

CANADA / JUDGMENT

Mawson v. Pederson

2022 BCSC 1430

COURT

Supreme Court of British Columbia

DECIDED

18 August 2022

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2022 BCSC 1430 Mawson v. Pederson IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Mawson v. Pederson, 2022 BCSC 1430 Date: 20220818 Docket: E42527 Registry: Penticton Between: William Mawson Claimant And Kimberley Pederson Respondent Before: Master Keighley Reasons for Judgment As a friend of the Court: P.J. Reimer Claimant, appeared in person: W. Mawson Counsel for the Respondent: R. Okayama Place and Date of Hearing: Penticton, B.C. July 21, 2022 Place and Date of Judgment: Penticton, B.C. August 18, 2022

- [1] Mr. Mawson applies to vary and cancel or reduce arrears owing pursuant to an order of the Queen's Bench of Alberta pronounced August 8, 2012. The order of The Honourable Mr. Justice E.F. Macklin of that Court (the "Order") required, inter alia, Mr. Mawson to pay commencing as of June 1, 2012, the sum of \$1,351 per month, together with a further sum of \$150 per month to be applied to arrears, for the support of Mr. Mawson's three infant children: Makenna Paige Pederson, born September 6, 2004 (now 17). Preston William Pederson, born June 29, 2006 (now 16). And Rylen Connor Pederson born February 9, 2002 (now 13). Based on an annual income of \$71,697.
- [2] The Order was an interim and contemplated a trial of the issues in October of the same year no trial has occurred. Ms. Pederson moved to British Columbia following the parties' separation and parenting time granted to Mr. Mawson by the terms of the order has taken place only twice in the past 10 years. Mr. Mawson says that he does not know where Ms. Pederson and the children live.
- [3] The Order was filed with the Penticton Registry of this Court on October 26, 2017, and has been filed with the Director of Maintenance Enforcement. THE APPLICATION
- [4] Mr. Mawson's application, filed February 20, 2020, pursuant to the Interjurisdictional Support Orders Act ("ISO"), S.B.C. 2002, c. 29. In that application, Mr. Mawson seeks the following orders: A change or variation of the amount of child support payable by him pursuant to the terms of the Order from \$1,351/ to \$0/month;
2. An order that arrears owing by him for child support under the terms of the Order be fixed at \$0. JURISDICTION

- [5] Section. 31 and 32 of the ISO read as follows: Application of laws for child's and party's support 31 (1) In determining entitlement to receive or to continue to receive support for a child, the British Columbia court must
- (a) subject to paragraph (b), apply the law of British Columbia, and
 - (b) if there is no entitlement to support for the child under the law of British Columbia, apply the law of the jurisdiction in which the child habitually resides.
- (2) In determining the amount of support to be paid for a child, the British Columbia court must apply the law of British Columbia.
- (3) In determining a party's entitlement to receive or continue to receive support other than child support, and the amount of support, the British Columbia court must
- (a) subject to paragraph (b), apply the law of British Columbia, and
 - (b) if the party is not entitled to support under paragraph (a), apply
 - (i) the law of the jurisdiction in which the party habitually resides, or (ii) if the party is not entitled to support under subparagraph (i), the law of the jurisdiction in which the parties last maintained a common habitual residence.
- [6] S. 32 provides as follows: Powers of British Columbia court respecting variation orders 32 (1) After considering the evidence and documents with respect to a support variation application, a British Columbia court may do the following in respect of a party, a child or both:
- (a) make a support variation order;
 - (b) make an interim support variation order and adjourn the hearing to a specified date;
 - (c) adjourn the hearing to a specified date without making an interim support variation order;
 - (d) refuse to make a support variation order.
- (2) An order under this section may also provide for one or more of the following:
- (a) payment periodically, annually or otherwise, and either for an indefinite or limited period or until the happening of a specified event;
 - (b) payment of a lump sum directly or in trust on terms provided;
 - (c) charging of property with payment under the order;
 - (d) payment of support in respect of any period before the order is made;
 - (e) payment for expenses arising from and incidental to
 - (i) the prenatal care of the mother or child, or (ii) the birth of a child.

- (3) A British Columbia court that refuses to make a support variation order must record the reasons for its refusal.
- [7] As far as the law of British Columbia referred to in s. 31(1) is concerned, the applicable provisions of the Family Relations Act, S.B.C. 2011, c. 25 are as follows: VARIATION OF SUPPORT
- [8] Section. 152 provides as follows: 152 (1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.
- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
- (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
- (b) evidence of a substantial nature that was not available during the previous hearing has become available;
- (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.
- [9] Section. 152(2)(a) essentially restates a clear principle summarized by Martinson, J. in the case of Earle v. Earle, 1999CanLII 6914 (BCSC):
- [19] Before a judge can change a maintenance order that has already been made, there has to be a material change of circumstances since the original order was made. That is, the change must be of the kind that, if known by the judge when the last order was made, would have resulted in a different order. The change must be significant and long lasting. Otherwise, there will be uncertainty, which is not in the best interests of children.
- [10] At the time the Order which Mr. Mawson seeks to vary was made, he was found to earn income of 71,697 annually. Over the 10 years since the Order was made. He has sometimes earned more, and sometimes less. His materials include the following earnings summary: 2013 \$61,785 2014 \$76,278 2015 \$75,100 2016 \$84,630 2017 \$28,425 2018 \$19,849 2019 \$36,542 2020 \$84,007 2021 \$42,656
- [11] In 4 of the 9 years referred to, he earned more than \$71,697; in the other 5, he earned less. Notably, his second highest earnings occurred just 2 years ago, in 2020, suggesting that any change in his circumstances which resulted in lower earnings in 2017 to 2019, even if significant, was not long lasting.

- [12] Mr. Mawson has failed to present evidence which would support a variation under s. 152(2) (a). Neither does the material before me disclose any "evidence of a substantial nature that was not available during the previous hearing" other than, perhaps, Mr. Mawson's assertion (which is denied by Ms. Pederson) that he has been denied contact with his children. That is no basis for variation. The application for variation of the support obligations set out in the Order is dismissed. REDUCING OR CANCELLING ARREARS
- [13] The legal principles to be applied on applications to reduce or cancel arrears of child support were recently reviewed by the Supreme Court of Canada in *Colucci v. Colucci*, 2021 SCC 24 [Colucci]. Although that case was concerned with a variation application under the provisions of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the applicable principles are essentially the same as those considered by this Court under the provisions of the FLA.
- [14] Section. 174 of the FLA reads as follows: Reducing or cancelling arrears 174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.
- (2) For the purposes of this section, the court may consider
- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
- (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
- (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.
- [15] As the court in *Colucci* explains, an application to reduce or cancel arrears, a "rescission" application, is based not on a material change in the payor's circumstances, but on a form of hardship application.
- [16] Access to this remedy is through a very narrow portal indeed. As the court noted in *Colucci*, at para. 136, the 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". At para. 138, the court noted that there is indeed a presumption against rescinding any part of the arrears and at para.140, that the court has a range of available options when faced with proven payor hardship, such as temporary suspension, periodic payments. Rescission, said the court at para. 140 is "a last resort in exceptional cases, such as where

the payor suffers a 'catastrophic injury'. DISCUSSION

- [17] The pronouncements of the court in Colucci are, of course an overlay contextualizing the provisions of s. 174 (supra), in particular that this Court: " may reduce or cancel arrears if satisfied that it would be grossly unfair not to reduce or cancel the arrears" (emphasis added).
- [18] I was advised by counsel that the arrears of child support presently stand at \$99,367. Mr. Mawson may or may not be entitled to a credit of \$16,799 as a result of contributions he made to a mortgage, but I will leave that for another day. I am not quantifying the amount of arrears on this application.
- [19] Section. 174(2)(a) provides that I may take into account the efforts Mr. Mawson has made to comply with the order. In the first year following pronouncement of the Order, Mr. Mawson paid slightly more than ½ of his support obligation, while earning \$61,181. In 2014, a year in which he earned more than the amount upon which his obligations were based, he broke more or less even. In 2014 and 2016, despite making more than he did in 2012, he paid only \$10,754 and \$11,225 respectively against a support obligation of \$16,212 annually. Then, in 2020, when he had his highest earnings in the period under review (\$84,007), he paid nothing. This pattern suggests that Mr. Mawson has not applied himself to meeting his support obligations. In many instances, credits he received were the result attachment of sums otherwise due to him from EI or CRA. His application, which initiated this proceeding includes the following: "I am not willing to pay support for children I don't know or have never seen "
- [20] For the past 10 years Mr. Mawson's 3 children have been raised on Ms. Pederson's modest earnings with little enough financial assistance from him. The eldest, who recently graduated as valedictorian of her class, will soon be leaving for college in Alberta funding her education with scholarships and earnings from part time work as a server. If her father had lived up to his obligations, her path would likely have been somewhat smoother. The two younger children will also likely benefit from a more responsible attitude on the part of their father.
- [21] His reasons for non-payment of child support are clear enough, in his own words. RESULT
- [22] I am not satisfied that Mr. Mawson has met the standard for reduction or cancellation of arrears of child support. It would not be grossly unfair to reduce or cancel them.
- [23] Ms. Pederson will have her costs of this application to be paid forthwith following assessment. "Master Keighley"

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