
CANADA / JUDGMENT

L.L.M. v. D.R.M.

2022 BCSC 143

COURT

Supreme Court of British Columbia

DECIDED

31 January 2022

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2022 BCSC 143 L.L.M. v. D.R.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.L.M. v. D.R.M.,

2022 BCSC 143

Date: 20220131

Docket: E1955990

Registry: Prince George

Between:

L.L.M. also known as L.L.L.

Claimant

And

D.R.M.

Respondent

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for Claimant:

V. Canil

Counsel for Respondent:

D. Lindsay

Place and Date of Trial/Hearing:

Prince George, B.C.

October 13, 2021

Place and Date of Judgment:

Prince George, B.C.

January 31, 2022

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Introduction

- [1] The claimant and the respondent are the parents of two children, J., born in June 2001, and N., born in August 1999. The parties separated in January 2016, and are not yet divorced. Master Cameron made a child support order for J. on August 7, 2019, pursuant to which the respondent is required to pay \$700.00 per month in child support for J. (the "Cameron Order"). The respondent unilaterally stopped paying child support for J. in March 2020.
- [2] There are two cross-applications before me. The respondent applies for a declaration that J. is not a child pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA]. He also applies to terminate the child support payable for J. under the Cameron Order, effective March 31, 2020. Finally, the respondent applies to have all arrears of child support accruing under the Cameron Order since March 31, 2020, be vacated. The claimant opposes all orders sought.
- [3] The claimant applies for a divorce. She applies for an order that the respondent pay her retroactive child support for both J. and N. to the date of separation. She also applies for an order setting aside the parties' separation agreement, dated November 2, 2017 (the "Separation Agreement"). Finally, the claimant applies for an order dividing the family assets, or in the alternative, that the respondent forthwith pay her the sum of \$25,000.00 promised in the Separation Agreement, in full and final settlement of the division of family assets.
- [4] The respondent took no position with respect to a divorce being granted. He opposed the other relief sought, with the exception of the alternate request for payment of \$25,000.00 under the Separation Agreement. In response to the latter position, the claimant withdrew the alternative request for \$25,000.00.

Background facts

- [5] The parties began living together in April 1996. They were married on August 19, 2000. They separated on January 25, 2016. They have two children, J. and N., who are now 20 and 22 years of age. The respondent is 54 years of age, and the claimant is 47.
- [6] The claimant is employed as a receptionist and part-time security guard. The respondent is employed as a truck driver.
- [7] The parties signed the Separation Agreement, dated November 2, 2017. The claimant says the respondent pressured her into signing the Separation Agreement, and that she believed he would kill her if she did not. The respondent denies these allegations. Under the Separation Agreement, the respondent was to pay no child or spousal support, and was to pay the claimant \$25,000.00 in settlement of all property and debts within 24 months or by December 1, 2019. That sum has not been paid.

- [8] At a judicial case conference on August 7, 2019, Master Cameron made a consent order that the respondent pay the claimant \$700.00 per month commencing September 1, 2017, for the support of J. on an interim, without prejudice basis. There has never been an order or previous application for child support for N.
- [9] The respondent unilaterally ceased paying the child support for J. payable under the Cameron Order in March 2020. The respondent ceased working for Chu Cho Logging at that time, under circumstances which are in dispute between the parties. It is not disputed that the respondent has failed to make any child support payments since that time.

Applications related to J.

Does J. remain a child of the marriage?

- [10] The respondent applies for a declaration that J. is no longer a child pursuant to the FLA. Related to this declaration, he applies to have the Cameron Order for child support terminated, and his arrears vacated. The claimant opposes all these orders.
- [11] I will deal first with the evidence related to J.'s circumstances, and then consider whether he is no longer a child. Much of the evidence relevant to this and the other issues in this case is in dispute.

Review of evidence related to J.

- [12] There does not appear to be any dispute that J. graduated from high school in June 2019.
- [13] There does not appear to be any real question that J. is currently unemployed and living with the claimant. According to the respondent, J. is now living with the claimant in Prince George. The claimant says J. lives with her and she supports him financially. J. confirms this evidence.
- [14] Beyond that, there is much in dispute. I will outline each party's view of J.'s living arrangements, education, work history, relationship with his father, and health, and make my findings below.

Living arrangements

- [15] For her part, the claimant says that both J. and N. have lived with her since the parties separated. She says she moved out of the family home with the children in February 2016. She has provided some evidence of living in rental accommodation between February 2016 and June 2017, in the form of an unsworn letter from a person who writes that the claimant lived in an apartment between those dates, and rent receipts for the months of August, November and December 2016. J. also says he and his mother and older brother moved out in February 2016.

- [16] The respondent denies this, and says that the claimant and the children continued to live with him in the family residence after the parties separated and until August 2016. He says that it was only in or about August 2016 that the claimant and the children moved into an apartment. The respondent has filed affidavits from two family friends who say that it was in late July 2016 that the claimant and the children moved out.
- [17] The claimant says that she and the children moved back in with the respondent from June to mid-September 2017. She says that situation did not work out because the respondent was threatening and aggressive to her and the children, and physically abusive to J. The respondent denies abusing J.
- [18] For his part, the respondent says the parties reconciled during December 2016, and that the claimant and the children moved back into his residence in or about April 2017. He agrees they left in September 2017. However, the respondent says that while the claimant and N. moved to Kamloops at that time, J. asked to stay with him and did so initially. For his part, J. says that they moved back in with the respondent in June 2017 and that they left in mid-September. He says he never moved in with his dad again after that.
- [19] The respondent says that in September 2017, he told J. that he had to go to school and get an after-school job, which he did, getting a job as dishwasher and cooks' helper. The respondent was working in a camp up north, and when he got home, he found out J. had missed a few days of school. As a result, he told J. that if he wasn't going to attend school regularly, he would send him to live with his mother. After a recurrence, the respondent asked the claimant to come and get J., which she did. The respondent says that J. started to live with the claimant on October 20, 2017, and commenced school in the city she was living in on October 24, 2017. The respondent has filed an affidavit from a neighbour who says she is aware that the claimant and N. moved out in September 2017 but that J. stayed behind for some period of time before moving out. He also provides school records which indicate the new school requested J.'s records on October 23, 2017, and that he began attending the new school on October 24, 2017.

J.'s post-secondary schooling and work

- [20] The respondent says he is not aware of J. being in enrolled in any kind of post-secondary education since graduating high school in the spring of 2019. In his affidavit, J. explains that he graduated high school in June 2019, but he had been attending a welding course since January 28, 2019, which he finished on August 16, 2019. The claimant says that J. attended a security guard training course in October 2020. J. explains that his doctor told him he should no longer do welding or heavy lifting due to his scoliosis, an issue I return to below, and that it was after this that he took the security guard course.

- [21] According to the respondent, J. has worked at a few restaurants and a welding company since he graduated from high school. The respondent says that shortly after the Cameron Order was made, J. moved in with him on a full-time basis between November 1, 2019 and the end of March 2020, for work purposes.
- [22] He says that J. told him in the spring of 2020 that he had started working at CBS Truck Parts as a parts person, but the respondent did not know if that position was full-time or part-time or how much J. was earning.
- [23] The claimant says that J. was hired part-time by Monster in November 2019. He continued to live with her, and travelled for work. She denies that he lived full-time with the respondent after September 2017. According to the claimant, J. would stay at his father's a night or two before or after going to camp. She says J.'s earnings in 2018 amounted to \$7,792.97 in total. She denies the respondent supported J. financially. The respondent replies that he got J. the job at Monster, and that he lived with him between November 2019 and March 2020. For his part, J. says he stayed at his dad's place a few nights here and there in this period while working part-time at Monster. He says his dad was not usually there, and did not provide him with financial support.
- [24] The claimant says that J. could not find any work between October 2020 and February 2021, when he was hired by CBS as a forklift operator. It is not clear if this is the same CBS parts position the respondent referred to. The claimant says he had to quit that job in June 2021 due to his health problems. In his affidavit, made June 30, 2021, J. says that he worked for CBS until "recently". J. says that he had to leave that job because of his health problems.

The respondent's relationship with J.

- [25] The respondent says that his relationship with both children was quite good until the summer of 2020. That summer, J. came to spend the weekend with him at his home. According to the respondent, J. was going to come work with him to earn some money to pay off a vehicle the respondent had previously purchased for him. As the respondent tells it, J. went out the night before, and when he went to wake him up to go to work they had a big fight, with J. calling him a variety of names. The respondent left for work, telling J. that when he got home J. needed to be back at his mother's place. Since that time, the respondent says he has regularly continued to try to contact J. but he has visited on only one occasion, and only occasionally responds to his text messages.
- [26] For her part, the claimant says that a few times in the past when the respondent found out J. had quit a job or wasn't working, he would message her and denigrate J. In reply, the respondent says that J. has quit or been fired from jobs at least half a dozen times for reasons unrelated to his health, and he told him he should not quit until he has another job lined up. He admits calling J. "lazy" for refusing to work. J. has attached to his affidavit a text in which his father calls him "lazy", among other insults. J. denies that his relationship with his dad was good until September 2020, noting that he received mean and nasty texts from him prior to that.

J.'s health

- [27] J. has some health issues. According to the claimant, J. was diagnosed with scoliosis on March 9, 2019, after experiencing a year and a half of severe back pain. In his affidavit, J. confirms he was diagnosed on that date.
- [28] The claimant gives hearsay evidence that J. was told by his doctor in September 2020 that he could no longer work in welding or other jobs requiring heavy lifting. The claimant says J. is currently unemployed, unable to work because of pain, and awaiting an appointment with an orthopaedic surgeon. J. confirms in his affidavit that he is waiting to see a surgeon in Surrey.
- [29] J. has provided some evidence from his physicians. First, there is a June 6, 2019 letter from Dr. Robichaud written to whom it may concern that states J. "has a diagnosis of scoliosis with further investigations pending to determine extent of condition. Therefore, his employability is unknown at this time." Second, there is a note from Dr. Raymond dated October 2, 2020 that states J. "has been advised to leave current work for medical reasons and seek alternate employment suitable with his medical condition." Third, there is a note to whom it may concern from Dr. Desrosiers dated March 29, 2021, that states J. has been referred to a specialist, and is awaiting that appointment.
- [30] Finally, there is a longer document from Dr. Desrosiers, dated June 28, 2021. Also written to whom it may concern, Dr. Desrosiers writes that he has been asked to write a summary letter. He states he is J.'s attending family physician. He outlines J.'s past medical history as including anxiety, x-ray confirmed levoscoliosis and chronic pain, presumed to be secondary to that condition. As of the date of the letter, J. was not taking any medications, although he had in the past. There were pending investigations including lab work for inflammatory arthropathy, an echocardiogram, and an aortic ultrasound. J.'s issues at the time included back pain, and J. had reported he was unable to work because of that pain. His complaints also included chest pain. Dr. Desrosiers noted that it was unclear whether these issues were separate, or the result of an underlying diagnosis. Attached to this document was a note dated June 29, 2021, from Dr. Desrosiers, written to whom it may concern, in which he stated that J. "will be unable to work until further notice due to medical concerns" under investigation.
- [31] The respondent says in response that J. is capable of working and notes there are many jobs that do not require heavy lifting. He says he is unaware of any medical reason J. could not work as a forklift operator. He does acknowledge that J. has scoliosis and would have difficulty with heavy lifting. But the respondent says he is aware that J. continues to engage in recreational activities such as quading and dirt bike riding. He does not accept J. is incapable of being employed.

Is J. still a "child"?

- [32] Section 146 of the FLA defines "child" as including "a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of his or her parents or guardians". J. turned 19 in June 2020. I must determine whether he has been unable because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of his parents since turning 19.
- [33] In *Dring v. Gheyle*, 2018 BCCA 435 [Dring], Mr. Justice Goepel summarized the law relevant to this question as follows:
- [49] Once a child of the relationship reaches the age of majority, the presumption is that the child is no longer a "child" and child support is no longer required. At age 19, a child is an adult who, generally speaking, must support himself or herself. To remain a "child" for support purposes, the adult child must be unable to withdraw from his or her parents' charge, or unable to obtain the necessities of life because of illness, disability or another reason. Once a child reaches the age of majority, the party applying for child support bears the onus of proving that the child is still a child: *Olson v. Olson*, 2003 ABCA 56 at para. 13.
- [50] If an adult child is still living at home, "but is neither ill nor disabled nor under the effect of [another reason] by which he or she is unable to withdraw from parental charge or to obtain the necessities of life, then that adult child is no longer" a child entitled to support: *Ethier v. Skrudland*, 2011 SKCA 17 at para. 16. As noted in *Kohan v. Kohan*, 2016 ABCA 125 at para. 14, the wording "signifies something more than a mere lifestyle choice to remain dependant."

(emphasis in original)

- [34] In *M.J.L. v. G.H.*, 2015 BCPC 208, Marchand, P.C.J., as he then was, provided the following helpful overview of the principles to apply in determining whether a person remains a child under the FLA:
- [28] Child support is dealt with in Part 7 of the FLA. Within that Part, s. 147(1) imposes a duty on parents to provide support for their children and s. 146 defines a "child" to include "a person who is 19 years of age or older and unable, because of illness, disability or another reason to obtain the necessities of life or withdraw from the charge of his or her parents or guardians."
- [29] There are many cases which deal with the question of when a child who reaches the age of majority remains a child eligible for child support. Though most of the leading cases deal with the question in the context of proceedings under the Divorce Act, R.S.C. 1985, c. 3, the language is similar and the principles remain the same under the FLA. These principles include:
1. The party seeking child support for a child who has reached 19 years of age bears the onus of proving that the child is a "child" as defined by s. 146 of the FLA: *Nitchie v. Nitchie*, 2014 BCSC 468 at para. [18] and *T.A.P. v. J.T.P.*, 2014 BCSC 2265 at para. 21);

2. The definition of a "child" who is over 19 years of age in s. 146 of the FLA is disjunctive and, therefore, captures persons who are unable to withdraw from their parents' charge or obtain the necessities of life "because of illness, disability or another reason": *Briard v. Briard*, 2010 BCSC 65, *aff'd* at 2010 BCCA 431;
3. The receipt of PWD [Persons with Disability] benefits by an adult child does not absolve a family from providing financially for that child. The obligation to provide the necessities of life is case specific and should not be based on "poverty level necessities": *Lougheed v. Lougheed*, 2007 BCCA 396 at paras. 23, 25, 30 and 31;
4. Two important factors to consider in determining whether an adult child with disabilities is unable to obtain the necessities of life are the child's employability and the extent of the child's disability: *H.M.R. v. D.G.R.*, 2010 BCSC 647 at para. 33 [H.M.R.] and *T.A.P.* at para. 27;
5. The concept of being within a parent's "charge" means being in the "care", "custody" or "responsible possession" of that parent: *Briard* which may include being in the financial care of that parent: *Nitchie* at para. 17;
6. The pursuit of education qualifies as "another reason" which may cause a child who has reached 19 years of age to be unable to withdraw from the charge of his or her parents: *Nitchie* at para. 17;
7. In considering whether a child's educational pursuits justify an adult child remaining a child for purposes of child support, the following factors from *Farden v. Farden* (1993), 1993 CanLII 2570 (BC SC), 48 R.F.L. (3d) 60 (BCSC) may be helpful:
 - (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
 - (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
 - (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
 - (4) the ability of the child to contribute to his own support through part-time employment;
 - (5) the age of the child;
 - (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
 - (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
 - (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

8. The "Farden factors" are of less importance when assessing an adult child with disabilities: S.M.W. v. R.E.W., 2013 BCSC 2362 at para. 19 and T.A.P. at para. 26; and
 9. An adult child's severance of a relationship with the payor parent has reduced significance when the severance is due to the child's disability: T.A.P. at para. 34.
- [35] The evidence in this case is somewhat mixed as it relates to these issues. J. has worked since he turned 19 in June 2020, but his employment has been very spotty. On the evidence before me, I find that he worked part-time for Monster starting in November 2019. The evidence does not reveal precisely when he left that position but it may well have been in March 2020. The evidence is not clear about what work J. did between March 2020 and October 2020, although the evidence supports that he was told by his physician to leave his current work in October 2020 for medical reasons. He was likely working as a welder prior to that. In October 2020 he attended a security guard course. He was unable to find work between October 2020 and February 2021, when he obtained a part-time position with CBS. He has not worked since June 2021.
- [36] I appreciate there is no expert medical evidence before the Court, but H.M.R. at para. 33 and the cases cited therein, indicate that a person's disability for the purposes of s. 146 may be demonstrated in the absence of expert evidence.
- [37] The medical evidence before the Court, together with the claimant's and J.'s evidence, is sufficient to establish that J. was diagnosed with scoliosis in March 2019. As of June 2019, he was undergoing medical investigations, and his employability was in doubt. In October 2020, he was advised by a physician to leave his current employment, likely as a welder, and to seek suitable alternative employment. This appears to have led to him taking the security guard course. In March 2021, J. had been referred to a specialist, and was awaiting the appointment. In June 2021, J. was medically incapable of working, had a diagnosis of levoscoliosis, had symptoms of back and chest pain, and was undergoing a number of investigations.
- [38] The parties disagree about why J. has been unable to maintain steady employment. The respondent clearly believes J. is lazy and quits or is fired from jobs for reasons unrelated to his health. He thinks J. is capable of working. However, there does not appear to be any real basis for this opinion, given their limited interaction since at least March 2020. In my view, the evidence supports that J.'s difficulties maintaining employment are related, in whole or substantial part, to his health, and that he is currently incapable of working due to his ongoing health problems.
- [39] This is sufficient, in my view, to establish that J. is, at this time, unable to withdraw from the charge of his parents due to disability. J. remains a "child" under s. 146 of the FLA. I therefore deny the respondent's application for a declaration that J. is no longer a "child".

[40] As in H.M.R., the situation appears rather fluid, as medical investigations were pending at the time of hearing, and it may be that greater clarity will be obtained about J.'s diagnoses, limitations and employability in the future. I therefore direct that, unless the parties are able to agree otherwise, there be a review of J.'s status as of June 2023. If at that time the claimant continues to suggest that J. remains a child, updated information concerning J.'s employability and medical conditions should be put before the Court.

Should child support be terminated for J.?

[41] The respondent applied for an order terminating child support for J. under the Cameron Order.

[42] Under s. 147 of the FLA, each parent has an obligation to support a child. In light of my conclusion that J. remains a child unable to withdraw from his parents' charge, there is no basis upon which to terminate the Cameron Order for child support for J. I therefore deny the respondent's application for this order.

Should arrears of child support accruing since March 2020 be vacated?

[43] The respondent applies for an order that all child support accruing since March 2020 be vacated.

[44] Section 152 of the FLA gives the court jurisdiction to change, suspend or terminate a child support order, in the following terms:

- (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.

[45] Section 174 gives the court jurisdiction to cancel arrears in the following terms:

- (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.
- [46] The respondent says that he stopped paying child support when he lost his job on March 21, 2020, as a result of the Covid-19 pandemic. The respondent says he did not return to work until June 2020, when he returned to his former employer. J. turned 19 in June 2020, and the respondent was of the view that as J. had finished school and was working, he no longer had an obligation to pay child support.
- [47] The claimant says that the respondent quit his job in March 2020, while he says that he was laid off. She has provided a text message from the respondent in which he says "I'm giving my notice to chu cho on Monday morning so I'll be fine work on Friday March 20 so if I'm not working anymore the bank will not release the money so do whatever Gnight". In response, the respondent has provided a copy of his record of employment, which says he was laid off on March 21, 2020.
- [48] The order sought by the respondent was that arrears be "vacated". In submissions before me, counsel for the respondent acknowledged that there is a very high bar to cancel arrears, if the support was payable. That acknowledgment was appropriate, in light of the applicable case law. He clarified that he was not seeking to have the arrears in this case be cancelled. Rather, he was seeking an order that they were never payable in the first place after J. turned 19.
- [49] In light of my conclusion that J. remains a child, and that there is no basis to terminate the Cameron Order, it follows that there is no basis to "vacate" the arrears, as the child support was and remains payable. I therefore deny this order.

Application to set aside Separation Agreement

- [50] The claimant applies for an order setting aside the parties' Separation Agreement. She alleges the respondent had verbally and emotionally abused her for years. The respondent's father killed the respondent's mother, and the claimant says the respondent threatened to kill her, often suggesting he would do what his father had done to his mother. The claimant

alleges the respondent forced her to sign the Separation Agreement. She also asserts that the Separation Agreement is substantively unfair, as she was to receive no spousal or child support under it, and only \$25,000.00 in settlement of all property issues.

- [51] The respondent denies the allegations of abuse and death threats. He denies forcing her to sign the Separation Agreement. He does not make any specific submissions with respect to the substantive fairness of the Separation Agreement, other than to say that the claimant has not brought forth evidence to establish it is unfair.
- [52] The court has jurisdiction under s. 93 of the FLA to set aside a separation agreement:
- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
 - (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
 - (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
 - (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
 - (a) the length of time that has passed since the agreement was made;
 - (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.
- [53] In *A.K.K. v. A.S.K.*, 2021 BCSC 1602 [A.K.K.], Madam Justice Wilkinson recently summarized the analysis under s. 93 as follows:
- [48] Section 93 of the FLA is essentially a codification of the common law set out in *Miglin v. Miglin*, 2003 SCC 24; and *Rick v. Brandsema*, 2009 SCC 10, as it applies to marriage agreements.

- [49] Section 93 contemplates a two-pronged approach to determining whether to set aside an agreement: see *Asselin v. Roy*, 2013 BCSC 1681 at paras. 124-131.
- [50] The first inquiry is directed at the formation of the agreement. Under this stage the court should determine if any of the circumstances described in s. 93(3) existed when the parties entered into the Agreement. If so, the Agreement was unfairly reached.
- [51] A court may decline to set aside an agreement that was unfairly reached if the terms that the court would substitute are not substantially different than those contained in the agreement: *Y.L. v. G.L.*, 2020 BCSC 808 at para. 283.
- ...
- [53] The second stage assesses the substantive fairness of the effect of the Agreement. This involves consideration of the three factors set out in s. 93(5), for ease of reference, those being:
- (a) the length of time that has passed since the agreement was made;
 - (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.
- [54] I accept that a separation agreement could be set aside on the basis of duress such as that alleged by the claimant: *Azanchi v. Mobrhan-Shafiee*, 2021 BCCA 55 at para. 39.
- [55] The claimant's notice of application did not refer to any specific rules of the Supreme Court Family Rules [SCFR]. The respondent submitted her application had been made pursuant to the summary trial rules, and that hearsay evidence was therefore inadmissible. The claimant did not make any submissions on this point. I note that Rule 10-5(2)(c) provides that Rule 10-5(1) applies to applications to set aside or replace an agreement filed under Rule 2-1. Rule 10-5(1)(a) in turn provides that such an application is to be made under Rule 10-6. This suggests that the claimant's application was not made under the summary trial rules found in Rule 11-3. To state the obvious, it would have been preferable for the claimant's notice of application to clearly state the rules she was applying under. The same can be said of the respondent's notice of application, which did not refer to the SCFR at all.
- [56] All of that said, I am not able, on the affidavit evidence before the Court, to resolve the credibility issues raised by the parties' affidavits about the allegations of abusive and threatening behaviour by the respondent to determine if the Separation Agreement was unfairly reached. As a result, unlike the Court in *A.K.K.*, I am unable to decide the application to set aside this Separation Agreement.
- [57] In the circumstances, I consider it appropriate to direct that the application to set aside the Separation Agreement be tried under Rule 10-3(7)(d). The parties are to contact Scheduling to arrange a hearing at which I will make any directions that might be necessary with respect to the trial of this application.

Retroactive Child Support for J. and N.

[58] The claimant applies for an order that the respondent pay her retroactive child support for both J. and N. to the date of separation in 2016. This order is opposed by the respondent.

Does the Court have jurisdiction to order retroactive support for N.?

[59] There is a preliminary jurisdictional issue that must be addressed. The respondent submits the Court does not have jurisdiction to make a retroactive order for support for N. or J. The claimant submits there is no reason the Court cannot make such an order.

[60] In *Crepnjak v. Crepnjak*, 2011 BCCA 177 [Crepnjak], the Court of Appeal considered this issue in the context of similar facts to N.'s situation, in so far as the original application for support was filed after the child for whom support was sought was over the age of majority. The Court held, relying on *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.], that the court has no jurisdiction to grant a retroactive support order for a person who was not a child of the marriage at the time the application was made:

[28] More significantly, the application raised the issue of whether K.C., who was born on April 17, 1991, and therefore was over the age of majority when the application was brought in May 2010, continued to have the status of a child of the marriage under the Divorce Act. This was a threshold issue that had to be determined before the merits of the application could be considered.

[29] In order to grant an award of retroactive child support, the court must be satisfied that the child was a child of the marriage as defined by the Divorce Act at "the material time". The material time is when the application for child support is made: See *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231 at para. 89. In most instances this is not an issue for a child who is under the age of majority at the time of the application. However, where an application seeks an award of retroactive support for an adult child, the court must first determine if the adult child meets the definition of a "child of the marriage" under the Divorce Act.

[Emphasis added.]

[61] There is no suggestion that N. was a child at the time this application was filed. *Crepnjak* was decided under the Divorce Act, not the FLA. That potentially distinguishing feature aside, under *Crepnjak*, this Court has no jurisdiction to make an order for retroactive child support for N. as he was not a child at the time the application was filed.

[62] More recently, in *Dring*, the Court of Appeal returned to this issue. There, Goepel J.A., writing for the majority held:

- [97] In my respectful opinion the court does not have jurisdiction to make a statutory retroactive award unless at the date of the application the child retains the status of a child, or there has been a prior application which brings the matter under the "Henry exception". The answer to the jurisdiction question is the same regardless of whether the application is an original application or for a variation of an existing order.
- [63] Dring concerned an application under the FLA. At para. 98, the Court held that the relevant language in the FLA and the Divorce Act was aligned, and that the two statutes should be interpreted in the same way. Under Dring, this Court has no jurisdiction to make an order for retroactive support for N., as he was not a child when the application was filed, and there is not prior application to bring him within the "Henry exception".
- [64] The Supreme Court of Canada considered the question of retroactive support orders for persons who are no longer a "child" in *Michel v. Graydon*, 2020 SCC 24 [Michel]. That case was an appeal from a decision of the British Columbia Court of Appeal. The question for decision was whether a court is precluded from varying an existing child support order under the FLA after the order has expired and the beneficiary has ceased to be a "child". Justice Brown, for the majority, held at para. 9 that the FLA authorizes a court to retroactively vary a child support order, irrespective of whether the beneficiary is a "child" at the time of the application, and regardless of whether the order has expired.
- [65] In coming to this conclusion, Brown J. considered at para. 14 whether the time had come to reconsider the Court's interpretation in *D.B.S.* of "material time", as that term appears in s. 2 of the Divorce Act. He declined to do so, however, as he thought the Court would benefit from submissions on that point. The ratio of the Court's decision in *Michel* was therefore confined to the narrow question of whether the FLA authorizes variation of an existing child support order after the beneficiary ceases to be a "child".
- [66] Does the Supreme Court's decision in *Michel* alter this Court's jurisdiction to make a retroactive support order in the circumstances of this application? So far as N. is concerned, in my view, it does not. While dicta in *Michel* suggest that the time might be ripe for reconsideration of whether the court has jurisdiction, whether under the Divorce Act or the FLA, to order retroactive child support in response to an original application made for a person who is no longer a "child", the majority of the Court in *Michel* declined to undertake that reconsideration. As stated at para. 28, *Michel* stands for the proposition that "the text of s. 152 and the scheme of the FLA indicate that the Legislature authorized a court to vary any child support order, irrespective of whether the beneficiary remains a dependent child, and irrespective of whether the order continues to require payment". To that extent, *Michel* overrules *Dring*. But *Michel* does not overrule the holding in *Dring* that the Court has no jurisdiction to entertain an original application for child support under the FLA where the would-be beneficiary is no longer a "child".

[67] Bound as I am by both Michel and the aspect of Dring that has not been overturned, I find that this Court has no jurisdiction to grant an order for retroactive support for N. By contrast, given that there is an order in place with respect to J., this Court has the jurisdiction to vary the existing order. It is to that question that I now turn.

Should a retroactive child support order be made for J.?

[68] In Michel at para. 10, Brown J. provided the following helpful summary of the governing principles arising from D.B.S. with respect to child support orders, including retroactive ones:

- Child support is the right of the child, which right cannot be bargained away by the parents, and survives the breakdown of the relationship of the child's parents (para. 38);
- Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together (para. 38);
- The child support owed will vary based upon the income of the payor parent, and is not confined to furnishing the "necessities of life" (paras. 38-45);
- Retroactive awards are not truly "retroactive", since they merely hold payors to the legal obligation they always had to pay support commensurate with their income (para. 2);
- Retroactive awards are not confined to "exceptional circumstances" or "rare cases" (para. 5); and
- In determining whether to make a retroactive award, the payor parent's interest in certainty in his/her obligations must be balanced with the need for "fairness and . . . flexibility". A court should consider whether the recipient parent's delay in seeking retroactive support was reasonable in the circumstances, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail (para. 133).

[69] The parties made limited submissions with respect to the claimant's application to vary the Cameron Order to retroactively increase the support payable for J. The claimant sought only a bare declaration that retroactive support should be payable for J., and did not seek to quantify the amount of such an award. The respondent submitted that the claimant had failed to lead evidence on the four D.B.S. factors. He further submitted that any retroactive award should be limited to the shortfall between what would have been payable and the amounts actually paid by the respondent, which he itemized in his affidavit.

[70] The evidence and submissions on whether the Cameron Order should be varied to increase the support for J., and if so in what amount, were not fully developed before the Court on this application. In the circumstances, I consider it appropriate to declare that the Court has jurisdiction to make such an order for J. Should the parties be unable to agree on retroactive support for J., they may appear before me for a hearing to provide further evidence and submissions specifically directed to whether the Cameron Order should be varied, and if so, from what date and in what amount.

Divorce

[71] The claimant sought an order for divorce. The respondent did not oppose a divorce being granted. The difficulty that arises in granting this order is that there are child support arrears payable at present. According to the claimant's child support affidavit, as of June 31, 2021, there was \$7,700.00 in arrears under the Cameron Order. Further, the claimant's application to vary the Cameron Order remains outstanding.

[72] Section 11(1)(b) of the Divorce Act provides that:

11 (1) In a divorce proceeding, it is the duty of the court . . .

(b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made.

[73] In the circumstances, I am not satisfied that reasonable arrangements have been made for the support of J., who remains a child of the marriage. I therefore stay the granting of a divorce until such time as evidence has been provided to the Court that all arrears payable under the Cameron Order have been paid, and the claimant's variation application has been resolved.

Conclusion

[74] By way of summary, I have made the following orders and directions:

- a) A declaration that J. remains a "child" under s. 146 of the FLA;
- b) A direction that, unless the parties are able to agree otherwise, there be a review of J.'s status as of June 2023. If at that time the claimant continues to suggest that J. remains a child, updated information concerning J.'s employability and medical condition should be put before the Court;
- c) The respondent's application to terminate child support for J. is dismissed;
- d) The respondent's application to vacate the child support arrears under the Cameron Order is dismissed;
- e) The claimant's application to set aside the Separation Agreement is to be tried separately;
- f) A declaration that the Court has jurisdiction to retroactively vary the Cameron Order for child support for J., but the Court lacks jurisdiction to retroactively order child support for N.;
- g) A direction that a further hearing be held to determine if the Cameron Order with respect to child support for J. should be varied, and if so as of what date and in what amount;

- h) The claimant's application for a divorce is stayed pending resolution of the child support issues related to J; and
- i) The parties are to appear before me for any necessary directions related to the hearing of the application to vary child support for J. retroactively, and the trial of the application to set aside the Separation Agreement. The parties are to contact Scheduling within 30 days of the date of this decision to arrange an appearance by conference call or MS Teams for that purpose.

[75] In the circumstances, I consider it appropriate to seize myself of this matter.

[76] In my view, given that several matters raised in these applications have not been finally dealt with, costs should be dealt with after those matters have been concluded.

"Lyster J."

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Prepared on 29 October 2026 · Esheria