
CANADA / JUDGMENT

Moazzen-Ahmadi v. Ahmadi-Far

2021 BCCA 126

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 126 Moazzen Ahmadi v. Ahmadi Far

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Moazzen-Ahmadi v. Ahmadi-Far,

2021 BCCA 126

Date: 20210329

Docket: CA46560

Between:

Hashem Moazzen-Ahmadi

Respondent

(Claimant)

And

Shahrzad Ahmadi-Far

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

October 17, 2019 (Moazzen-Ahmadi v. Ahmadi-Far, 2019 BCSC 1772,
New Westminster Docket E37226).

Counsel for the Appellant

(via videoconference):

D.H. Goodwin

Counsel for the Respondent

(via videoconference):

B.J. Ingram

Place and Date of Hearing:

Vancouver, British Columbia

June 22, 2020

January 14, 2021

Written Submissions Received:

September 22, 2020

October 13 and 20, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 29, 2021

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

Summary:

The appellant appeals an order of the chambers judge granting an application for repayment of overpaid child and spousal support as a result of a retroactive variation and dismissing the appellant's cross-application to reduce or cancel those amounts. The appellant argues the chambers judge did not have jurisdiction to order the repayment of overpaid child and spousal support and that he erred in the exercise of his discretion in ordering repayment of the overpaid support. The appellant also seeks to introduce fresh evidence. Held: Appeal dismissed. Certain of

the appellant's arguments and the fresh evidence relate properly to a prior and separate proceeding based on the same issues. As such, they are barred by the doctrines of *res judicata* and collateral attack. With respect to the issues properly before the Court on this appeal, the judge below was correct to find he had jurisdiction to order the repayment of overpaid support owed as a result of a retroactive variation order. The judge did not err in the exercise of his discretion in ordering the repayment, as a mistake in the evidence as to an asset allegedly owned by the appellant was not material to the outcome.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] In principle, the issues on this appeal should be relatively straightforward. Their resolution is, however, complicated by the lengthy procedural history involved in a dispute about whether Mr. Moazzen-Ahmadi was entitled to a retroactive reduction and repayment of child support and spousal support as a result of an alleged material change of circumstances after the amounts and duration of support had been agreed to and formalized in consent orders.
- [2] The complications arise because there have been multiple proceedings in the Supreme Court of British Columbia and appeals to this Court. Only one of those appeals is formally before this division. It arises out of a second application in the Supreme Court and the dismissal of an application to reopen that application. But previously, the Supreme Court had heard and decided an application by Mr. Moazzen-Ahmadi in which it found a material change of circumstances, concluded that he was entitled to a retroactive downward variation of his support obligations, and set the date from which the variation would run and the amount of support payable from that date. That order was appealed, but the appeal has not been advanced.
- [3] For convenience, I am going to attach labels to the various proceedings. The first application ("Application #1") in the Supreme Court led to an order pronounced March 26, 2019 ("Order #1"). The appeal of that order is "Appeal #1" (Appeal No. CA46051). The second application ("Application #2") in the Supreme Court resulted in an order pronounced October 17, 2019 ("Order #2"). The judge dismissed that application in Order #2. It forms the subject matter of "Appeal #2" (Appeal No. CA46560), the matter formally before us. Subsequent to Order #2, Ms. Ahmadi-Far applied in the Supreme Court to reopen Order #2 ("Application #3"). On January 15, 2020, the judge refused to reopen his order ("Order #3"). That decision is now an aspect of Appeal #2, as Ms. Ahmadi-Far applies to introduce fresh evidence in this appeal.
- [4] We heard Appeal #2 on June 22, 2020. Mr. Moazzen-Ahmadi supported Order #2 on a number of grounds, including arguing that, for the most part, the issues advanced on the appeal were matters that properly should have been raised in the application leading to Order #1 and in Appeal #1. Mr. Moazzen-Ahmadi has invoked the legal doctrines of *res judicata*, estoppel, and collateral attack consistently in proceedings subsequent to Application #1 and Appeal #1. We reserved judgment. Subsequently, the division decided it

needed to understand better the relationship between the various orders and appeals and invited counsel to provide written and oral submissions to assist the Court. In part, this request recognized that Appeal #1 remained a live appeal. It had not been moved to the inactive list or dismissed as abandoned (by operation of s. 25 of the Court of Appeal Act, R.S.B.C. 1996, c. 77) because of the suspension of the running of time limits for filing and serving materials owing to the COVID-19 pandemic.

- [5] At the second hearing on January 14, 2021, Ms. Ahmadi-Far declined to bring a motion extending time to perfect Appeal #1 in order to have the appeals from Orders #1 and 2 heard at the same time by this division. She expressly took the position that issues arising out of Application #1 and Order #1 should be treated as forming part of Appeal #2. She contended that it had been unnecessary to appeal Order #1 because the subsequent applications were continuations of the same dispute between the parties which were only finally resolved in the Supreme Court with the judge's refusal to reopen Order #2. Parenthetically, Mr. Moazzen-Ahmadi has taken the position throughout that the subsequent applications raised issues that should have been raised and dealt with in Application #1.
- [6] In light of the position taken by Ms. Ahmadi-Far, the only appeal before us is Appeal #2. Order #1 and Appeal #1 remain relevant to the disposition of Appeal #2 because we must consider what issues are properly part of Appeal #2 and, more particularly, whether issues Ms. Ahmadi-Far attempts to raise as part of Appeal #2 are properly before us.

Background

- [7] Having painted the context for this appeal in broad brush strokes, I will now turn to a more detailed explanation of the issues between the parties and how they have unfolded over what is now a protracted period.
- [8] First, Mr. Moazzen-Ahmadi in Application #1, filed in late 2014, applied for a retroactive downward variation of his child support and spousal support obligations because of an alleged material change in circumstances arising from a significant reduction in income. What is material to the issues before us is that Mr. Moazzen-Ahmadi sought an order reducing the monthly amount of support "effective as of September 1, 2014." There followed a complicated procedural history, including an appeal to this Court, but ultimately the substance of the matter was heard by Justice Blok in 2018.
- [9] In *Moazzen-Ahmadi v. Ahmadi-Far*, 2019 BCSC 424, Blok J. found that Mr. Moazzen-Ahmadi's reduction in income was a material change in circumstances. Justice Blok briefly analyzed the appropriate quantum and effective date of variation. Ms. Ahmadi-Far did not argue either quantum or effective date nor other possible material issues. Her argument focussed on contesting whether Mr. Moazzen-Ahmadi had established a material change in circumstances warranting variation. In the result, Blok J. pronounced Order #1 on March 26, 2019, varying spousal support from \$8,000 to \$3,600 per month effective December 1, 2014, and varying child support from \$4,000 to \$1,434 per month effective December 1, 2014. A

notice of appeal from Order #1 was filed with this Court on April 25, 2019.

- [10] Second, following Ms. Ahmadi-Far's refusal to repay overpaid amounts of child support and spousal support that Mr. Moazzen-Ahmadi considered he was entitled to as a result of Order #1, Mr. Moazzen-Ahmadi filed an application for the recovery of the overpayment of child support and spousal support, seeking a declaration that the overpaid amounts be payable forthwith. In a cross-application (Application #2), Ms. Ahmadi-Far contested the jurisdiction of the court to order repayment of overpaid support. She also sought an order cancelling or reducing the claimed overpayment of child support and spousal support. This alternative argument was based primarily on the hardship she and the parties' daughter would suffer if required to repay the support they had received. Mr. Moazzen-Ahmadi argued that the application for cancellation or reduction of the overpaid amount was *res judicata* and a collateral attack on Order #1.
- [11] In *Moazzen-Ahmadi v. Ahmadi-Far*, 2019 BCSC 1772, Blok J. concluded that he had jurisdiction to order repayment of overpaid support. He also rejected Ms. Ahmadi-Far's cross-application for cancellation or reduction of those amounts. He did not find it necessary to address Mr. Moazzen-Ahmadi's arguments on *res judicata* or collateral attack. In Order #2, pronounced on October 17, 2019, Blok J. dismissed Ms. Ahmadi-Far's Application #2 save that he referred the matter to the registrar to settle and certify the amount to be repaid to Mr. Moazzen-Ahmadi, taking into account the effect of taxes and interest. A notice of appeal from Order #2 was filed with this Court on December 5, 2019. This is Appeal #2, the matter formally before us.
- [12] Third, in Application #3, Ms. Ahmadi-Far applied for a reconsideration of Order #2. That application was dismissed. The parties agree that the issues arising out of that application may properly be considered as part of Appeal #2.
- [13] It is convenient now to put more flesh on the bone, so that the issue of what is properly before us in Appeal #2 can be appreciated.
- [14] The parties married in Iran on November 3, 1998, separated in September 2007, and divorced on January 7, 2010. They have one child together, a daughter born on October 4, 2002. She has significant special needs.
- [15] On May 3, 2013, the parties settled their financial affairs by consent orders under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). By those consent orders, Mr. Moazzen-Ahmadi was required to pay: (1) \$4,000 per month in child support plus an additional \$1,000 per month as a contribution to certain child-related expenses; and (2) spousal support of \$8,000 per month commencing February 2013 until January 2019.

- [16] Mr. Moazzen-Ahmadi filed Application #1 on November 28, 2014, to vary child support and spousal support. He alleged a material change of circumstances because his income as a pharmacist was greatly reduced as a result of an investigation by the Ministry of Health into certain breaches of his PharmaCare agreements. The PharmaCare agreements were terminated, resulting in reduced income. Mr. Moazzen-Ahmadi argued that this was a material change in circumstances justifying a variation of child support and spousal support.
- [17] Application #1 was not finally decided until March 26, 2019. A number of factors contributed to the delay in the final disposition of the application. These included Mr. Moazzen-Ahmadi's unsuccessful application to have the application referred to the trial list, a stay of the application pending payment of arrears, orders for cross-examination and proper document disclosure by Mr. Moazzen-Ahmadi, a hearing on the merits of the application resulting in its dismissal (2016 BCSC 258), a successful appeal (2016 BCCA 503), the return of the application to the Supreme Court, further applications to cross-examine and further disclosure of documents, finally culminating in the hearing before Blok J.
- [18] In reasons for judgment dated March 26, 2019, Blok J. accepted that there had been a material change in circumstances justifying variation of child support and spousal support under s. 17 of the Divorce Act. He then assessed the quantum and effective date of the variation. With respect to the effective date, he said:
- [94] The general rule is that the change ought to run from the date of effective notice: *D.B.S. v. S.R.G.*, 2006 SCC 37, at paras. 124-125. I conclude that, here, the variation should be made effective to December 1, 2014.
- [19] With respect to quantum, he based the variation on an income of \$165,000 for Mr. Moazzen-Ahmadi and \$28,400 for Ms. Ahmadi-Far. The judge said:
- [96] The amount of monthly child support is straightforward as the Guidelines provide for a sum certain. I have based the figure on a 2014 table. Child support is set at \$1,434 per month effective December 1, 2014.
- [97] Spousal support involves some exercise of judgment because the [Spousal Support Advisory Guidelines] provides for a range of support on a given level of income. I conclude that the varied spousal support obligation should be nearer the high end of the range because Ms. Ahmadi-Far has primary responsibility for the care of D., a child with developmental challenges, and thus the compensatory and "need" factors are strong. I set spousal support at \$3,600 per month effective December 1, 2014.
- [99] For clarity, I make no change to the May 2013 child support order insofar as it concerns the additional \$1,000 payable by Mr. Moazzen-Ahmadi toward the cost of a nanny.
- [20] Neither the parties nor the judge addressed the effect of the variation order in terms of any obligation to repay the amounts overpaid. Mr. Moazzen-Ahmadi did not address repayment explicitly in his notice of application, but as noted above, he sought an order "reducing the

monthly amount of [child support and] spousal support effective as of September 1, 2014." Ms. Ahmadi-Far did not address repayment in her response. The judge did not address it in his reasons. Nor did anyone address whether the potential obligation to repay or other discretionary factors might affect the order for a retroactive downward variation of support. Having found that the threshold of a material change of circumstances supporting a retroactive variation was established, the judge did not consider whether or not one was appropriate on the other facts of the case. He moved directly into an assessment of quantum and a brief discussion of the effective date of the variation.

[21] Order #1 reads:

THIS COURT ORDERS that:

1. The Order of The Honourable Mr. Justice Jenkins made on May 3, 2013 shall be varied such that, effective December 1, 2014, spousal support payable by Mr. Moazzen-Ahmadi to Ms. Ahmadi-Far shall be \$3,600 per month.
2. The Order of The Honourable Mr. Justice Jenkins made on May 3, 2013 in related Court File No. E31659 shall be varied such that, effective December 1, 2014, child support payable by Mr. Moazzen-Ahmadi to Ms. Ahmadi-Far shall be \$1,434 per month.
3. Mr. Moazzen-Ahmadi shall have his costs on the basis of ordinary difficulty.

[22] Order #1 was entered in April 2019. At that point, as a general rule, the judge would be considered to be functus. As noted, Order #1 was appealed on April 25, 2019.

[23] At this point, a dispute arose about whether Mr. Moazzen-Ahmadi was entitled to be repaid the amounts he had overpaid according to the terms of Order #1. Ms. Ahmadi-Far took the position that the court did not have the jurisdiction to order repayment of support amounts already received and stated her intention to apply to cancel or reduce the amounts ordered to be owing.

[24] This brings us finally to Application #2. On July 4, 2019, Mr. Moazzen-Ahmadi filed a notice of application seeking a declaration of amounts owed in respect of the overpayment of child support and spousal support and their repayment. He calculated the amount by multiplying the number of months of overpayment (based on the effective variation date) by the amount overpaid in each of those months. He calculated \$133,432 of overpaid child support and \$220,000 of overpaid spousal support, in addition to pre-judgment and post-judgment interest.

[25] Ms. Ahmadi-Far responded to the application, and filed a cross-application seeking cancellation or reduction of the claimed overpayment of child support and spousal support. She argued that the Supreme Court of British Columbia has no jurisdiction to order repayment of overpaid support, even though it has clear jurisdiction to retroactively vary support orders. Further, she argued that the amount of claimed overpayment had to be cancelled or reduced because collecting overpayment would cause her and the parties'

daughter hardship.

Chambers judgment and the order under appeal

- [26] The chambers judge substantially dismissed Ms. Ahmadi-Far's cross-application. First, he found that the Divorce Act and, if necessary, the inherent jurisdiction of the court gave the court authority to order repayment of overpaid support. He distinguished the cases relied on by Ms. Ahmadi-Far that suggested there was no jurisdiction to order repayment under the Divorce Act. He also concluded that authority in British Columbia contemplated the existence of the jurisdiction to do so. He relied in particular on this Court's reasons in *G.M.W. v. D.P.W.*, 2014 BCCA 282, and *Cornelissen v. Cornelissen*, 2003 BCCA 666, to which I will return.
- [27] The judge concluded his analysis on the jurisdictional point as follows:
- [45] In summary, I conclude that courts may order repayment of overpaid support in appropriate circumstances, but the special nature of support and the unique circumstances involved in family law require that the D.B.S. factors be taken into account in making any repayment order. I note, parenthetically, that this is how the public policy concerns mentioned in [*G.M.J. v. L.F.B.*, 2008 YKSC 51] ought to have been taken into account. I will discuss these factors under the next heading.
- [28] In other words, in the judge's view, while the court had jurisdiction to order repayment, he was obliged to take into account factors unique to an application for the recovery of the overpayment of support which he had not considered and which had not been argued before him on Application #1. In short, he treated the D.B.S. factors (*D.B.S. v. S.R.G.*, 2006 SCC 37) as relevant to whether he should order repayment, rather than to whether he should have made a retroactive variation order in the first place or on what terms.
- [29] Second, the judge found no reason to cancel or reduce the amount of overpaid support. He cited the D.B.S. factors, which this Court used in *G.M.W.*, to assess the propriety of a retroactive downward variation of child support: (1) the circumstances surrounding the delay in bringing the application; (2) the payor parent's conduct; (3) the children's circumstances; and (4) any hardship caused by a retroactive child support order. He discussed these factors jointly for both child support and spousal support.
- [30] Having considered these factors, the judge found no reason to cancel or reduce the overpaid amounts. Focussing specifically on the "hardship" factor, the judge noted that Ms. Ahmadi-Far has substantial assets and a net worth of approximately \$6.87 million. Relevant to this conclusion was the judge's acceptance of evidence from Ms. Ahmadi-Far that assets included vacant land valued at over \$1.2 million, which could be sold to repay the amounts owing without compromising Ms. Ahmadi-Far's other source of income from revenue generating assets.

[31] The judge agreed with Ms. Ahmadi-Far that the effect of taxes "must be taken into account so that Mr. Moazzen-Ahmadi does not get both the benefit of an enhanced tax deduction (based on the original support amount) and a repayment of the excess support paid": at para. 54. He asked the parties to file amended tax returns if possible and, if not possible, he directed the registrar to take account of the effect of taxes when settling the amount to be repaid.

[32] The judge declined to address Mr. Moazzen-Ahmadi's argument that Ms. Ahmadi-Far was engaged in a collateral attack on Order #1 and that the issues she sought to argue were res judicata.

[33] Order #2 reads:

THIS COURT ORDERS that:

1. The application by Shahrzad Ahmadi-Far for cancellation or reduction of the amount of overpaid child and spousal support is dismissed.
2. The application by Shahrzad Ahmadi-Far for a stay regarding the Order made in these proceedings on March 26, 2019 is dismissed.
3. The application by Shahrzad Ahmadi-Far for the extension of the spousal support obligation of Hashem Moazzen-Ahmadi is dismissed.
4. Hashem Moazzen-Ahmadi is awarded costs of the applications.

THIS COURT DIRECTS that:

The matter is referred to the registrar to settle and certify the amount to be repaid to Hashem Moazzen-Ahmadi by Shahrzad Ahmadi-Far, taking into account the effect of taxes, and court order interest to the date of judgment.

[34] I note in passing that Ms. Ahmadi-Far's application to extend Mr. Moazzen-Ahmadi's spousal support obligation was dismissed but not appealed. It is not before us.

Application #3: The application to reopen and reconsider

[35] Following Order #2, Ms. Ahmadi-Far filed Application #3 to reopen and reconsider Order #2. The basis of the application was, inter alia, that a mistake had been made in Ms. Ahmadi-Far's description of her assets and that she did not have a direct or indirect interest in the vacant land valued at \$1.2 million, contrary to the evidence before the judge. Accordingly, she could not comply with the order to repay the support without selling an income producing asset, contrary to the assumption of the judge. She also argued that the original consent support orders in 2013 were part of a settlement package and therefore the orders should not be interfered with.

[36] The judge refused the application to reopen and reconsider Order #2. First, the judge noted that there was no formal application to adduce fresh evidence before him about the vacant lot. He determined that the application amounted to an attempt to reargue, recast, or restate

the case. This finding related both to the evidence about the vacant lot and the suggestion that the support obligations were part of a settlement package. Despite the absence of a formal application, the judge was of the view that none of the elements of the well-known Palmer test (*Palmer v. The Queen* (1979), [1980] 1 S.C.R. 759) were met. For current purposes, most significantly, he was of the view that the evidence, if admitted, would not have affected the result. The reason for this was as follows, although expressed in connection with an issue to do with a stay application:

- [30] On this issue the question was the balance of convenience, and it emerged in a dialogue early in submissions today that if the condominium were sold, and it is said to have a value of \$2,069,000, and so if it were to be sold to pay a \$360,000 judgment, it would leave Ms. Ahmadi-Far without the condominium but with \$1.7 million in cash. While she would not be receiving the rent of \$3,000 a month, she would have \$1.7 million to invest in order to enjoy a return on that investment.
- [31] By way of illustration, \$1.7 million, and I have no evidence of any rates of return, but by way of illustration only, if one could get a 5 percent return, \$1.7 million would generate income of \$85,000 per year, or just over \$7,000 a month, which is \$4,000 more than she makes from the current rent.
- [32] I did not have to go through that kind of analysis back in October because it seemed that there was an empty or vacant lot that could be sold without affecting either rental income or the child, but looking at this further, it is apparent to me that the fact that she may have to sell the condominium - and I refer to the condominium, not the commercial property, because the commercial property is rented for quite a bit more than 3,000 a month, so the condominium is the logical thing to sell - but having done that rough further analysis, it is clear to me that the balance of convenience is unchanged.
- [37] It is apparent that the judge concluded that even if he had known that Ms. Ahmadi-Far had no direct or indirect interest in the vacant lot, he would have made the same order based on another property being sold that would have left Ms. Ahmadi-Far with a sufficient revenue stream to maintain her existing income.
- [38] The judge also viewed many of the arguments made by Ms. Ahmadi-Far on Application #3 to be an attempt to reargue, recast, or restate the case. He said:
- [26] For whatever reason, experienced family law counsel at the application heard in September (and decided in October), cast his client's argument in a certain way and chose not to raise these other arguments that are now being raised. I consider that this offends the rule against rearguing, recasting or restating a case, and in any event, it does not persuade me that it is in the interest of justice that the Court reopen the case based on those arguments.
- [27] Put another way, I was not persuaded that there was a miscarriage of justice flowing from the new arguments counsel referred to today.

On appeal

[39] Ms. Ahmadi-Far advances the following arguments on appeal:

- i. The chambers judge erred in finding that he had jurisdiction to order repayment of overpaid support;
- iii. The chambers judge erred in the exercise of his discretion in ordering repayment of overpaid spousal support with regard to the factors enumerated in s. 17(7) of the Divorce Act; and
- iii. The chambers judge erred in the exercise of his discretion in ordering repayment of overpaid child support with regard to the factors set out in D.B.S.

[40] As will be apparent from what I have already canvassed, we face a preliminary difficulty in determining what issues are properly before us in Appeal #2 given our concern that many of the issues advanced appear to be matters that could have and ought to have been raised in defending Application #1 and formed the subject matter of Appeal #1. I am not persuaded that we can simply treat all of these issues as being a continuation of issues properly falling within Appeal #2, not least because Mr. Moazzen-Ahmadi has consistently taken the position that they all should have been dealt with as part of Application #1.

[41] I propose to begin by addressing what in my view were the issues properly in play in Application #1. I will then address the question whether Application #2 and Appeal #2 amount to a collateral attack on Order #1 or are otherwise not properly before us. I will then address those aspects of Appeal #2 which I think we should address.

Issues arising in Application #1

[42] Application #1 sought an order reducing both child support and spousal support effective as of September 1, 2014, based on a material change of circumstances. By the time the application was heard, Mr. Moazzen-Ahmadi had satisfied his support obligations. It is clear that the order sought a retroactive reduction of support, not simply a prospective cancellation. Moreover, it did not seek a cancellation of arrears. There were none. Ms. Ahmadi-Far was on notice from late 2014 of Mr. Moazzen-Ahmadi's assertion of overpayment.

[43] I can only conclude that it is necessarily implicit in Mr. Moazzen-Ahmadi's application (Application #1) that the orders he sought entailed a right to repayment. In my opinion, this application was not simply a first step towards an ultimate determination of what amounts might have to be repaid. It did not simply raise the issue of whether there had been a material change in circumstances as a precondition for a retroactive order leaving for later other issues bearing on whether such an order should be pronounced and, if an order for retroactive variation were made, whether any amount quantified should be repaid.

- [44] To approach the matter in this way is contrary to principle and it does not achieve finality and certainty in a speedy and efficient manner. The issue before the court reduced to three questions. First, had Mr. Moazzen-Ahmadi overpaid support, and by how much? Second, was Mr. Moazzen-Ahmadi entitled to an order for a retroactive variation of his support obligations? Third, if he was, was he entitled to be repaid any amount he had overpaid in light of the retroactive variation? The answers to these questions should have resulted in one order for a retroactive variation in support that, if granted, necessarily carried with it the entitlement to repayment. The fact that multiple considerations bear on whether the order should be made does not mean that they should not be addressed in one hearing.
- [45] In this case, it was incumbent on Ms. Ahmadi-Far to make her whole case against the retroactive variation in response to Mr. Moazzen-Ahmadi's Application #1. As I shall explain, the arguments about s. 17(7) of the Divorce Act and the D.B.S. factors advanced by Ms. Ahmadi-Far in Application #2 are arguments that go clearly and directly to the relief sought by Mr. Moazzen-Ahmadi in Application #1. We were not offered any sort of explanation as to why Ms. Ahmadi-Far defended Application #1 only by challenging the material change in circumstances. Application #1 was not just about whether there was a material change in circumstances; it was about whether a retroactive variation should be ordered and it settled all issues directly bearing on that question.
- [46] Applications dealing with retroactive variation come in different forms. Some involve applications for retroactive support by or on behalf of a recipient of the support. The multiple factors bearing on whether an order for retroactive child support should be made were canvassed in D.B.S. Other applications involve the attempt, retroactively, to cancel or reduce unpaid support. Again, the factors bearing on pronouncing such orders are well known. In both of these circumstances there are multifactorial considerations in play. Those considerations involve elements of discretion, including for example hardship, which must be considered before a retroactive order is pronounced. The issues are not dealt with *seriatim*.
- [47] Application #1 was slightly different because it was an application for a retroactive variation that carried with it the implication that overpaid amounts, if any, would be repaid. This Court considered a similar situation in G.M.W. In that case, a judge had ordered a retroactive variation in child support paid over a four-year period immediately prior to a father's variation application. The order was based on a material change in circumstances resulting from a change in income. As this Court accepted, without question, the effect of the variation order was to require the mother to reimburse the father the cumulative amount of the reduction in child support (calculated at \$31,719) during the period of retroactivity: at para. 2. The reimbursement was ordered as a set-off against a compensation order. The mother appealed. The appeal was allowed.
- [48] This Court did not accede to an argument that the chambers judge erred in finding a material change in circumstances. But the Court said this:

- [39] The question then is whether the retroactive reduction of child support was an appropriate order. This issue engages an application of the test in D.B.S. and the factors to be considered in determining whether a retroactive variation of a child support order should be made.
- [49] I take this to be a clear indication that whether a retroactive variation in child support should be made at all engages all issues including factors considered in D.B.S. to the extent that they are applicable in these slightly different circumstances. These factors must be considered with a "children first" perspective: G.M.W. at para. 40. In G.M.W., Justice D. Smith said:
- [41] D.B.S. involved four appeals in which the issue of retroactive child support was raised in the context of applications by the recipient parent for child support or increased child support. Accordingly, the decision did not expressly address the circumstances in this case of an application for a retroactive reduction of support where that support has largely been paid during the period of retroactivity. The Court did, however, provide some general comments on the appropriateness of retroactive child support orders in the context of the underlying principles of certainty and flexibility in regard to child support:
- [95] It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award.
- [96] Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable status quo; retroactive awards serve to supplant it.
- [50] For current purposes, it is sufficient to note that the Court took into account factors such as delay, the payor parent's conduct, the child's circumstances, and any hardship caused by a retroactive child support order.
- [51] It follows from this that whatever considerations rooted in D.B.S. as they bear on child support were live issues in Application #1 and needed to be taken into account as part of the analysis in determining whether Mr. Moazzen-Ahmadi was entitled to a retroactive variation order. These issues included: (a) whether Mr. Moazzen-Ahmadi's conduct disentitled him to an order or might affect the effective start date of the order; (b) whether in the interests of certainty, and in light of how the proceedings had unfolded, the child's receipt of her support should be upended; (c) any hardship that would result from repayment; (d) any considerations arising from the arrangements leading to the original consent orders (i.e., they were part of an overall settlement package so should not be treated in isolation) that might be relevant, and so forth.

- [52] Many similar observations can be made in the context of an application to retroactively reduce spousal support that would result in a repayment obligation. As with child support, the first question is whether a material change of circumstances has been established: Divorce Act, s. 17(4).
- [53] Once the threshold has been met, a court must determine what variation to the order needs to be made in light of the change in circumstances: *L.M.P. v. L.S.*, 2011 SCC 64 at para. 47. The court must consider the four objectives set out in s. 17(7): *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 20; *L.M.P.* at para. 48. These objectives operate in the context of "wide judicial discretion": *L.M.P.* at para. 49.
- [54] The Court in *L.M.P.* summarized the approach to arriving at the appropriate variation as follows:
- [50] In short, once a material change in circumstances has been established, the variation order should "properly reflect the objectives set out in s. 17(7), . . . [take] account of the material changes in circumstances, [and] consider the existence of the separation agreement and its terms as a relevant factor" (*Hickey*, at para. 27). A court should limit itself to making the variation which is appropriate in light of the change. The task should not be approached as if it were an initial application for support under s. 15.2 of the Divorce Act.
- [55] When an application is made for retroactive variation of spousal support, considerations similar to those set out in *D.B.S.* should be considered: see *Kerr v. Baranow*, 2011 SCC 10 at paras. 207-212; *Willms v. Willms*, 2020 BCCA 51 at para. 28. That said, the factors "must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support": *Kerr* at paras. 207, 208-12.
- [56] The fact that a retroactive downward variation of spousal support would require the payee to repay the overpaid amounts may, depending on the circumstances, be relevant to a judge's assessment of whether the variation is appropriate and, if so, the appropriate amount of the variation and the effective date: see, e.g., *Brown v. Brown* (1999), 45 O.R. (3d) 308 at 309, 317 (S.C.J.); *Threlfall v. Threlfall*, 2018 BCSC 1805 at para. 61. As Justice Arnold-Bailey put the matter in *Y.O.S. v. R.B.S.*, 2005 BCSC 1801 at para. 85, "it is important to consider whether the payee is able to repay monies given to her pursuant to a pre-existing support order, when determining whether an application to vary downwards should be applied retroactively."
- [57] The purpose of this analysis is to show what issues were or might have been relevant to whether any order for retroactive variation should have been pronounced and, if so, in what amount. This is not intended to be a complete analysis of what factors may be material to such an order. It is merely illustrative. The judge in this case did not receive submissions bearing on many of these considerations. He did take some factors into account, for example, in determining the effective date of the retroactive variation. Before us, Ms. Ahmadi-Far acknowledged that issues dealing with the effective date were properly live in Application #1, but no submissions about them were made to the judge. The other considerations were also not raised in Application #1 but became the subject matter of

Application #2. I turn to consider the implications of this in deciding what is before us.

Is Application #2 a continuation of Application #1?

[58] This Court recently explained the application of legal doctrines such as collateral attack and res judicata in *M.K. v. British Columbia (Attorney General)*, 2020 BCCA 261, noting:

[1] As Justice Binnie explained in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the law seeks a finality to litigation. For this reason, litigants must put their best foot forward when first called upon to establish a claim. In subsequent proceedings, a litigant may not attack an order pronounced by a court of competent jurisdiction except as provided by law for that express purpose. In other words, generally speaking, litigants are entitled to only one "bite at the cherry" when they bring a claim: *Danyluk* at para. 18.

The same can be said of someone defending a claim.

[59] The starting point is that an order made by a court having jurisdiction is final, conclusive, and binding. While an order may be reopened in certain circumstances before it has been entered, once entered, the judge generally is functus (subject to any exceptions, none of which are applicable here). The order is binding unless set aside on appeal or quashed. As Justice Iacobucci explained in *Garland v. Consumers' Gas Co.*, 2004 SCC 25:

71 The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *D. J. Lange, The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review).

72 The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

[60] In my opinion, the time and place to have advanced issues of hardship, the effect of the consent orders as part of a settlement package, and the other discretionary factors raised in Application #2 was in Application #1. Application #2 was not a variation application and it was not a continuation of Application #1. Any issues concerning Order #1 form part of Appeal #1. The opportunity exists in that appeal to attempt to introduce fresh or new evidence.

- [61] While the rule against collateral attack admits of principled exceptions, I see none as applying here. From the beginning, Mr. Moazzen-Ahmadi has taken the position that Application #2 and the appeal from it are collateral attacks on Order #1. In the course of addressing the implications of the multiple proceedings, as I noted, Ms. Ahmadi-Far took the position that all of the issues (except the effective date of the variation) formed part of Appeal #2 and that it had been an error to have filed Appeal #1 because it was unnecessary. Moreover, she did not make an application to extend the time to perfect Appeal #1. Had she done so, this division would have had the opportunity to consider whether those issues properly forming part of Appeal #1 could inform the resolution of this appeal. Ms. Ahmadi-Far has foreclosed that possibility by the position she has taken.
- [62] Accordingly, I propose to limit myself to a consideration of those matters I think it appropriate that we deal with in the context of this appeal. In doing so, I recognize that we have before us much material that would form part of the record in Appeal #1. As Appeal #1 remains a live appeal, nothing in these reasons should be taken as preventing Ms. Ahmadi-Far from applying to extend time to advance that appeal and nothing should be taken as expressing a view on the merits of such an application, should it be made.
- [63] I also think it may be helpful to express the opinion that the judge ought to have ruled on the objection made by Mr. Moazzen-Ahmadi in Application #2 grounded in collateral attack and abuse of process. There was, it seems to me, a live issue in Application #2 about whether the judge was functus, with Order #1 having been entered. The chambers judge did not find it necessary to address Mr. Moazzen-Ahmadi's arguments on collateral attack or res judicata because he would have dismissed Ms. Ahmadi-Far's applications in any event. In my view, the court should not, as a general rule, proceed this way. When collateral attack, abuse of process by re-litigation or res judicata is pleaded, it should be addressed. This case illustrates two related reasons for this. If the judge had concluded that Ms. Ahmadi-Far's cross-application was estopped by res judicata, or that it was a collateral attack on Order #1 in an improper forum, Ms. Ahmadi-Far would have had the benefit of the first instance judge's conclusion on this point when deciding how to proceed. She may, for example, have seen it fit to proceed with the appeal of Order #1 instead of Order #2. Similarly, this Court would have the benefit of the first instance judge's view of how the proceedings relate to one another when confronted with the argument on appeal.

Does the Supreme Court have jurisdiction to order the repayment of overpaid support?

- [64] Given Ms. Ahmadi-Far's refusal to repay the overpaid support, Mr. Moazzen-Ahmadi was forced to apply for an order of repayment. In these circumstances, it is appropriate to address the jurisdictional issue at the heart of Order #2.
- [65] I begin by setting out the applicable legislation and regulations. Section 17 of the Divorce Act reads, in relevant part:

Order for variation, rescission or suspension

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (a) a support order or any provision thereof on application by either or both former spouses; or
- (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

Factors for child support order

- (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

Factors for spousal support order

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

Guidelines apply

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

Objectives of variation order varying spousal support order

- (7) A variation order varying a spousal support order should
 - (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
 - (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[66] Section 14 of the Federal Child Support Guidelines, SOR/97-175 provides:

Circumstances for variation

14 For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
- (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support;

[67] Ms. Ahmadi-Far argues that the Divorce Act does not contain any specific provision empowering the court to order repayment of child support or spousal support found to be an overpayment resulting from a retroactive variation of an order of the court. But, it is clear by the terms of the Divorce Act that a judge is empowered to make an order for a retroactive downward variation of child support and spousal support. Ms. Ahmadi-Far concedes this. Ms. Ahmadi-Far's argument is that a judge may make an order for a retroactive downward variation in a certain amount and effective to a certain date, but may not make an order compelling the overpaid payee to repay overpaid amounts to the payor.

[68] Like the chambers judge, and for largely the same reasons, I would reject Ms. Ahmadi-Far's argument.

[69] Ms. Ahmadi-Far relies on two cases in support of her proposition that the court does not have jurisdiction to order repayment of overpaid support amounts: *Gartley v. Thibert*, 2002 CanLII 2726 (Ont. S.C.J.), and *G.M.J. v. L.F.B.*, 2008 YKSC 51. She argues there are good policy reasons for not ordering repayment of support once it has been received by the payee, as the parties have conducted their affairs based on their reliance on the court order. In absence of clear legislative authority, she contends there is no jurisdiction to order repayment.

[70] In *Gartley*, the husband applied for reimbursement of child support paid in excess of the amount subsequently found to have been due. Assessing this issue with respect to the Divorce Act, the judge said, at para. 54: "It is not clear to me the court's authority to order payment of child support under the federal statute necessarily includes authority to order a repayment of that support" (emphasis in original). The judge found, however, that a provision in other Ontario legislation authorized an order for repayment. Accordingly, he said, "I need not comment further on whether there is other jurisdiction or factors or considerations that need to be addressed beyond the language of this statutory provision": at para. 56.

[71] As the judge below noted, the passage at para. 54 of *Gartley* was clear obiter, not given significant consideration, and, in any event, is not binding on this Court.

- [72] In G.M.J., the applicant husband sought an order for repayment of \$2,337 of child support. The original child support order was made against the husband, who made payments, but then discovered that he was not the father of the child. The child support order was made pursuant to Yukon's Family Property and Support Act, R.S.Y. 2002, c. 83 [FPSA], not the Divorce Act. The judge found that any authority to order repayment must also be found in the FPSA.
- [73] Like the Divorce Act, the FPSA contains powers of retroactive variation. In G.M.J., the original child support order was varied once it was discovered that the applicant was not the father of the child. There was "no express authority" in the variation provisions "to order the repayment of funds", and the judge declined to infer such a power: at para. 11.
- [74] In G.M.J., the judge's statutory interpretation was influenced by the fact that the variation provisions in s. 44 of the FPSA specifically contemplate that the court might relieve the payor from any arrears, but do not say anything of repayment of monies already paid: at para. 15. The judge reasoned that to include one (cancelling arrears) implicitly excluded the other.
- [75] With respect, I do not find this reasoning compelling. In my view, as a necessary corollary to the power to order a retroactive downward variation, s. 17 of the Divorce Act confers the power to order repayment of overpaid amounts.
- [76] In G.M.W., as we have seen, the mother appealed from an order that retroactively varied the amount of child support payable to her. The Court noted that the "effect of the variation order was to require the mother to reimburse the father the cumulative amount of the reduction in child support during the period of retroactivity": at para. 2. The reimbursement was ordered as a set-off against a compensation order. The jurisdiction to do so was treated as uncontroversial, as it surely is.
- [77] Ms. Ahmadi-Far argues that cases involving repayment by way of set-off, including G.M.W., are not analogous to repayment by way of out-of-pocket payment. I agree with the comments of the chambers judge in this case in rejecting this distinction for the purpose of assessing the court's authority under the Divorce Act:
- [37] Although the respondent argues that the set-off cases are different in character, it is not clear why this would be so. If there is no authority to order a repayment of overpaid support, then it would seem there would also be no authority to order a repayment through a set-off against another obligation.
- [78] I note that it is uncontroversial that courts rely on s. 17 of the Divorce Act to cancel or reduce arrears in appropriate cases despite the absence of any express provision providing for a power to cancel them. If s. 17 confers the power to make an ordering canceling or reducing arrears, in principle, it also confers the power to make an order for repayment of overpaid sums.

[79] Like Blok J., this Court was also of the view that repayment of overpaid child support could be ordered in *Cornelissen v. Cornelissen*, 2003 BCCA 666. There, Justice Prowse concluded as follows:

[56] Because the issue of spousal support is being remitted to the Supreme Court, I would direct that the payment of \$98,100 which I have found that Ms. Cornelissen owes to Mr. Cornelissen by virtue of his overpayment of child support be suspended until the issues of spousal support, and any variation of child support for 2003, are determined by the Supreme Court. At that time, the judge considering these matters can make the appropriate order for repayment, taking into account these reasons for judgment.

[Emphasis added.]

[80] Similarly, in *Egan v. Egan*, 2002 BCCA 275, this Court retroactively varied child support to account for a change in income, and said:

[40] His support payments for those four months, therefore, should be reduced to \$1,105 per month from the \$1,166 he paid. I would direct that the total overpayment of \$244 for that period be adjusted by permitting Mr. Egan to deduct \$25 per month from the his support payments from May 1, 2002, until the amount of \$244 is repaid in full.

[Emphasis added.]

[81] I accept that this Court's prior judgments do not expressly engage with the argument that the Divorce Act does not confer jurisdiction to order repayment of overpaid support amounts. In my view, the Court has treated the jurisdiction to order repayment as uncontentious because it is so. I specifically agree with this portion of the chambers judge's reasons:

[42] Section 17 of the Divorce Act provides courts with the power to vary support orders both prospectively and retroactively, and so they have the power to retroactively decrease support. To accept the respondent's argument would be to conclude that although the court has power to retroactively decrease support, it has no power to actually effect that change, in some circumstances, by ordering repayment. The result would be that an overpaying payor would have a right, but no remedy. This would be an odd result, and inconsistent with a purposive approach to statutory interpretation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21. The jurisdiction to order a repayment of overpaid support may therefore be found as a concomitant to the power to retroactively decrease support.

[82] I would not accede to this ground of appeal.

Did the judge err in refusing to reopen Application #2?

[83] The judge refused to reopen Application #2. As I have explained above, he took the view that the application was merely an attempt to reargue, recast, or restate the case and the mistake about ownership of the vacant lot was immaterial because he would have made the same order in any event.

- [84] Ms. Ahmadi-Far applies to introduce fresh evidence on this appeal. The fresh evidence is intended to establish that the record before the judge contained a factual error about Ms. Ahmadi-Far's ownership of a non-revenue-producing vacant lot valued at \$1.2 million. She says the evidence resulted from an error in the preparation of her financial information. She has, she says, no direct or indirect interest in the vacant lot. Had the judge properly appreciated the true state of her property ownership, he would not have made the order requiring repayment of the overpaid support obligations because to do so would force her to sell income producing property, thereby compromising her income stream.
- [85] Setting aside the problem that this evidence is tendered in support of a hardship argument which should have been advanced in response to Application #1, I see no reversible error in the judge's treatment of this matter.
- [86] The judge did refer to and rely on the apparent availability of this asset as part of his reasoning in making Order #2. But as is demonstrated by the reconsideration reasons, he would have made the same order if he had been appraised of the true facts. The judge treated the possibility of the sale of the vacant lot as a convenient means to permit repayment and to address the argument that being forced to sell assets would cause hardship. When confronted in the reconsideration application with the information that Ms. Ahmadi-Far had no interest in the vacant lot, he explained that, nevertheless, Ms. Ahmadi-Far had an asset she could sell which would satisfy the judgment and still leave her with the capacity to generate income by investment. In short, ownership of the vacant lot was not in fact material to the order for repayment.
- [87] In these circumstances, it does not seem to me that the fresh evidence is material. The mistake in the evidence was ultimately without consequence to Order #2. The order would have been the same, if the judge had been properly informed of the facts. Accordingly, I would not admit the evidence on this point.
- [88] Second, Ms. Ahmadi-Far raises issues to do with whether the support obligations should be seen as part of a package settling the affairs between the parties. To the extent that this argument is meritorious, it seems to me, as I have already made clear that it should have been advanced in Application #1. I will not consider it further.

Conclusion

- [89] I would dismiss the appeal before us; namely, Appeal #2. I would not admit the fresh evidence. This order is without prejudice to whatever rights the parties have in relation to Appeal #1.

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Butler"

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