

CANADA / JUDGMENT

Nash v. Nash

2023 BCSC 348

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Supreme Court of British Columbia

DECIDED

17 February 2023

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2023 BCSC 348 Nash v. Nash

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nash v. Nash,

2023 BCSC 348

Date: 20230217

Docket: E082362

Registry: Victoria

Between:

Stephanie Lynn Parker also known as Stephanie Lynn Nash

Claimant

And:

John David Nash

Respondent

Before: The Honourable Madam Justice Jackson

Oral Reasons for Judgment

In Chambers

Counsel for Claimant:

N.C. Hamilton

Counsel for Respondent:

G. Houlden

Place and Date of Trial/Hearing:

Victoria, B.C.

February 16, 2023

Respondent's Response re Costs Received:

February 23, 2023

Place and Date of Judgment:

Victoria, B.C.

February 17, 2023

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[1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication and to address the issue of costs.

I. Introduction

[2] These are my oral reasons for judgment with respect to the application by the respondent filed December 13, 2022. In his application the respondent seeks the following relief:

- 1) A stay of enforcement of child support arrears effective immediately;
- 2) That ongoing child support payments be terminated as the parties' children Hailey, Emily, and Megan, are all now adults. During the hearing I was advised this has already occurred and that no child support has been payable since the oldest child turned 19 in August 2020. Therefore this aspect of the respondent's application is not necessary;
- 3) That the respondent's retroactive child support be reassessed, based on the respondent's actual line 150 Federal Child Support Guidelines, SOR/97-175 [Guidelines] income from July 2008 to August 2020;

- 4) A declaration that the current Family Maintenance Enforcement Program ("FMEP") arrears which as at the date of hearing totalled \$153,685.55, including fees and interest, be reduced to \$23,635 based on the requested retroactive assessment; and
- 5) Costs.

II. Facts

- [3] The parties were married on March 14, 1998 in Victoria, British Columbia, separated on January 18, 2008, and thereafter entered into a separation agreement filed in this Court on August 8, 2008. A term of the separation agreement was that commencing January 31, 2008, the respondent would pay the claimant child support every two weeks in the table amount determined in accordance with paragraph nine of the agreement, which referred to the basic amount the respondent was required to pay to the claimant under the Guidelines. As of the date of the agreement that amount was \$550 every two weeks. The respondent was also required to pay his share of s. 7 expenses. A further term of the separation agreement was that the parent parties would review child support and, if necessary, revise it to ensure that it was in accordance with the requirements of the Guidelines by May 31 of every year, with the first review to be completed by May 31, 2008. The separation agreement also contemplated that despite the annual review called for under the agreement, either party could request a review upon written notice where there had been a material change in circumstances or a change leading to undue hardship.
- [4] Despite the agreement, the respondent never made a voluntary payment of child support to the claimant. He has been in arrears of his child support obligations since the separation agreement. All child support received by the claimant was through FMEP.
- [5] The respondent's mother passed away in February 2022, and he received an inheritance of over \$86,000. FMEP attached those funds. Some of those funds were dispersed to another FMEP file the respondent has with respect to another child, but approximately \$75,000 remain with FMEP awaiting the outcome of this application.
- [6] At no time prior to the filing of his application in December 2022 did the respondent seek a review of his child support obligations under the separation agreement, which had the effect of being a court order once filed.
- [7] This Court has no jurisdiction to order a stay of enforcement actions undertaken by FMEP, although it does have both the statutory and inherent jurisdiction to stay its own orders, which may in effect lead to a suspension of enforcement action by FMEP: Supreme Court Family Rules, R. 15-4(31); *Sekhon v. Sekhon*, 2020 BCSC 1422 at paras. 51-52.
- [8] The primary issues on the application are whether the arrears should be cancelled or reduced, and whether there should be a retroactive reassessment of child support.

- [9] An application for rescission or cancellation of child support arrears will normally arise if a request for a retroactive variation decreasing child support, and consequential arrears, is unsuccessful or results in only a partial reduction of the arrears: *Colucci v. Colucci*, 2021 SCC 24 at para. 133.
- [10] Therefore I will turn first to address the respondent's application for a retroactive reassessment of his child support obligations.

III. Retroactive Reassessment of Child Support

- [11] The respondent did not refer to any statutory authority in his notice of application for the order seeking to retroactively vary his child support obligations, which by virtue of the separation agreement being filed constitute a court order. The claimant refers to s. 17 of the Divorce Act, R.S.C. 1985, (2nd Supp.), c. 3. The separation agreement is silent as to whether the child support order was made under the Divorce Act or the then in force Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], and the child support order could have been made under either statute. Where a final order does not specify the legislation under which the child support orders were granted, and both the FRA and the Divorce Act were pled in the notice of family claim (which I will assume was the case based on the claimant's reliance on the Divorce Act), the Court of Appeal has held that based on the doctrine of paramountcy the Court will assume the child support order was made pursuant to the Divorce Act: *C.L.B. v. A.H.B.*, 2013 BCCA 472 at para. 3.
- [12] The Divorce Act provides that the Court may make an order varying child support, retroactively or prospectively: s. 17(1)(a). Before making any variation in respect of a child support order, the Court shall satisfy itself that a change of circumstances as provided for in the Guidelines has occurred since the making of the child support order: s. 17(4). The threshold question then is whether there has been a change in circumstances since the separation agreement.
- [13] Relevant to the time of the separation agreement in this case, s. 14 of the Guidelines provides that any of the following constitutes a change of circumstances that gives rise to the variation of a child support order:
- a) In the case where the amount of child support includes a determination made in accordance with the applicable child support 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 the table, any change in the condition, means, needs, or other circumstances of either spouse or any child who is entitled to support.

- [14] Again, it is unclear to me which of these two bases for variation the respondent relies on. The Guidelines in place at the time of the separation agreement were not presented at the hearing. However, based on my interpretation of the overall separation agreement, I have concluded the amount of child support included a determination which was made in accordance with the applicable table of the Guidelines. The respondent did not advance an argument to the contrary.
- [15] In *Colucci*, the Supreme Court of Canada reviewed the applicable framework for considering applications to retroactively vary, by way of decreasing or rescinding, the amount of child support. In that case, the payor parent had not made any voluntary payments toward his child support obligations for over 16 years and by the time the matter was determined by the Court he owed approximately \$170,000 in arrears: para. 2.
- [16] In *Colucci*, the Court referred to its decision in *D.B.S. v. S.R.G.*, 2006 SCC 37, in which it had considered the principles and competing interests underlying the recipient parent's application for retroactive child support. The Court noted at para. 4 that the applicable framework needed to give effect to the objectives and provisions of the Guidelines, particularly the core objective of safeguarding the child's right to a fair standard of support: Guidelines, s. 1. The framework also is aimed at weighing the certainty and predictability provided by an existing court order against the need for flexibility in a system that ties support to fluctuating payor income: *Colucci* at para. 4. The framework established by the Court in *Colucci* balances those interests "in a way that incentivizes payment of the right amount of child support when it is due and the timely disclosure of financial information--the linchpin of a just and effective family law system": *Colucci* at para. 4. The Court went so far as to hold that "[r]ules which create perverse incentives to ignore or postpone parental support obligations are to be firmly rejected": *Colucci* at para. 4.
- [17] Under the framework established by the Supreme Court of Canada in *Colucci*, a "payor who has established a past decrease in income is not automatically entitled to a retroactive decrease of support back to the date of the decrease"; instead, the decision is a discretionary one: *Colucci* at para. 5.
- [18] Child support is the right of the child, and parents have a financial obligation to their children which arises at birth and continues after separation: *D.B.S.* at paras. 37-38. The paramount interest in the analytical framework for the retroactive variation of child support and the rescission of arrears is the safeguarding of the child's interest in receiving the appropriate amount of support to which they are entitled, which must be fairly balanced with certainty and flexibility to reach a just result in light of fluctuations in payor income and the particular circumstances of each case: *Colucci* at para. 55.
- [19] As the Court observed at para. 55 of *Colucci*:
- the framework under s. 17 must promote the timely disclosure of accurate information, which in turn encourages equal bargaining and fair settlements, as the payor parent "holds the cards" when it comes to child support (*Michel*, at para. 32, per Brown J.). Above all, "the ultimate goal

must be to ensure that children benefit from the support they are owed at the time when they are owed it. Any incentives for payor parents to be deficient in meeting their obligations should be eliminated" (D.B.S., at para. 4). Payors should not be better off from a legal standpoint if they do not pay the child support the law says they owe. Nor should payors receive any sort of benefit or advantage from failing to disclose their real financial situation or providing disclosure on the eve of the hearing.

- [20] In Colucci, the Court made clear that timely and complete financial disclosure is to be encouraged and the courts must "in no way reward those who improperly withhold, hide or misrepresent information they ought to have shared": para. 54.
- [21] Where, as here, the retroactive variation is based on an argument that the prior order overestimates the payor's income, as a threshold requirement the payor has the onus of establishing a change of circumstances: Colucci at paras. 55-60. To do so, 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, because the decision to retroactively decrease support can only be made based on "reliable, accurate and complete information": Colucci at para. 62, citing Earle v. Earle, 1999 BCSC 283 at para. 28.
- [22] Regardless of which circumstance in s. 14 of the Guidelines the respondent is relying on, his application fails.
- [23] The quality of the evidence filed by the respondent is poor. It leaves me unsatisfied on a balance of probabilities there has been a change in the respondent's circumstances.
- [24] Although the respondent seeks to retroactively assess his child support back to 2008, even according to the meagre evidence put before me, his level of income remained at or close to what it had been at the time of the separation agreement up until 2013.
- [25] There has been incomplete financial disclosure by the respondent. The respondent has not filed a Form 8 Financial Statement, in which he would have to exhaustively list all of his assets and sources of income.
- [26] There is no evidence of his efforts to obtain employment. There is no evidence that enables the Court to assess whether he was intentionally underemployed.
- [27] In 2017 the house in which the respondent lived with his new partner was sold. There is a lack of evidence with respect to the proceeds of that sale and no evidence that the respondent did not benefit or have the opportunity to benefit from same.
- [28] The evidence with respect to the respondent's inability to work because of disability is weak. There is no medical opinion evidence, but only a letter from a doctor attached to the respondent's affidavit, which speaks of disability in 2020. It says nothing about the respondent's inability to work in earlier years.

- [29] Well before the respondent's health difficulties allegedly prevented him from earning any income, he was not paying child support.
- [30] The respondent's failure to disclose on a timely basis any changes in his earnings or his ability to earn income have effectively robbed the claimant of the ability to test whether he was intentionally underemployed. It also left the claimant with the reasonable expectation that she continued to be entitled to that amount and would receive it if those funds were made available through FMEP.
- [31] Insofar as his application is based on the suggestion of undue hardship, the financial evidence is also unreliable and incomplete. For example, he has not provided evidence about the financial situation of his current partner, which is relevant on an application of this nature: Guidelines, s. 10.
- [32] For these reasons I find the respondent has failed to establish the threshold requirement that there has been a change in circumstances since the separation agreement.
- [33] If I am wrong on that issue, I would only have retroactively varied the respondent's child support obligations to December 2019.
- [34] Where a retroactive award is appropriate, the date of retroactivity is generally the date of the "effective notice", and retroactive awards should generally extend no further than three years before the date of effective notice. This is because the "three-year rule" encourages parties to "move discussions forward after giving effective notice", although the three-year rule is only a presumption and not determinative: Colucci at para. 39, citing D.B.S. at paras. 118, 121.
- [35] In this case there was no notice prior to December 2022 when the respondent filed his application. Therefore the three-year rule, which is only a presumption, would lead to a retroactive variation of no earlier than December 13, 2019.
- [36] In considering whether to depart from the three-year rule, Colucci at para. 38 holds that the Court is to be guided by consideration of four factors, as set out in D.B.S. at para. 133:
- 1) The recipient's delay in seeking retroactive support;
 - 2) The payor parent's conduct;
 - 3) The child's circumstances; and
 - 4) Hardship entailed by a retroactive award.
- [37] There is no satisfactory explanation for the respondent's gross delay in bringing his application. I find that he probably brought this application only for the purpose of trying to secure some of the money which FMEP has attached for himself, rather than seeing it benefit his three children.

- [38] The respondent's history of failing to make payments voluntarily (even when, based on the evidence he has filed, he had the ability to do so) and his failure to make timely and adequate financial disclosure is conduct that favours against departing from the three-year rule. Further, the respondent made no reference to his inheritance in his notice of application. That failure has the aroma of an intent to deceive and defeat.
- [39] The children have had significant hardship as a result of his non-payment given the claimant's income was very modest. They had to rely on charity and the kindness of friends and family.
- [40] While there would be hardship to the claimant arising from a retroactive variation, I am not satisfied the same can be said for the respondent. The respondent is currently receiving a federal government disability benefit, from which approximately \$300 per month has been deducted since 2015. I infer from the fact that the respondent did not bring an application to retroactively vary his child support obligations until December 2022 that this ongoing garnishment does not cause him undue hardship.
- [41] This aspect of the respondent's application is dismissed.

IV. Cancellation of Child Support Arrears

- [42] As noted above, s. 17 of the Divorce Act permits the court to rescind child support arrears. Similarly, under s. 174(1) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the Court may reduce or cancel arrears owing under an agreement or order respecting child support if it is satisfied that it would be grossly unfair not to reduce or cancel the arrears. Whether under the Divorce Act or the FLA, the analysis for considering a retroactive application to cancel child support arrears is the same. Neither of the parties argued otherwise.
- [43] As a starting principle, the presumption is against rescinding any arrears of child support unless the payor parent shows a current and future inability to pay.
- [44] In considering such an application, s. 174(2) of the FLA sets out that the Court may consider:
- a) 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) Given the question involves the exercise of judicial discretion, any circumstances that the Court considers relevant.
- [45] The respondent has made no efforts to comply with the child support order.
- [46] As I have already set out above, the evidence he relies on to establish that he cannot pay the arrears is weak.

- [47] Arrears will typically only be cancelled if the person is unable to pay now and will be unable to pay in the future. In this case there is a paucity of evidence with respect to the respondent's efforts to earn income during the years in which his arrears have accrued. Further, it is not the case that the respondent does not have the ability to pay now, nor in the future. As I have already noted, there is approximately \$75,000 being held by FMEP which is available to contribute towards the outstanding child support arrears. Further, there is no reason why the \$300 that has been garnished every month for the last seven years cannot continue to be put towards his outstanding arrears.
- [48] Further, reduction or cancellation of arrears requires a detailed and full financial disclosure, under oath, that at the time the payments were to be made every effort was made to earn money: Earle at para. 46. I will not repeat my concerns with respect to the quality of the respondent's evidence (and lack thereof).
- [49] I consider the fact that the respondent has inherited a significant amount of money which could substantially reduce his outstanding arrears of child support to be a relevant circumstance.
- [50] I also consider relevant that the recitals of the separation agreement reflect the parties' intention that the separation agreement be the final settlement of "adjustments respecting Disabilities or advantages and disadvantages arising out of the marriage or otherwise between the parties".
- [51] Any of these facts would have led me to exercise my discretion not to cancel or reduce the arrears. Logically, this aspect of his application also fails when the factors are considered collectively.
- [52] The respondent's application is dismissed.

V. Costs

- [53] At the conclusion of the hearing, I found the claimant was entitled to her costs. The claimant sought double costs of the steps taken in the family law case after the date of delivery of her offer to settle, which was February 14, 2023: Supreme Court Family Rules, R. 11-1(5)(b).
- [54] As counsel for the respondent did not have instructions on that issue, I allowed the respondent time to provide written submissions. On February 23, 2023, I was advised by Supreme Court Scheduling that counsel for the respondent had written as follows: "I wanted to confirm I will not be opposing the Claimant's costs application, and do not have any submissions on this issue".
- [55] I find the offer to settle was one that ought reasonably to have been accepted. It was not a nuisance offer as it offered to substantially reduce the amount of outstanding arrears. Following the hearing the respondent remains responsible for paying the full arrears.

[56] The claimant's financial circumstances have been adversely affected by the respondent's failure to pay child support for more than 14 years. At the hearing I found the respondent had not made full financial disclosure. I also view the respondent's failure to take any steps seeking to vary his child support obligations until after FMEP had attached his inheritance, and his failure to disclose the inheritance at the outset in his application material, to be further conduct that is relevant to the exercise of my discretion on the matter of costs.

[57] I award the claimant double costs of the steps taken in the family law case after February 14, 2023.

"Jackson J."

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Prepared on 27 October 2026 · Esheria