
CANADA / JUDGMENT

M.D.W. v. T.T.W.

2022 BCSC 770

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 770 M.D.W. v. T.T.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.D.W. v. T.T.W.,

2022 BCSC 770

Date: 20220405

Docket: E76242

Registry: Kelowna

Between:

M.D.W.

Claimant

And

T.T.W.

Respondent

Before: The Honourable Madam Justice Hardwick

Oral Reasons for Judgment

In Chambers

Appearing on her own behalf:

M.D.W.

Counsel for the Respondent:

S.T. Taylor

Place and Date of Trial/Hearing:

Kelowna, B.C.

March 22, 2022

Place and Date of Judgment:

Kelowna, B.C.

April 5, 2022

- [1] THE COURT: These are my oral reasons for judgment in respect of the application of the respondent, T.T.W., dated February 14, 2022, and the cross-application of the plaintiff, M.D.W, dated February 24, 2022. I heard both applications on March 22, 2022, and reasons for judgment were reserved briefly until this date to allow the court time to consider certain significant legal issues arising from the applications and to accommodate the schedules of counsel for the respondent, the claimant, and the court.
- [2] As these are oral reasons for judgment, I reserve my right to edit these reasons for grammar and style, to include full citations for case law referred to, and to the extent not done in these oral reasons, to include the full text of such case law or other statutes or materials cited. However, the substance of my decision will not change.

The Relief Sought by the Respondent and the Claimant

- [3] The notice of application filed by the respondent, T.T.W., on February 14, 2022, seeks the following relief:
1. Pursuant to Section 174 of the Family Law Act, an Order that any and all child support arrears prior to April 1, 2022, including any interest and penalties, accumulated under the Order pronounced on April 7, 2009, be cancelled.
 2. Pursuant to Section 14.4 of the Family Maintenance Enforcement Act, an Order that any and all default fees owed by the Applicant prior to April 1, 2022, be cancelled.
 3. Pursuant to Section 152 of the Family Law Act, an Order that paragraph 9 of the Order of April 7, 2009 be varied such that [T.T.W] shall pay \$185.00 per month, commencing April 1, 2022, for the support of his son, [L.J.W.], based on the Applicant's 2021 Guideline Income of \$22,000.00, with payments first to be paid out from the funds held in trust by FMEP, until depleted.
- [4] This relief is opposed by the claimant, M.D.W., except that she defers in some respect to the discretion of the Family Maintenance Enforcement Program with respect to the relief sought at paragraph 2 of the notice of application regarding the cancellation of default fees.
- [5] The cross-application of M.D.W. filed on February 24, 2022, seeks the following relief:

1. An Order for Special and Extraordinary Expenses for [L.J.W], born June 19, 2002.
2. An Order for the information and documents demanded by me through correspondence to Scott T. Taylor dated November 16, 2021, including [T.T.W.'s] Business Licence from 2021 and financial records relating to his company High Voltage Electric (Electronic?). [sic]
- [6] This relief is opposed by T.T.W., with the exception that he is prepared to consent to paying 50 percent of L.J.W.'s orthodontic expenses, less contributions already made, and seeks to have those payments made out of funds currently held in trust by the Family Maintenance Enforcement Program. T.T.W. is also prepared to contribute to agreed prospective s. 7 expenses for L.J.W. on a 50/50 basis, again with the funds to be paid out from the money currently held in trust by the Family Maintenance Enforcement Program at first instance.

The Amount in Issue

- [7] As a starting point of these reasons for judgment, it is important to note that the total amount of arrears owing as of the date of the hearing on March 22, 2022, was \$25,030.67. Of this, the sum of \$1,458.81 I was advised was interest, and \$1,600.00 was default fees assessed by the Family Maintenance Enforcement Program.

Background Facts

- [8] Although the application record binder was relatively modest in size, it is clear from the overall record and the circumstances that this matter has a lengthy litigation history. I will only address the key points of that factual background relevant to these two applications before me in these reasons for judgment.
- [9] T.T.W. was born in 1972 and is presently 50 years of age.
- [10] The parties began to live together in 1993. They married in September 1998, and separated in April of 2007. They were ultimately divorced pursuant to the order of Mr. Justice Rogers of this court made June 1, 2009.
- [11] There were two children of the marriage as defined by the Divorce Act at the material time. Namely, the children of the marriage at the relevant time were: J.R.W., born in March 1995, and L.J.W., born in June 2002. J.R.W. is 27 years of age. The present applications do not concern J.R.W., as there is no suggestion he continues to be a child of the marriage.
- [12] L.J.W. is 19 years of age as of the date of these reasons for judgment. Although slightly over the age of majority, it is not in dispute that L.J.W. continues to reside with M.D.W. and is engaged in full-time post-secondary studies, such that it is appropriate that basic child support should continue.
- [13] The key issue, as I will address later in these reasons, is what support is appropriate for L.J.W., both retroactively and prospectively, as well as certain s. 7 expenses for L.J.W.

Chronology

- [14] Family law proceedings were initially commenced by M.D.W. in July of 2007. Relief was sought on behalf of M.D.W. pursuant to both the Divorce Act and the Family Relations Act. The Family Relations Act being the operative provincial statute at the date of commencement, since the Family Law Act did not come into force until March of 2013. T.T.W. filed a statement of defence and counterclaim shortly thereafter in August of 2007. Again, relief in the counterclaim was sought pursuant to both the Divorce Act and the then-operative Family Relations Act.
- [15] On April 7, 2009, an interim consent order was pronounced by desk order by a master of this court. It was ultimately entered on April 15, 2009. Both parties were represented by counsel. It is a comprehensive interim order on a variety of issues. The relevant provisions regarding child support include the following:
9. The Federal Child Support Tax Guidelines shall prevail. The Defendant has returned to work as a commercial electrician. He is hopeful in 2009 that he will be able to earn approximately \$66,300.00 child support income. Commencing on March 1, 2009, the Defendant will pay the Plaintiff the sum of \$1,000.00 per month child support for the support of the Children.
 10. The parties will exchange their income tax returns on or before May 1st of each year commencing May 1, 2010 and shall automatically adjust child support according to the proper income level, taking into consideration that the Defendant is self-employed and has CCRA approved deductions available to him.
- [16] Importantly, the children are referred to as "children of the marriage" in the interim consent order, although the relevant provisions of the order referred to regarding support ultimately do not identify what statute the interim order was made pursuant to.
- [17] On the same day, a final order was pronounced, also by desk order, by a judge of this court. This final order dealt with lump-sum spousal support, the former family home and, somewhat uniquely, a confidentiality provision.
- [18] Various steps in the litigation were taken following these above-mentioned orders. These steps culminated in a trial before Mr. Justice Betton of this court in October 2011. In an order after trial made February 23, 2012, Mr. Justice Betton made, inter alia, the following orders:
1. The claimant's application for arrears of child support under the Federal Child Support Guidelines is dismissed.
 4. The claimant's application to attribute income to the respondent is dismissed.

8. The parties will exchange their income tax returns and other financial disclosure as required by the Child Support Guidelines by May 1st of each year, at which time there will be an automatic adjustment of the child support for the forthcoming year on the basis of the last years income, continuing each year until the children are no longer eligible for child support under the Child Support Guidelines with leave to apply for a variation in the absence of an agreement.
9. The claimant and the respondent will share section 7 expenses that they agree on in proportion to their Guideline incomes and in the event an agreement can't be reached, either party has liberty to apply for an order in that regard.
10. This court declares, and by consent, the Consent Order entered April 7, 2009 is confirmed as a final order, the terms of which are as follows:

"2. The parties agree, on an interim basis, that they will have joint custody and joint guardianship of the two children of the marriage, namely,

[J.R.W.], born [in March], 1995

[L.J.W.], born [in June], 2002

(hereinafter the "Children")

3. Joint guardianship of the Children will incorporate the Joyce model as follows:
 - a) The parents are to be the joint guardians of the estate of the Children;
 - b) In the event of the death of either parent, the remaining parent will be the sole guardian of the person of the Children;
 - c) The custodial parent, who has the primary responsibility for the day-to-day care of the Children, will have the obligation to advise the other parent of any matters of a significant nature affecting the Children;
 - d) The custodial parent will have the obligation to discuss with the other parent any significant decisions which have to be made concerning the Children, including significant decisions concerning the health (except emergency decisions), education, religious instructions and general welfare of the Children;
 - e) The parent who does not have custody will have the obligation to discuss the foregoing issues with the custodial parent and each parent shall have the obligation to try to reach agreement on those major decisions;
 - f) In the event that the parents cannot reach agreement with respect to any major decision, despite their best efforts, the custodial parent shall have the right to make such decision;

- g) The non-custodial parent shall have the right, under s. 32 of the Family Relations Act, to seek a review of any decision which that parent considers contrary to the best interests of the Children;
- h) Each parent will have the right to obtain information concerning the Children directly from third parties, including teachers, counselors, medical professionals and third party care givers.
4. Until further order or agreement of the parties, the Children will be in the day-to-day care of the Plaintiff.
5. The Defendant shall have access to the Children every second weekend commencing after school Friday and he will deliver the Children to their school on Monday. If there is a non-instructional day on Friday or Monday, his weekend access will be extended by one day.
6. The Defendant shall have the Children on Wednesdays from after school and will deliver them to school on Thursday mornings.
7. The parties will equally share school vacations as follows:
 - a) The first half of the Winter Break school vacation in 2009 will be the Plaintiff's and the second half will be the Defendant's, alternating each year thereafter;
 - b) The first half of Spring Break in 2009 will be the Defendant's and the second half will be the Plaintiff's, alternating each year thereafter;
 - c) The parties will equally share the summer school vacation. The parties will use best efforts to reach an agreement prior to May 1 of each year, regarding which two week block of time they wish to spend with the Children. The remaining weeks of the summer school vacation shall be alternating on a weekly basis. Starting in the summer of 2009, the Defendant will commence the summer vacation with the Children, and the following year, the Plaintiff will commence the summer vacation with the Children, alternating each year thereafter. In the event the parties cannot settle a schedule, leave is granted to seek directions from the Master on five (5) days' notice;
 - d) The Children will spend Mother's Day with the Plaintiff notwithstanding the agreement, and Father's Day with the Defendant.
9. The Federal Child Support Tax Guidelines shall prevail. The Defendant has returned to work as a commercial electrician. He is hopeful in 2009 that he will be able to earn approximately \$66,300.00 child support income. Commencing on March 1, 2009, the Defendant will pay to the Plaintiff the sum of \$1,000.00 per month child support for the support of the Children."

[19] And finally, paragraph 11:

11. This Court declares the Final Order entered April 7, 2009 is confirmed.

- [20] From March 2009 to March of 2014, T.T.W. paid child support of \$1,000 per month for J.R.W. and L.J.W. For at least the period commencing January 1, 2010, this is confirmed by the Family Maintenance Enforcement Program records attached as Exhibit "E" to T.T.W.'s affidavit sworn March 3, 2022. The parties further confirmed at the hearing that the Family Maintenance Enforcement Program record is accurate and there is no dispute that payments were made and not recorded or that payments were inaccurately recorded.
- [21] J.R.W. turned 19 in March 2014. Although no new order was made by this court, the evidence confirmed some arrangement was made with or via the Family Maintenance Enforcement Program that the amount of support would be varied to \$617.84 per month effective April 2014, to reflect that the child support was being paid for L.J.W. solely. This is again consistent with the Family Maintenance Enforcement Program record at Exhibit "E" of T.T.W.'s March 3, 2022 affidavit.
- [22] Based on these arrangements, the court concludes there were no arrears or support accruing up to April 1, 2017, and T.T.W. was in compliance with his obligation as a child support payor.
- [23] On April 2, 2017, T.T.W. was incarcerated in the State of California in the United States of America in relation to charges on two narcotic-related offences. The register of actions attached as Exhibit "D" to T.T.W.'s affidavit sworn March 3, 2022, is of less than ideal quality but it does show T.T.W. was charged with two felony offences on April 2, 2017. The first being possession of a controlled substance with intent to sell, and the second being sale or transport of a controlled substance.
- [24] T.T.W. shortly thereafter pled nolo contendere, commonly referred to as no contest, to the offence of possession of a controlled substance with intent to sell. Nolo contendere means that an accused effectively neither disputes nor admits the relevant charge. As a result of that, the charge of sale or transport of a controlled substance was dismissed as part of what the record in Exhibit "E" refers to as a "plea negotiation".
- [25] T.T.W. was then sentenced to what appears on the record before me to be five years and eight months of incarceration, after taking into account credit for time served prior to the disposition of the charges. By pleading nolo contendere, T.T.W. did not have to admit the essential elements of the offence. However, he also did not dispute them. Further, given the timing of the plea and the dismissal of the related charge, it seems a reasonable inference for this court to make that T.T.W. considered that there was a legitimate concern that he could be found guilty of at least one or both of the offences, and if that occurred, his sentence would be substantially greater. Indeed, T.T.W. effectively confirmed the latter point in explaining the nature of the nolo contendere or no contest plea to the court at the hearing.
- [26] It bears noting that these events occurred a number of years after separation and that T.T.W. was well aware of his financial obligations to L.J.W. as a dependant child at the relevant time. T.T.W., notwithstanding that obligation, chose to engage in conduct which ultimately

resulted in his incarceration in California. In this regard, even though this court cannot find in the circumstances that T.T.W. actually committed the offence for which he was incarcerated given the nature of a nolo contendere plea, this court can conclude that T.T.W. alone was responsible for the circumstances which gave rise to his incarceration.

- [27] Ultimately T.T.W. only served some approximately 35 months in custody and returned to Canada on March 10, 2020. During his incarceration, T.T.W. did make some payments towards his support obligations for L.J.W. Some were voluntary and some were by virtue of attachment processes, by the Family Maintenance Enforcement Program, as set out in Exhibit "E" of T.T.W.'s affidavit sworn March 3, 2022. It is ultimately not material to this application whether the payments were voluntary or by attachment, as T.T.W. will, in any event, receive credit for payments made during the material time.
- [28] Upon his return to Canada in March of 2020, again some payments of child support were made by T.T.W. or on his behalf. Some of these payments, T.T.W. deposes, were from monies borrowed by his father. Again, these payments are set out in Exhibit "E" of T.T.W.'s affidavit sworn March 3, 2022, and T.T.W. is receiving credit for them.
- [29] Ultimately, regardless of their voluntariness or source, the payments did not satisfy the \$617.84 per month owing and arrears accumulated. The total amount paid, and arrears owing, for the years 2017 through to and including 2022, as set out in Exhibit "E" of T.T.W.'s affidavit sworn March 3, 2022, are as follows:

Year

Total Paid

Arrears Owing (Cumulative)

2017

\$4,790.58

\$2,284.19

2018

\$4,810.20

\$5,000.44

2019

\$964.47

\$11,788.83

2020

\$3,059.53

\$16,576.01

2121

\$2,758.84

\$21,677.71

2022

\$0.00

\$22,338.98

- [30] In April of 2021, T.T.W. deposes that he began working in construction as an electrician on a self-employed basis. He has provided a Form 8 financial statement which I will return to shortly. This Form 8, along with the summary at Exhibit "F" of T.T.W.'s affidavit sworn March 3, 2022, does show that his official reported income on his Canadian tax returns since 2018 has been modest.
- [31] Despite his incarceration in 2017, his income was still approximately \$60,000 per annum and thus only modestly below that set out in the relevant court order.
- [32] In July of 2021, the Family Maintenance Enforcement Program seized all of the funds in T.T.W.'s personal bank account. The seized funds are still being held by FMEP. The total amount seized at first instance was approximately \$6,339.25. Monthly distributions of \$210 have been made to M.D.W. from those funds since seizure and so the balance held is the seized amount less those payments.
- [33] Before turning to T.T.W.'s Form 8, I will note that T.T.W. deposes at paragraph 17 of his affidavit sworn March 3, 2022, that he is steadily taking on additional work and anticipates that his income will slowly but steadily increase in 2022 and the following years.

T.T.W.'s F8

- [34] T.T.W. swore a Form 8 financial statement on January 10, 2022, although it was not filed until February 11, 2022. In it, T.T.W. deposes to having a Guideline income of only \$19,900 per annum. This is less than a person can earn based on minimum wage in the Province of British Columbia, only working 30 hours a week for 50 weeks a year. I appreciate that in the notice of application, T.T.W. proposes using an income slightly higher at \$22,000. However, the same analysis applies.
- [35] Despite his criminal record in California, T.T.W. has a skill set that enables him to earn significantly above minimum wage. I will return to this point later.

- [36] Other points of significance regarding T.T.W.'s Form 8 financial statement are that he deposes to having expenses of some \$47,752 per month despite the above income of either \$19,900 or \$22,000. This is not entirely surprising, as an income of \$19,900 or \$22,000 would put T.T.W. below the poverty line, and so some deficit between income and expenses is explainable.
- [37] What stands out is that some of T.T.W.'s expenses seem unrealistically low. By one example, he claims only \$83 per month in personal expenses and \$30 per month in health expenses. However, T.T.W. does disclose having a lease payment for a 2020 GMC Sierra truck of \$1,044.53 per month. That amounts to approximately \$12,500 per year in lease payments alone.
- [38] Although there are other points of note in T.T.W.'s Form 8, the other key issue is the fact that it discloses that T.T.W. is the joint owner, along with S.W., of a residence in Surrey, British Columbia, which has a 2021 B.C. Property Assessment value of \$1,133,000. In M.D.W.'s affidavit, she provides the 2022 B.C. Assessment notice for the Surrey, British Columbia, property, indicating that the assessed value has increased to \$1,455,000.
- [39] There is apparently, according to the Form 8 of T.T.W., a mortgage of some approximately \$246,000 on the property.
- [40] The court accepts that T.T.W. is separated from S.W. and that the allocation of equity in the Surrey property remains a disputed issue in the family law matters as between those parties. However, there is still substantial equity to be divided, particularly if the court were to take judicial notice of the fact that the actual fair market value of the property, in light of current market conditions, might even exceed the 2022 B.C. Assessment value.

M.D.W.'s Evidence

- [41] The evidence of M.D.W. is found in the affidavit #2 of M.D.W. sworn February 24, 2022, and her Form 8 financial statement, also sworn February 24, 2022. The affidavit of M.D.W. deposes that T.T.W. has never provided any income tax documents from the date of the order after trial of Mr. Justice Betton until served with the present application materials on February 20, 2022. T.T.W. also did not request or make any applications to vary his child support prior to the present application.
- [42] M.D.W. says in turn she did not ask T.T.W. for his financial information pursuant to the relevant order. This is not disputed in the reply affidavit of T.T.W. sworn March 3, 2022. M.D.W. further deposes that T.T.W. is in fact a journeyman industrial electrician. This is also not disputed in the reply affidavit of T.T.W. sworn March 3, 2022.
- [43] M.D.W. deposes that she has struggled emotionally and financially for several years to make sure that L.J.W. had the opportunity to have a normal upbringing by enrolling him into swim programs, soccer programs, driving lessons, first aid program, lifeguarding courses, and so forth.

- [44] In her Form 8 financial statement, which I will refer to momentarily, M.D.W. lists the costs of these various expenses and they are not insignificant having regard to her income.
- [45] In terms of her Form 8 financial statement, M.D.W. deposes that she works for Interior Health. Her current contract expired on March 31, 2022, and she is working on a casual basis until she hopes to secure a full-time position. Although there was a temporary reduction to her income as a result of this transition, it appears from her tax returns that M.D.W. is generally capable of earning income of at least \$33,000 to \$40,000 per year. Specifically, her total reported income on her tax returns was \$35,500 in 2020, \$33,574 in 2019, and \$39,248 in 2018.
- [46] M.D.W.'s expenses also exceed her income, although if T.T.W. was paying support of \$617.84 per month at the material time, the discrepancy between her expenses and her income would be relatively modest.

Jurisdiction

- [47] T.T.W.'s application was brought pursuant to the Family Law Act. In my view, this is not appropriate. The April 2009 interim order clearly refers to the children as "children of the marriage". This is a term specific to the Divorce Act. The terms of that April 2009 interim order were incorporated into the February 2012 order after trial of Mr. Justice Betton, as described above. The parties further were married and there was, as also described above, a divorce order made by Mr. Justice Rogers of this court in June of 2009.
- [48] This matter is thus appropriately governed by the Divorce Act, specifically s. 17 of the Divorce Act. Having regard to this conclusion, one option would be to dismiss T.T.W.'s application with leave to bring on a further application citing the Divorce Act instead of the Family Law Act. However, it serves these parties no benefit to dismiss this application and have them come back and argue the same facts before a different justice of this court under a slightly reframed application. This would offend the objects of the Supreme Court Family Rules, which include as their objects proportionality and cost effectiveness.
- [49] That said, the Court of Appeal of this province has made clear in various decisions that this court should be clear in identifying which of the two potentially applicable statutes it is applying when considering family law matters. In addition, there are certain nuances which I will address below between the two statutes. As such, I will reiterate for the benefit of the record that the support orders that I am making today are pursuant to the Divorce Act.

The Wakeman v. Wakeman Issue

- [50] Although not directed to this authority by counsel, this court is aware of the decision in *Wakeman v. Wakeman* and is obliged to consider its application to this application. In general terms, *Wakeman* included an application to vary an existing order to increase the amount of child support to be paid both prospectively and retroactively pursuant to s. 17(1) of the Divorce Act. It was supported by affidavit evidence.
- [51] The court, with some reluctance, referred the matter to the trial list. In doing so, the court in *Wakeman* stated as follows at paragraphs. 59 and 60:
- [59] Rule 10-3(1)(b)(i) provides that a "chambers proceeding" includes "an application to change or set aside a judgment". Thus, although a final order can only be obtained at a trial or a summary trial (see Rule 10-11), the SCFRs are structured so that a final order can at least potentially be varied by an ordinary chambers application.
- [60] I say "at least potentially" because this ability is restricted by the decision of the Court of Appeal in *C.M.R. v. L.F.R.*, 2019 BCCA 371. Dealing with an appeal from the dismissal of an application to refer an application to vary a final order to the trial list, the Court reasoned as follows:

11 At this stage of proceedings, the question before the chambers judge was not whether the applications could be decided on conflicting affidavit evidence or must be referred to the trial list. The proper question was whether the applications raise a triable issue. If the applications raise a triable issue they must be referred to the trial list: *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P.*, and *Robertson v. Dhillon*,

12 This conclusion follows from a consideration of the relevant Rules. As noted in the introduction, in defended family law cases that are brought by the filing of a notice of family claim, final orders can only be obtained at a trial or by way of summary trial. If a party subsequently seeks to change a final order he or she must do so by way of application. An application to change or set aside a judgment is by definition a chambers proceeding (Rule 10-3(1)(b)(i)).

13 Rule 10-3(7) sets out the powers of the court on the hearing of a chambers proceeding. Rule 10-3(7)(d) gives the court the power to order a trial of the chambers proceeding. That subrule reads:

(7)Without limiting subrule (4), on the hearing of a chambers proceeding, the court may

...

(d)order a trial of the chambers proceeding, either generally or on an issue, and order a pleading to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

14 The ordering of a trial of a chambers proceeding does not necessarily mean that a full trial with witnesses is required. Pursuant to Rule 11-3(2)(b) either party may apply for a summary trial in a family law case that has been transferred to the trial list. See also Saputo at para. 47.

15 While I note that Saputo concerned a petition, the same principles apply in relation to an application to change a final order. Such applications are of vital importance to the parties, and if they raise a triable issue, must be determined at a trial or summary trial.

16 The test as to whether an application should be converted to trial was set out in Saputo at para. 44:

In Robertson, the Court set out the test to determine whether a petition should be converted to a trial:

[55] On the hearing of a petition, a judge must be satisfied that there is no dispute as to the facts or law which raises a reasonable doubt or which suggests that there is a defence that deserves to be tried: Douglas Lake Cattle Co. [a decision from the Court of Appeal in 1991]. If such a dispute exists, the judge may refer the matter to the trial list, pursuant to R. 22-1(7) (former R. 52(11)(d)).

In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.

[Emphasis added in original.]

[52] The court concludes in Wakeman at paragraph 61:

[61] I do not see any principled basis on which to distinguish the unfortunate effect of C.M.R. here.

[53] As set forth above, the decision in Wakeman in this court followed the British Columbia Court of Appeal authority in C.M.R. v. L.F.R.

[54] C.M.R. v. L.F.R. followed the prior British Columbia Court of Appeal authority in British Columbia (Milk Marketing Board) v. Saputo Products Canada, 2017 BCCA 247 (commonly known as Saputo). At the time Wakeman was decided, Saputo was still good law in this province. That is no longer the case given the recent decision of the five-member panel of the Court of Appeal in Cepuran v. Carlton, 2022 BCCA 76.

[55] Cepuran is a commercial law decision decided under the Supreme Court Civil Rules. However, this decision has meaningful import into the realm of family law on this particular issue. As such, I will highlight the significant points of the Cepuran decision.

[56] Prior to Cepuran, Saputo was the authority for converting a petition to an action under the Supreme Court Civil Rules. The "Saputo rule" was that a petition must be referred to the trial list where there is a bona fide triable issue. The Court of Appeal in Cepuran states, however, that the existence of a triable issue is no longer "a good reason" to convert a petition into an action. The new approach advocated by the Court of Appeal is to tailor the procedure to the

proceeding. This is in line with the modern approach to civil procedure as encouraged by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2017 SCC 7. This approach is intended to "allow parties and the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits."

- [57] In deciding whether to convert a petition into an action, courts must keep in mind the object of the Supreme Court Civil Rules as set out in Rule 1-3. Namely, to secure the just, speedy, and inexpensive determination of every proceeding on its merits, so far as can be achieved in ways that are proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding.
- [58] I pause to note that Rule 1-3 of the Supreme Court Family Law Rules, while not identical as it takes into account certain nuances relevant to family law and particularly the interests of any children affected, is substantially similar to Rule 1-3 of the British Columbia Supreme Court Civil Rules in terms of its object.
- [59] Thus, having regard to the significant change in the law pursuant to the decision in *Cepuran*, I have concluded that the *Wakeman* decision and the *C.M.R. v. L.M.R.* decision upon which it relies are distinguishable from the case at bar.
- [60] There inevitably will be cases involving similar relief where the evidence is such that referral to the trial list is necessary, notwithstanding the principles outlined in *Cepuran*. However, this is not one of those cases. The court is able to determine this matter on the basis of the affidavit evidence contained in the application record. Doing so is consistent with the objects of Rule 1-3 of the Supreme Court Family Law Rules, as I have outlined above.

The Substantive Law: Including the Colucci Decision

- [61] Having concluded, as set forth above, that this matter is governed by the Divorce Act and that it can proceed on the basis of affidavit evidence, notwithstanding the decision in *Wakeman*, I turn to the substantive law which applies to the merits of the application.
- [62] In this regard, the primary governing authority to apply is the recent Supreme Court of Canada decision in *Colucci v. Colucci*, 2021 SCC 24. Had I concluded that this matter was governed by the Family Law Act, the possible application of *Colucci* would have required further consideration. Specifically, as noted by the British Columbia Court of Appeal in *P.J.M. v. R.M.S.*, 2021 BCCA 260 at paragraph 43:

- [43] Assuming without deciding that the Colucci framework applies to an application under the Family Law Act, [the respondent] was *prima facie* entitled to the benefit of the presumption. I say "*prima facie*" because the judge did not consider Colucci and a substantive analysis of that case in the context of the Family Law Act is for another day, when a lower court has considered the issue and its consideration is subject to appellate review. Nothing said here should be taken as determinative in the application or interpretation of Colucci.
- [63] Returning to Colucci, the Supreme Court of Canada in this case considered the law regarding retroactive support orders and the rescission of arrears. It is now the governing authority on applications of this nature, at least those governed by the Divorce Act.
- [64] At paragraph 30 of Colucci, the Supreme Court of Canada noted that there are three main categories with respect to claims for retroactive relief under s. 17 of the Divorce Act. The second of those two categories apply here to T.T.W., namely the payor is seeking a retroactive decrease in support because of a past change in circumstances, and the payor seeks to rescind or suspend arrears because of a current or future inability to pay.
- [65] At paragraph 46 of Colucci, the Supreme Court of Canada referred to its earlier seminal decision in a trilogy of cases considering retroactive support generally: namely, *D.B.S. v. S.R.G.*, 2006 SCC 37. The Court specifically referred to paragraph 37 of *D.B.S.* where it noted that there are:
- ... three interests which must be balanced to achieve a fair result in retroactive variation cases: first and foremost, the child's interest in receiving the appropriate amount of support to which they are entitled; second, the interest of the parties and the child in certainty and predictability; and third, the need for flexibility to ensure a just result in light of fluctuations in payor income
- [66] At paragraph 57 of Colucci, the Supreme Court of Canada also specifically considered the framework for dealing with retroactive increases and stated that:
- Any framework developed to accommodate retroactive variations of child support in response to decreased payor income must deal fairly with a wide range of factual situations, from payors who diligently paid the proper amount until they lost their employment or otherwise fell on hard times, to those who have made little effort to meet their responsibilities and are absent, intentionally underemployed or persistently delinquent.
- [67] At paragraph 61 in Colucci, the Court held that to meet the threshold for a retroactive variation of support based on a material change in circumstances, a decrease in income must be significant. It must have a degree of continuity and it must be real and not one of choice.
- [68] At paragraph 62 of Colucci, the Supreme Court of Canada further stated that:

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

[69] Skipping forward to the issue of arrears, the Supreme Court of Canada in Colucci at paragraph 134 stated that a claim for rescission of arrears is a form of "hardship" application in which there has been no past change in circumstances justifying a retroactive decrease in the support obligation. In other words, rescission of support calls for a different analysis than the aforementioned retroactive variation, which does not involve such a retroactive or backward-looking lens.

[70] The Supreme Court of Canada continued, in part, at paragraphs 135 to 137 of Colucci as follows:

135 under this third category of cases, the payor's ongoing financial capacity is the only relevant factor. The payor must therefore provide sufficient reliable evidence to enable the court to assess their current and prospective financial circumstances, including their employment prospects and any assets, pensions, inheritances or other potential sources of future capacity to pay.

136 Courts have taken a highly restrictive approach to the availability of rescission or suspension of child support based solely on current and ongoing inability to pay

137 This strict approach to rescission and suspension of arrears based on current inability to pay is justified. The interests of the recipient and child in certainty and predictability are paramount, as the payor has failed to comply with a court order or agreement without any "excuse for non-payment of support when it came due"

[71] Finally, at paragraph 138, the Supreme Court of Canada held that:

138 Accordingly, in this third category of cases, the payor must overcome a presumption against rescinding any part of the arrears. The presumption will only be rebutted where the payor parent establishes on a balance of probabilities that -- even with a flexible payment plan -- they cannot and will not ever be able to pay the arrears

[72] The first case in British Columbia that this court is aware that considered and applied Colucci is *D.K.D.S. v. M.S.S.*, 2021 BCSC 2084. *D.K.D.S.* shared some similarities with the case at bar. In both cases, the primary basis for the application to retroactively decrease support or rescind/suspend arrears was as a result of criminal conduct on the part of the payor parent. In *D.K.D.S.*, the payor was not ultimately incarcerated, despite having been found guilty of the relevant offence, but sought to prove that the circumstances of the conviction had contributed to the loss of his employment and a subsequent disability rendering him unable to work.

- [73] The court in D.K.D.S. found that the payor's criminal conviction was a situation of his own making and he did not tender accurate, reliable, or complete evidence to support his claim that, during the relevant time period he had been disabled from working.
- [74] I will note that there are several factors which distinguish T.T.W.'s circumstances from the D.K.D.S. decision. The first is that the payor in D.K.D.S. had been historically non-compliant with his support obligations from the outset. In contrast, T.T.W. was compliant with his agreed support obligations until April of 2017. The amount of arrears was also on a fundamentally different scale. The payor in D.K.D.S. owed in excess of \$300,000 in both child and spousal support arrears. As set forth at the outset, even including interest and default fees, the arrears in question in this matter are approximately \$25,000.
- [75] That said, the application of the law set forth in Colucci in D.K.D.S. about the reduction of income being a matter of choice are very germane to this application.
- [76] I will note at this juncture that I also did review the case law cited by T.T.W.'s counsel. The only decision I found instructive was Lay v. Lay, 2019 BCSC 1845. However, there are again distinguishable factors between this application and Lay, beyond the fact that Lay was decided prior to Colucci. The first being that there was a shared parenting arrangement and the second being there was distinct interplay between child and spousal support. Neither is a factor here as the evidence establishes, and it is indeed conceded, that L.J.W. has resided exclusively with M.D.W. at all material times, and spousal support was dealt with, through a modest lump-sum payment, back in 2007.
- [77] Having considered all of the case law, and in particular applying Colucci, my ultimate conclusions on the primary issues before the Court are:
- a) T.T.W. has not tendered evidence that is sufficient to meet the requirement of "reliable, accurate, and complete information" (as set out in Colucci). In this regard, I obviously accept that he was not working during his period of incarceration. However, I cannot conclude, notwithstanding the "grey area" created by a nolo contendere pleading, that the reduction of income was not one of choice, a factor specifically referred to in Colucci and applied in D.K.D.S. as set forth above.
 - b) T.T.W., also as indicated above, appears to have been underemployed on his return to Canada following his incarceration.
 - c) Finally, I accept that T.T.W.'s ability to obtain and instruct counsel to vary his support obligations while incarcerated in California was limited, albeit not impossible. However, even accepting those limitations, T.T.W. did not file this application until February 14, 2022, that is some 23 months after he returned to Canada. T.T.W. also failed to comply with the requirement to provide annual financial disclosure, even prior to his incarceration.

- [78] As such, I find that T.T.W. has not met the onus of showing that there has been a past material change in circumstance that would justify a retroactive variation to his support obligations.
- [79] Turning to the other substantive option in this regard, namely the cancellation or rescission of arrears, I similarly conclude that T.T.W. has not established any of the relevant factors, set forth in my above review of the law, on the balance of probabilities. He especially has not satisfied the onus upon him, otherwise known as the presumption, based on Colucci specifically. That is, he has not established that he is unable to pay his arrears at the present time or that, even if he were unable to pay, that his inability to pay will be longstanding. In this regard, it is the latter point which, in the court's view, T.T.W. has very clearly failed to provide sufficient evidence to establish on the relevant standard.
- [80] Specifically, I refer to the totality of the evidence before the court about T.T.W.'s skills as a journeyman electrician and his income-earning capacity. In this regard, I note his relatively young age and likelihood of many years of work; and, most importantly, specifically refer to T.T.W.'s claim to a share in the significant equity in a jointly-owned home with his current (but separated) spouse.
- [81] Simply put, the arrears of support in this case are not such an amount that they are unmanageable for T.T.W. in the long term. I do recognize that they may not be immediately payable and deal with this later in my reasons by setting forth a flexible payment plan. That is a term specifically referred to in Colucci.

Prospective Support

- [82] As it relates to prospective support, I do not accept that T.T.W. cannot earn a greater income than what is set forth in his Form 8 financial statement or proposed in his notice of application. As set forth above, T.T.W. claims to have quite modest personal expenses in certain respects, but then has taken on a lease obligation of a vehicle that exceeds \$1,000 per month. He took out that obligation, according to his Form 8 financial statement, in August of 2020. That is only some four to five months after he returned from his period of incarceration in California. He has managed to stay current on those payments apparently, despite failing to stay current on his child support obligation for L.J.W.
- [83] Ultimately, and more importantly, there is not reliable and admissible evidence tendered as to what T.T.W. could be earning, and M.D.W. has not brought an application to impute additional income to T.T.W. In all the circumstances, this court concludes that T.T.W. is at least capable of making what he was earning at the time of the interim order in April of 2009, namely \$66,300 per year. Basic child support for one child at an income of \$66,300 is, based on the current child support tables, \$629 per month.

- [84] I shall thus order that, effective April 1, 2022, and continuing on the first of each month until such time as L.J.W. ceases to be a child of the marriage as defined by the Divorce Act, T.T.W. shall pay \$629 per month in basic child support for L.J.W.

Interest and Arrears

- [85] The interest on the arrears of support which have been set by the Family Maintenance Enforcement Program are entirely appropriate. M.D.W. has not had the benefit of receiving support in a timely way and I do not see any basis for reducing the interest, having regard to my conclusions as to not cancelling or reducing the arrears owed by T.T.W.
- [86] I do, however, expressly have the discretion under s. 14.4(6)(c)(ii) of the Family Maintenance Enforcement Act to reduce or cancel the annual default fees assessed. In the circumstances, I do think there are sufficient "special circumstances" that warrant cancellation of those fees. Although I have concluded that T.T.W.'s inability to pay was as a result of choices that he made, the reality is that he was incarcerated for a portion of the time that the arrears accumulated and did not have income while incarcerated.
- [87] The default fees also do not bring any tangible benefit to L.J.W. and cancelling those default fees will provide T.T.W. the opportunity to contribute funds which actually go to L.J.W.'s day-to-day cost of living while he pursues his post-secondary studies. Thus, I shall order that the default fees of \$1,600 are thus cancelled.

The Document Disclosure Application

- [88] By virtue of my above order, I have concluded that the relief sought in paragraph 2 of M.D.W.'s notice of application filed February 24, 2022, is moot. This is not to say that document production is not important in this matter. It is. I have, however, simply been able to conclude, on the basis of the evidence before me, the necessary facts underlying my decision and do not require additional documents. I also do not consider delaying the resolution of this matter for additional documents, which are unlikely to materially impact any consideration on the merits, to be beneficial and consistent with the object of the Rules as I have already referred to.
- [89] I will, however, deal substantively with paragraph 1 of the notice of application filed by M.D.W. on February 24, 2022, as it deals with special and extraordinary expenses for L.J.W.

Section 7 Expenses

- [90] The most difficult portion of this case, from a factual perspective, relates to s. 7 expenses for L.J.W. M.D.W.'s affidavit in this respect is rather incomplete. It is supplemented somewhat by her Form 8 financial statement, but there is still a notable lack of supporting documentation. There is also no evidence that T.T.W. agreed to any s. 7 expenses beyond L.J.W.'s orthodontic expenses. Though I accept that contacting T.T.W. for his consent to expenses would have been very difficult during his period of incarceration, there still is no

evidence of consent, even after his return to Canada.

- [91] Ultimately, and having regard to my decision not to cancel or reduce the arrears of basic support, I dismiss the application for any contribution by T.T.W. for s. 7 expenses for L.J.W., except for orthodontic expenses, which T.T.W. has conceded he is liable to contribute to.
- [92] In terms of the total amount of the orthodontic treatment, the evidence does establish that it was \$7,080. This was, pursuant to the relevant court order, supposed to be paid proportionately or specifically, as the order says, on a pro rata basis. This would have had T.T.W. pay more than 50 percent based on his income prior to incarceration, compared to the income of M.D.W.
- [93] There is also evidence through that T.T.W. made some payments prior to incarceration. M.D.W. deposes that he made \$400 in payments in her Form 8 financial statement, and this was ultimately not responded to in T.T.W.'s reply affidavit. However, the evidence on this point, I will stress again, is less than ideal. That said, having the parties return to court on this relatively narrow issue would diminish the funds available for L.J.W.'s benefit. Accordingly, I have concluded that, based on the discretion I have available to me, the appropriate way to deal with this is to take the total amount of the orthodontic expense and divide it equally, without any credit for payments made. Thus, T.T.W. is liable to pay the sum of \$3,540 to M.D.W. on account of all s. 7 expenses for L.J.W. up to and including April 1, 2022.
- [94] Any future s. 7 expenses for L. will be shared equally between the parties, provided that they are consented to in advance of being incurred, such consent not to be unreasonably withheld.

Payment Terms

- [95] Counsel for T.T.W. did not specifically address payment terms beyond suggesting that any amounts outstanding be paid from the funds in trust held by the Family Maintenance Enforcement Program. Those funds shall clearly be released to M.D.W. forthwith.
- [96] With respect to the remaining funds owing pursuant to this order and having regard to my conclusion that basic support should continue for L.J.W. based upon an income of \$66,300 per annum for T.T.W., I consider it appropriate that there be a payment plan for the arrears to allow T.T.W. the opportunity to pay them without falling into default again.
- [97] I shall thus order that T.T.W. pay off the arrears of child support and s. 7 expenses per the terms of this order, calculated as of April 5, 2022, less the credit owing from the remaining trust funds held by FMEP and released to M.D.W., at a rate of \$150 per month until those arrears are satisfied in full.

- [98] For the benefit of T.T.W., I say that these arrears payments will continue, even if L.J.W. ceases to be a child of the marriage, as they are on account of support that ought to have been paid when he was a dependant child, and the delay in payment is an accommodation of this court in an effort to allow T.T.W. to use his skill set to generate greater taxable income to retire these arrears without imposing an unreasonable burden upon him at this time.
- [99] The total monthly payment for T.T.W. will thus be \$779 per month, namely \$629 in basic support for L.J.W. and \$150 per month on account child support of arrears. If T.T.W. chooses to pay off his arrears by a lump sum, his obligation will of course be limited to the basic child support of \$629 per month and will continue, as indicated, only for as long as L.J.W. is a child of the marriage residing with M.D.W.

Costs

- [100] There are two applications before the court. M.D.W. was successful in opposing T.T.W.'s application, but not entirely successful in her application. However, her lack of success was, in part, due to her successful opposition of T.T.W.'s application and thus I consider that she was the substantially successful party and entitled to her costs today.
- [101] In an attempt to avoid the need for an attendance before the registrar, I am going to specify that those costs shall be assessed as costs at the "ordinary difficult scale", on the basis of this being a one-half-day application, which includes today's appearance, and the disbursements shall be limited to the court filing fee and applicable taxes.

Ordering Reasons for Judgment

- [102] Finally, in light of this court's consideration of the issue of the applicability of the decision in Wakeman, following the recent decision of the Court of Appeal in Cepuran, it is appropriate that the court direct that a transcript of these reasons for judgment be ordered at the court's cost. As those reasons will be published on the British Columbia Supreme Court website, I invite submissions from counsel, Mr. Taylor, and M.D.W. as to whether they wish to have the court anonymize the decision through the use of initials.
- [103] You are muted, Mr. Taylor.
- [104] S. TAYLOR: Thank you, Justice. A question with respect to the last section where you said that there would be an order that [T.T.W.] pays off the arrears as of April 5th, you mentioned less trust funds. So I'm assuming, if I'm not incorrect, to say that whatever those trust funds are going to be used to lessen what is owed by way of arrears. Is that -- is that correct?
- [105] THE COURT: That is correct, Mr. Taylor.
- [106] S. TAYLOR: Yes.

- [107] THE COURT: It will be necessary to figure out exactly, based on the math, of deducting the \$210 per month, how much is left. Based on those calculations and the record included at Exhibit "D", whatever is left shall be applied to those arrears and then there will be a recalculation. The remainder will be paid at the \$150 per month.
- [108] S. TAYLOR: All right, well thank you. Thank you, Madam Justice.
- [109] THE COURT: Do you have any submissions with respect to my inquiry as to whether or not the parties want to have these reasons for judgment anonymized?
- [110] S. TAYLOR: Well, I think -- I think that might be appropriate in the circumstances. I can certainly wait to see what the -- what else is said, but I think -- I think that would be appropriate in the circumstances. That would be a request that I believe supported by my client as well.
- [111] THE COURT: [M.D.W.], what I am asking is that -- so these reasons for judgment are going to be transcribed at the court's cost and then posted on the British Columbia Supreme Court website. I do have the option to anonymize the decision, which means that instead of being [W. v. W.], it would be M.D.W. v. T.T.W. Do you have a submission with respect to that issue? If you are speaking, you are muted.
- [112] M.D.W.: Hi there. I don't know that it matters to me one way or another, so I would be fine with whatever [T.T.W.] would be fine with.
- [113] THE COURT: All right, I think in L.J.W.'s circumstances, and having regard to some of the nature of the facts of this case, it would be appropriate that they be anonymized. [M.D.W.], Mr. Taylor will prepare the form of order for your review. You should consider it as against your notes, and if there are issues arising with respect to the form of order, the appropriate means is to first address those with Mr. Taylor. As indicated, though, there will be the published reasons for judgment in fairly short order, which should assist in the event that there is any concern.
- [114] M.D.W.: Thank you, Madam Justice.
- [115] S. TAYLOR: Yes, thank you, Madam Justice.

"Hardwick J."

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