July 2018, respectively.
- [17] According to Mr. Martel, after the relationship ended in 2002, he was addicted to crack cocaine, which affected his ability to work. He was involved in criminal activity in order to pay for drugs. He entered a drug rehabilitation program in 2005, but relapsed after six months.
- [18] Mr. Martel's evidence about dates was notably vague and unreliable.
- [19] At some point in time, he returned to Vernon. Since then, he has worked as a plumber or gasfitter at times. At other times he was incarcerated for various criminal offences.

- [20] In 2016, he sustained a back injury at work. He has been unable to return to work in the skilled plumbing and gas fitting work that he is qualified for. Since 2019, his income has been limited to government assistance, through the Persons with Disabilities ("PWD") program. Currently, he receives a monthly income through government support of \$1,400. He pays \$1,000 per month to a former girlfriend, with whom he still lives, for rent, room, and board. He has no assets. He owes \$2,590 in unpaid Medical Services Plan premiums.
- [21] A note from his family doctor dated November 27, 2017 says that he is unable to return to his work in construction trades due to chronic back problems and mobility issues. The note is not admissible as an opinion.
- [22] Mr. Martel has a lengthy and substantial criminal record. He began offending as a youth. He has a juvenile record, the details of which are not in evidence.
- [23] During 1991 to 1995, when the parties were already in a common-law relationship, Mr. Martel was convicted of a number of offences. In 1991, in Vernon, he was convicted of possession of a narcotic. He was sentenced to a \$500 fine, or in the event of default, 90 days in jail. In 1991, in Kelowna, he was convicted of possession of break-in instruments and sentenced to 30 days intermittent incarceration with a period of probation. In 1992, in Slave Lake, Alberta, he was convicted of possession of stolen property (a total of 16 charges) and fraud under \$1,000. He was also convicted of possession of stolen property occurring in Edmonton. He received a six month sentence. In 1992, in Grande Cache, Alberta, he was convicted of being unlawfully at large and sentenced to 14 days. In 1995, in New Westminster, he was convicted of possession of a narcotic for the purpose of trafficking and fined \$500.
- [24] There is then a break in his criminal record. This seems to have coincided with an improvement in Mr. Martel's personal circumstances. He qualified as a journeyman during this time. His two children were born in 1996 and 1999. However, the marital relationship broke down in 2002. Mr. Martel was working in camps in northern Alberta. He returned to criminal activities and drug abuse.
- [25] He was convicted of various offences in the period from 2003 to 2006, including thefts (several charges), assaults, assault causing bodily harm, and failure to appear. Several relatively short sentences of incarceration were imposed, as well as a conditional sentence and terms of probation.
- [26] In 2008, he was convicted of robbery, taking place in Edmonton. He received a 36 month sentence, as well as shorter sentences for failure to comply with a recognizance (2 counts). He was recommitted after violating the terms of the statutory release in 2010.

- [27] In 2016, he was charged with several offences taking place in Vernon, on November 23, 2016. The offences were assault with a weapon, uttering threats, and mischief. Mr. Martel testified that the 2016 offences all involved an incident of what he described as "road rage" on his part. At a cannabis supply store in Vernon, he got into an altercation with another driver. He assaulted the person, damaged his vehicle's door, and keyed (scored with a key) the other vehicle.
- [28] In 2020, he was charged with theft under \$5,000 and assault. He testified that he assaulted a store clerk. He is currently on probation, which ends in July 2022.
- [29] As part of his probation, he was referred to forensic psychiatric mental health treatment. He saw Dr. Stevenson for the first time on July 24, 2018. He has continued to see Dr. Stevenson since that time. According to Dr. Stevenson, he saw Mr. Martel three or four times through the Forensic Psychiatric Services Commission, and since then, a further 17 or 20 times. He was last seen in March 2022, about a month ago.
- [30] According to Dr. Stevenson, Mr. Martel suffers from persistent depressive disorder, antisocial personality traits, cannabis use disorder, stimulant use disorder (now in remission), and possible neurocognitive disorder. In Dr. Stevenson's opinion, he is currently unemployable. He continues under Dr. Stevenson's psychiatric treatment, which involves both psychiatric medication and psychological counselling treatment.
- [31] He has three psychiatric medications prescribed for him. The medications are antidepressants. Dr. Stevenson describes the medications as "fairly aggressive". There has been some improvement in his condition, but his improvement is "not robust". He is seeing a therapist for cognitive behavioural therapy, but he has only had one in person session so far. Dr. Stevenson testified that Mr. Martel had difficulties participating in therapy sessions over Zoom during the pandemic.
- [32] Dr. Stevenson's professional opinion is set out in a brief report dated February 14, 2022, prepared at the request of his legal counsel. It is very similar to an earlier report Dr. Stevenson prepared dated January 15, 2019. The 2019 report was inadmissible as it did not contain the certification required for admission as an expert report. In his current report, Dr. Stevenson states:

Mr. Martel was first seen by this writer through Forensic Psychiatric Services at the Vernon office with his first assessment occurring on July 24, 2018. His working diagnosis is persistent depressive disorder, antisocial personality traits, cannabis use disorder, stimulant use disorder in remission, and rule out neurocognitive disorder.

At this point, it is the writer's opinion that Mr. Martel will be unable to sustain employment. He struggles with extreme instability of his mood including considerable irritability. It is noted he has had a lifelong difficulty sustaining employment; however, at present [his] capacity for tolerating stress is at an all-time low. Because of this, he is prone to extreme irritability which would preclude working with others, in my opinion. At present, there is some uncertainty as to

the reversibility of his condition. He is currently receiving medical treatment and has had only a partial response with inadequate benefits which is consistent with little change in his functioning. Based on his presentation, he is unemployed for now and for the foreseeable future. Certainly, this could change if he had a sudden positive response to medical treatment of his depressive syndrome. Investigation of a possible underlying neurocognitive disorder is ongoing.

- [33] In testimony at the trial, Dr. Stevenson states that Mr. Martel has not improved in relation to day-to-day functioning. He has substantially reduced his use of cannabis, which is positive. He is smoking cannabis products rather than using a high potency distillate product. As to the prognosis, Dr. Stevenson confirmed that the chances of significant improvement in his condition is "very low" at any point in the future. However, in rare cases, spontaneous remission of depression can occur.
- [34] As noted, the Groves Order was based upon a Guideline income for Mr. Martel of \$60,000. At the time, Ms. Kelly had a Guideline income of \$34,200 as a legal assistant. However, Mr. Martel's income was markedly reduced during the period of 2005 through 2010, with the exception of 2007. In 2009 and 2010, he was in custody and earned very little. His income during the period of 2011 through 2016 was variable, and generally less than \$60,000, except for 2012 and 2013, when he made considerably more than \$60,000. His high-water mark was 2013, when he earned approximately \$115,000. After 2013, his income was variable, and always under \$60,000. He earned very minimal incomes in 2017, 2019, 2020, and he currently has minimal income. His PWD benefits are approximately \$17,000 per annum.
- [35] He testified that he has not had any out of province vacations, and has made no substantial gifts. When I asked him where the money went that he did not pay in child support, he simply said that it was used for drugs.
- [36] Mr. Martel will be 52 years of age next month. He has no future work plans.
- [37] Child support was paid through FMEP collections over the years. FMEP records indicate that Mr. Martel paid a total of \$66,730 for the period of October 29, 2003 to December 14, 2021. However, as noted, the balance owing is \$140,173, including interest of \$33,990 and fees of \$3,200.
- [38] Ms. Kelly testified that she was the primary caregiver of the children when the parties separated. She was a legal assistant at a law firm. Her income was very modest. She had a very difficult time managing, financially.
- [39] When the parties separated, Ms. Kelly was left with family debt. She had to sell the house that the parties were living in. She had significant daycare expenses.
- [40] Due to her strained financial circumstances, she has been able to help the children very little with the cost of post-secondary education. I can infer that the children were deprived of many things over the years, due to unpaid child support.

[41] Ms. Kelly is now 54 years of age. She has been in a stable marital relationship for the past 10 years. Her husband has two adult children. Her husband's income is \$80,000-\$85,000 per year. She now earns \$65,000 a year as a qualified paralegal. She and her husband own a home in joint tenancy and a recreational property. They have a mortgage. They share household expenses between them. I do not have other evidence as to her financial circumstances.

III. Legal Principles

[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.

IV. Analysis

A. Retroactive Variation

- [50] I have no difficulty concluding that Mr. Martel has established a past material change in circumstances. I accept that he has a long-standing problem with drug addiction, notably crack cocaine, which seems to have re-emerged with force around the time of the breakup of the relationship in 2002. This coincided with a resurgence of his past criminal behaviour. His criminal behaviour was at least in part fuelled by his drug addiction.
- [51] At the same time, Mr. Martel has long-standing mental health problems. Based upon the opinion of Dr. Stevenson, there is a clear inter-relationship between Mr. Martel's mental health condition and his criminal offending behaviour. Dr. Stevenson notes "extreme instability of mood" and "extreme irritability". This fits with his more recent offending behaviours, such as the road rage incident and the assault of a store clerk.
- [52] A formal diagnosis of his mental health condition was only made fairly recently, by Dr. Stevenson, but the record indicates that his problems extended well into the past. His criminal offending behaviour resulted in significant periods of incarceration. Most notably, after the conviction for robbery arising from events in Edmonton, Alberta, in November 2008. The date of disposition is unclear to me on the record. However, Mr. Martel testified that he was in custody during 2009 and 2010. This fits with his minimal income and zero child support payments for those years.
- [53] Based upon all the evidence, a material change in circumstances occurred long ago, in 2005, when his income dropped to \$40,552.
- [54] Thereafter, as noted, Mr. Martel's income has been quite variable, but generally less than the \$60,000 set out in the Groves Order, with the exception of 2012 and 2013. It appears, then, that at times Mr. Martel has been able to sustain employment and earn a good income.
- [55] Since 2016, his difficulties have been made worse by his back injury. His work is physical in nature.
- [56] Mr. Martel gave notice long ago of an intention to apply for variation of the order, but he did not follow through. The McKimm order notes that an application to vary the arrears may be pending. This may explain the very low amount set for retirement of the arrears. Ms. Kelly confirms that in 2012, Mr. Martel was intending to bring an application to court for variation. However, he never did so, and he did not provide financial disclosure until sometime fairly recently. No exact date is in evidence.
- [57] Relatively recently, Mr. Martel qualified for legal aid assistance. Legal aid has only been available to him because of the possibility of incarceration, pursuant to the McKimm order.
- [58] Applying the Colucci framework to Mr. Martel's application under s. 152, at best, Mr. Martel's application to vary cannot extend back earlier than 2015, given that the formal notice was given in 2018.

- [59] I accept that Mr. Martel has failed to bring his application for retroactive reduction in a timely way, primarily due to his functional limitations and lack of legal representation.
- [60] A number of authorities support the proposition that drug addiction and criminality can support a material change in circumstances, and can ground arguments of unfairness, for both types of applications: see e.g., *Dunbar v. Saunders*, 2021 BCSC 193, at paras. 84-92; *Marshall v. Wallat*, 2021 BCSC 337, at para. 71; *M. (T.) v. K. (Z.)*, 2021 ABQB 588, at paras. 32, 52, and 57.
- [61] As noted, I have a discretion to depart from the presumptive date of retroactivity: Colucci, at para. 113(4) states:

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.

- [62] Counsel for Mr. Martel contends that the amount that Mr. Martel should have paid, based upon the Guidelines and his income, amounts to \$117,121. Mr. Martel paid \$62,911.91. Counsel contends, therefore, that Mr. Martel's liability for child support should be retroactively reassessed and that he should be liable, on this basis, only for the difference of \$51,206.09. However, I calculate the difference as being \$54,209.09.
- [63] Counsel's table of child support payable according to income, and the amount collected through FMEP, which I accept with some arithmetic corrections, is as follows:

Year

Annual Child Support owed, according to income:

FMEP collection:

2003

\$10,368.00

\$1,000.00

2004

\$12,084.00

\$9,730.24

2005

\$6,876.00

\$2,267.56

2006

\$2,856.00

\$0.00

2007

\$11,688.00

\$0.00

2008

\$1,608.00

\$9,057.63

2009

\$0.00

\$0.00

2010

\$2,724.00

\$0.00

2011

\$10,212.00

\$1,835.31

2012

\$16,512.00

\$12,160.91

2013

\$20,160.00

\$11,782.51

2014

\$7,212.00

\$2,516.00

2015

\$6,456.00

\$5,143.73

2016

\$4,872.00

\$4,577.08

2017

\$0.00

\$2,707.81

2018

\$3,493.00

\$133.13

2019

\$0.00

\$0.00

TOTAL

\$117,121.00

\$62,911.91

Difference = \$54,209.09

[64] Consideration of the D.B.S. factors does not allow me to extend the date of retroactivity all the way back to 2003, as Mr. Martel seeks. However, applying these factors, I would set the date of retroactivity to 2012. By then, the material change in circumstances had occurred, long before. Ms. Kelly was on notice, at least, that an application was pending. She would have known that Mr. Martel had been incarcerated at times, which affected his ability to earn income. Mr. Martel failed to bring the application at that time. I infer that Mr. Martel did not bring the application because he did not have legal representation, and he was incapable of representing himself. He has a long history of poor decision-making and bad judgment. At times, however, Mr. Martel sustained good employment and paid child support.

- [65] The income information Mr. Martel belatedly produced is very uncomplicated. He has produced income information for all relevant years extending back to 2003.
- [66] There is no possibility in this case of hidden assets or diverted funds. In fairness, given the long period of time following a material change in circumstances, a retroactive variation to approximately the time when Ms. Kelly knew an application was pending, although not filed at that time, is fair and reasonable.
- [67] However, this reduces the arrears only modestly, because the largest part the arrears accumulated prior to 2012. The accumulated arrears from 2012 to 2018 are \$19,683.83.
- [68] According to the FMEP figures, the principal amount due, not including interest and fees, is \$102,983. If the principal amount is retroactively reduced by \$19,683, the net amount is \$83,300, approximately. Adding in a rough allowance for interest, the amount due for principal and interest, not including fees, would be \$105,000.

B. Cancellation - Gross Unfairness

- [69] Because his application for retroactive recalculation has only limited application, Mr. Martel's application must primarily be decided as an application for rescission, pursuant to s. 174 of the FLA.
- [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.
- [71] I have already indicated that a material change of circumstances occurred, long ago.
- [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.
- [73] The evidence establishes that Mr. Martel cannot pay presently. He suffers from serious psychiatric illness and a significant physical condition that interferes with his ability to do physical work, which is the work he is suited to do. Dr. Stevenson opines that he is unemployable from a psychiatric point of view. Mr. Martel qualifies for PWD benefits. I can infer from this that he met the application standards for that designation.
- [74] His only income is through PWD. It is minimal, and barely covers his expenses. As noted, he has no assets. He has some debts. He will not inherit anything. He says that he cannot pay, and therefore will go to prison if so ordered in the provincial court action.
- [75] The question is whether he has met the standard of establishing gross unfairness, and if so, what the remedy should be.

- [76] Mr. Martel was deemed morally responsible for his criminal activities, and was punished accordingly. It may be said that even though he was addicted to drugs at the time, he retained some ability to control his behaviour. He attempted treatment. At times, his condition improved. At times, he was capable of working and earning a good income. Given these considerations, it may be said that it would not be grossly unfair for Mr. Martel to be held accountable for his child support obligations, in full.
- [77] On the other hand, Mr. Martel did not freely choose to become addicted to drugs or to commit crimes, nor to have mental and physical health problems. These are the substantial reasons for his failure to pay child support. He did not choose to become financially destitute, as he now is.
- [78] Fairness also entails considering the circumstances of Ms. Kelly and the children. Ms. Kelly was forced to struggle financially for many years. The children suffered from the loss of the financial support they ought to have had.
- [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.
- [80] The statute allows the court to reduce or cancel arrears. In my view, the arrears should not be entirely cancelled. Cancellation is a last resort. Some possibility remains that, with treatment and with sincere efforts on his part, Mr. Martel could still pay at least a substantial portion of the child support that he ought to have paid.
- [81] Although Dr. Stevenson's prognosis is very negative, his opinion allows some possibility that Mr. Martel could recover. At just under 52 years of age, he remains young enough to work. Some degree of recovery would allow him to earn some income, although I accept that he cannot earn what he did in the past as a journeyman plumber.
- [82] Colucci endorses creative payment options or temporary suspensions in hardship cases.
- [83] I see no realistic possibility that Mr. Martel could pay the arrears, in full. Even if he becomes employable, his income earning capacity is not what it once was.
- [84] In my view it would be grossly unfair not to order cancelation of the arrears, in substantial part. The reasons for this include:
- (1) the primary reason for non-payment was Mr. Martel's involuntary, inter-related drug addiction, criminality, and mental health problems;
 - (2) Mr. Martel's failure to bring a timely application for variation was in part for the same reasons, and because he had no legal representation until he qualified for legal aid relatively recently;
 - (3) the material change in circumstances occurred long ago;

- (4) Mr. Martel did not completely fail or refuse to pay;
- (5) some reduction of the arrears is justified as a retroactive variation;
- (6) he did not hide assets;
- (7) his belated financial disclosure is adequate;
- (8) he cannot pay now, and the chances that he will be able to pay anything in the future are poor;
- (9) if the amount to be paid more realistically matches what he may potentially be able to pay, there is greater chance that he will in fact pay.

[85] Therefore, I order cancelation of the arrears except for the sum of \$48,000, including interest. The fees are cancelled.

[86] In setting that amount, I have considered the amount of the adjusted debt (\$105,000), my assessment of gross unfairness, and what I consider as the upper limit of what Mr. Martel could conceivably pay, if he recovers.

[87] Payment should be suspended for three years, to give Mr. Martel an opportunity to recover and re-enter the work force. The payments should be made over time - \$800 per month seems potentially feasible.

[88] It remains open to Mr. Martel to apply to cancel arrears based upon his circumstances in the future.

V. Conclusion

[89] Accordingly, I order as follows:

1. The arrears are cancelled except as to the sum of \$48,000. The fees owing to FMEP are cancelled. Payment is suspended for three years. Accrual of interest is suspended during the same period.
2. Subject to any further order of the court, Mr. Martel will pay \$800 per month beginning May 1, 2025 and every month thereafter until the full amount is paid.

"Verhoeven J."

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