

CANADA / JUDGMENT

S.N. v. A.N.

2025 BCSC 2575

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2575 S.N. v. A.N.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.N. v. A.N.,

2025 BCSC 2575

Date: 20251231

Docket: E80232

Registry: Vancouver

Between:

S.N.

Claimant

And

A.N.

Respondent

Before: The Honourable Justice Doyle

Reasons for Judgment

Counsel for the Claimant:

N. Gagnon-Bergeron

Counsel for the Respondent

S. Bunn

Place and Date of Trial:

Vancouver, B.C.

May 1 to 5, October 26, 2023,

April 10 and 11, 2024 and

July 19, 2024.

Place and Date of Judgment:

Vancouver, B.C.

December 31, 2025

Table of Contents

Introduction.. 3

Background.. 3

Further Background.. 5

Steps After April 2009. 6

Issue 1: Was the March 2021 Order a Final Order or an Interim Order?. 8

Issue 2: Is the claimant entitled to retroactive child support?. 11

Discussion.. 14

Conclusion.. 23

Introduction

- [1] This matter came on for trial on May 1, 2023. The trial had been set many months prior.
- [2] A variety of matters unfolded on May 1. After submissions about whether this was an application or a trial, the matter proceeded as a trial and evidence was heard from each party and the parties' child, who at that point was 26 years old.
- [3] A lengthy adjournment ensued, with the prospect of rebuttal evidence from the claimant. A further lengthy adjournment occurred consequent upon a change of counsel for the claimant.
- [4] Upon the appointment of new counsel for the claimant, there was no application for rebuttal evidence. Her new counsel, Ms. Gagnon-Bergeron, admirably represented the claimant, despite taking on the retainer at such a late stage, and this Court is grateful for her efforts in that regard.

- [5] Transcripts from some earlier chambers proceedings were prepared, and reasons for judgment for some of those proceedings were also obtained. Submissions proceeded on two occasions, including for submissions on the earlier proceedings and reasons for judgment.

Background

- [6] On March 26, 2021, in chambers, the claimant, who was self-represented, obtained an order for 101 months of retroactive child support at \$821 per month, for a total of \$82,921 ("March 2021 Order"). The 101 months ran from December 1, 2008 to April 14, 2017, when the child turned 19. The Court issued reasons.
- [7] The respondent, who had filed a response in opposition and had notice of the application, did not attend the telephone application. He was also self-represented at the time. At trial he provided some reasons for failing to appear at that crucial hearing, which he summarized by saying the "reality" was that he "screwed up".
- [8] The March 2021 Order provided that the respondent could apply to set it aside with seven days notice to the claimant, but that otherwise the March 2021 Order remained in effect.
- [9] The respondent did apply to set aside the March 2021 Order. That application was heard in chambers on September 21, 2021.
- [10] The respondent now had counsel. The claimant again represented herself. That chambers judge was not the judge who made the March 2021 Order. The application was dismissed with reasons.
- [11] The matter was ultimately set for a 5-day trial commencing May 1, 2023. Trial briefs were filed and a trial management conference took place March 27, 2023. The issue identified by both parties, who at this point both had counsel, was retroactive child support.
- [12] The claimant's position is that the March 2021 Order was a final order, and as such the respondent had the burden of proving a change in circumstances. The respondent's position was that the March 2021 Order was at best an interim order, and that the claimant had to prove her entitlement to retroactive child support and, if any, the quantum.
- [13] Ultimately, the matter proceeded as a trial. Given the history of the matter, a trial was the most comprehensive and fair manner to address the retroactive child support issue. It was the hearing process both parties chose, even though they did not agree who bore the burden of proof.
- [14] The issues posed by the parties after trial are:
1. Was the March 2021 Order a final order or an interim order?
 2. Is the claimant entitled to retroactive child support?

3. If the claimant is so entitled, in what amount is the claimant entitled to retroactive child support, and for what period of time?

Further Background

- [15] As of May 1, 2023, this matter had spanned three decades. I will set out some further background.
- [16] The child was born April 14, 1998. Given some of the evidence, and in the interests of maintaining the child's privacy and meaning no disrespect, I will refer to the child as the child. For similar reasons, I have exercised my discretion to anonymize the surnames of the parties.
- [17] The claimant commenced this proceeding, with counsel, under the old Supreme Court Rules. On January 21, 2008, she filed a writ of summons and statement of claim, stating the parties had been separated since May 1, 1999.
- [18] Included was a ticked box for "maintenance or support of a child". Under Part D ("Other Proceedings and Agreements") paragraph 14(a) stated that the Provincial Court ordered the respondent to pay \$200 per month for maintenance of the child, for which the claimant had to seek enforcement. That paragraph goes on to state the parties reached an oral agreement in 2003 to equally split what is now called parenting time, with the respondent paying no child support. Paragraph 28 sought child support or maintenance under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) and the Family Relations Act (later replaced by the Family Law Act, SBC 2011, c. 25) [FLA]. The claimant also sought a divorce.
- [19] The respondent's then counsel filed an appearance March 10, 2008, and filed a second appearance on March 26, 2008. He filed a Notice of Appointment of Solicitor on March 20, 2008.
- [20] The respondent filed his statement of defence and counterclaim on April 4, 2008. He opposed the child support claim, making his own claim for that. He denied the claimant's paragraph 14(a). The respondent also agreed to a divorce.
- [21] The pleadings were ad idem that the parties separated May 1, 1999. The claimant's testimony at trial varied slightly from that, but not in a manner that has any impact on this action, the parties now having been separated for over 25 years.
- [22] The respondent filed a financial statement on May 6, 2008; the claimant filed hers on June 23, 2008.
- [23] The claimant filed a requisition for a Judicial Case Conference ("JCC") on July 17, 2008.
- [24] At that JCC, on August 18, 2008, Madam Justice Gray ordered, by consent, that the respondent provide full tax returns for 2005 to 2007 and tax assessments for 2005 and 2007. There was no order for child support. There was no order regarding a tax return and assessment for 2008, perhaps because taxation year 2008 was ongoing in August 2008.

- [25] On March 4, 2009, the claimant filed a requisition for a further JCC, which took place before Master Taylor on April 16, 2009. It appears no consent orders were made, including no order for child support.

Steps After April 2009

- [26] Not one further step was taken in this Court, by either party, until almost eleven years later, on February 7, 2020. On that date the claimant filed an affidavit. That affidavit contained various communications between counsel marked "without prejudice" regarding child support.
- [27] No divorce order was made prior to trial, nor since.
- [28] On July 10, 2020, the claimant filed a Notice of Application seeking, among other things, retroactive child support of \$82,921. At the time she was representing herself. In October 2020 the respondent filed a response opposing the retroactive child support claim. He did not file an affidavit but merely appended various materials to his response. He was also representing himself.
- [29] Further filings and court appearances ensued, and the claimant's July 10, 2020 application ultimately proceeded on March 26, 2021 by telephone (measures related to the pandemic were still in force).
- [30] As noted earlier, the respondent did not appear at that application. The March 2021 Order was made. It relied upon the claimant's representations regarding what counsel for the claimant acknowledges were "without prejudice" communications (included not only in the claimant's February 2, 2020 affidavit, but also in her second affidavit filed July 6, 2020).
- [31] No jurisdictional issue was raised on March 26, 2021.
- [32] On September 21, 2021, a different judge of this Court dismissed the respondent's application to vary the March 2021 Order. I will further address this appearance below.
- [33] The then Family Maintenance Enforcement Program (now the BC Family Maintenance Agency) Notice of Filing was filed with this Court on May 19, 2021. There is no issue that as a consequence \$82,921 was seized from the respondent and provided to the claimant. The respondent testified the funds came from the sale of his house. The claimant testified she used the funds to pay off bills (these included expenses related to an RV she had purchased in 2017 for approximately \$200,000, similar expenses for her former partner's RV, joint expenses for her and her former partner for several months, vet bills and financial help for her child (who was by then an adult)).
- [34] The parties were back in chambers on June 24, 2022, further to the respondent's application filed June 7, 2022. The Court granted some of the relief sought for document discovery and a financial statement, adjourned monetary relief generally and set a trial for 5 days to commence May 1, 2023.

- [35] The respondent filed a Notice of Trial on February 6, 2023 for a 5-day trial. As noted earlier a Trial Management Conference took place March 27, 2023. The respondent filed a Trial Certificate on April 4, 2023.
- [36] The parties then took all steps consistent with a trial leading up to May 1, 2023 where, after submissions, the matter proceeded to trial with the issue of which party bore the burden of proof to be decided depending upon the status of the March 2021 Order as either interim or final, a matter left to be decided at trial on a full record.
- [37] I note that counsel for the claimant submits in her written submissions that it was an error for her then-counsel to agree to set trial dates at a JCC, and that the claimant should not be prejudiced by prior counsel's "mistake". As noted, the trial dates were set after the June 24, 2022 matter in chambers on an application by the respondent.
- [38] As discussed further below, a trial or a summary trial are the only two avenues to obtain a final order in a defended family law case (Rule 10-11). Here counsel for the claimant seeks a finding that the March 2021 Order was a final order.
- [39] I note that this Court may, on an application in chambers, order that a matter be heard as a trial generally or on an issue pursuant to Rule 10-3(7)(d) (see *CMR v. LFR*, 2019 BCCA 371).

Issue 1: Was the March 2021 Order a Final Order or an Interim Order?

- [40] The claimant submits the March 2021 Order is a final order pursuant to the FLA. The respondent submits it was an interim order. Both parties submit I should address this first.
- [41] I will do so, in part because it may amplify my reasons on Issue 2.
- [42] The March 2021 Order permitted the respondent to apply to set it aside, on notice, absent which it remained in effect.
- [43] In making the March 2021 Order, the hearing judge stated:

THE COURT: On the basis of the materials filed and everything you have told me, I am prepared to grant you an order that the respondent pay child support arrears in the amount of \$82,921 payable forthwith.

[Claimant]: Okay.

THE COURT: Those amounts will be payable forthwith.

[Claimant]: Okay.

THE COURT: Because the respondent is not here today, I am going to say that the respondent may apply to set aside this order on seven days' notice to the claimant, but if that does not happen, the order remains in effect.

- [44] There is substantial merit to the respondent's submission that this was not a summary trial. I see no indication in the proceedings of March 26, 2021 that the claimant's application was considered to be an application for a summary trial.
- [45] The original pleadings of both parties sought child support under both the Divorce Act and (at that time, in 2008) the Family Relations Act.
- [46] The claimant's July 10, 2020 application does not specify the Act relied upon for retroactive child support. At the time, she was representing herself. The March 2021 Order is silent on this topic.
- [47] The respondent did apply to set aside the March 2021 Order.
- [48] He did not do so before the judge who heard the matter on March 26, 2021, but before a different judge. As noted earlier, that application was dismissed on September 21, 2021. Much of the respondent's submission focused on the claimant allegedly not filing and delivering a Notice of Intention to Proceed prior to the March 2021 Order.
- [49] With regard to the respondent's assertion that there was no agreement to pay \$821 per month, the September 21, 2021 judge noted that issue would have been more appropriately addressed before the original judge who heard the matter on March 26, 2021. It does not appear the respondent sought to do so thereafter.
- [50] There is no formal order entered from the September 21, 2021, decision.
- [51] The March 2021 Order is in Form 51. It was prepared following the hearing that day, apparently with the assistance of a lawyer who was helping the claimant (Transcript, March 26, 2021, p. 6, l. 20 to p. 7, l. 10).
- [52] Rule 15-1 provides for different forms depending on the circumstances set out. On March 26, 2021, that Rule provided:

RULE 15-1

Form of order

- (1) Unless these Supreme Court Family Rules otherwise provide, an order must be in the following form:
- (a) if the order is a final order,
- (i) in Form F33 if the order changes, suspends or terminates a final order and is made by consent,
- (ii) in Form F51 if the order rescinds, changes or suspends a final order and is not made by consent,
- (iii) in Form F34 if the order is made under Rule 10-8 without notice and without a hearing, or

- (iv) in Form F52 in any other case;
- (b) if the order is not a final order and is made without a hearing and by consent, in Form F33;
- (c) if the order is not a final order and is made under Rule 10-8 without notice and without a hearing, in Form F34;
- (d.1) if the order is a protection order under section 183 of the Family Law Act, in Form F54;
- (d.2) if the order is a change of a protection order under section 187 of the Family Law Act, in Form F54.1;
- (d.3) if the order is a restraining order under section 46 of the Family Maintenance Enforcement Act, in Form F54.2;
- (d.4) if the order is made under Rule 7-1 (15) at a judicial case conference, in Form F51.1;
- (e) for any order not referred to in paragraph (a), (b), (c), (d.1), (d.2) or (d.3), in Form F51.

[53] In summary, Form 51 is only the appropriate form in two circumstances:

1. 15-1(a)(ii): the order is a final order that changes, suspends or terminates a final order and is not made by consent; or
2. 15-1(e): any order not referred to in (a), (b), (c), (d.1), (d.2) or (d.3).

[54] The March 2021 Order did not change, suspend or terminate a final order. As such, Form 51 was only the appropriate form pursuant to Rule 15-1(e). Notably, Form 51 is entitled "Order Made After Application", as is the March 2021 Order.

[55] If the order was a final order after a contested hearing, as the claimant submits, the appropriate form was Form 52 (15-1)(a)(iv). As counsel for the respondent notes, Form 52 is entitled "Final Order".

[56] As noted above, the lawyer assisting the claimant apparently drafted the March 2021 Order in Form 51.

[57] In all the circumstances, I find that the March 2021 Order was an interim order. It was not made in the context of a summary trial. In this defended family law case, Rule 10-11 provides that the only other avenue for a final order is this trial.

[58] As such, as concisely posed by counsel for the claimant, the next issue is whether the claimant is entitled to retroactive child support.

Issue 2: Is the claimant entitled to retroactive child support?

[59] The trial evidence assists to a degree on this somewhat narrow issue. The Court file itself outlines the pleadings and proceedings leading to trial.

- [60] The writ of summons and statement of claim were filed by the claimant on January 21, 2008. The respondent filed his statement of defence and counterclaim April 4, 2008. Both parties, then represented by counsel, sought child support under both the Divorce Act and the Family Relations Act.
- [61] Counsel for the respondent correctly notes that there is no issue regarding child support prior to December 1, 2008.
- [62] Indeed, the claimant raises no such issue now, nor did she in her application filed July 10, 2020.
- [63] The claimant's application for retroactive child support was filed over twelve years after she filed the writ of summons and statement of claim. She sought retroactive child support solely for the period from December 1, 2008 to the date the child turned 19 on April 14, 2017.
- [64] On the evidence and submissions, there is an issue about calculating any retroactive child support payable after July 2014 until the child turned 19. This is because the child was not residing with either parent further to a voluntary care agreement and later a youth agreement with the appropriate government ministry.
- [65] Counsel for both parties agreed at trial that correspondence between counsel for each party in 2008 was "without prejudice". Unfortunately, that appears to have been the very correspondence provided to the chambers judge by the claimant on March 26, 2021 which underlies the March 2021 Order. The parties on this trial agreed such correspondence was not admissible. This includes new counsel for the claimant who lately assumed conduct of the matter; in my view, her concession in this regard was entirely appropriate.
- [66] To overcome that obstacle, counsel for the claimant relies in part on the respondent's Financial Statement filed May 6, 2008, which states his income for child support at that time as \$83,477. The claimant submits that this yields a monthly child support payment of \$798 per month (slightly less than \$821). For the same 101 months between December 1, 2008 and the child turning 19, the total for retroactive child support would be \$80,598 (slightly less than the March 2021 Order amount of \$82,921).
- [67] The respondent's income tax filings for the years 2009 to 2017 show his income being less than \$83,477 (often substantially) for those years (he was re-assessed in 2013, increasing his total income for that year to \$44,809 from \$39,809).
- [68] As noted earlier, the child lived with the respondent for the last few months of 2013, and with neither party as of early 2014. The parties agreed at trial that the child was afterwards in the care of the appropriate ministry, in one form or another, from approximately July 2014 until they turned 19.

- [69] The claimant believes, on somewhat speculative grounds, that the respondent's tax returns understate his income and that those filings are not reliable. The respondent denies that, testifying that the tax returns are accurate and that he did provide various funds to the claimant (or to the child directly) when the child was under 19 years old. He says those funds were largely in cash and that this makes it difficult to trace such payments since some bank records are no longer available at this late date.
- [70] The claimant did testify that she received some funds from the respondent, apparently contrary to her submissions to the judge hearing the March 26, 2021 application.
- [71] Given my conclusion below, I need not address the involvement of the ministry, nor resolve the evidentiary issues regarding conflicting testimony about the accuracy of the respondent's tax returns or what amounts he did pay or did not pay.
- [72] Aside from the March 2021 Order for retroactive child support, there was no court order for child support after the writ and statement of claim were filed. The March 2021 Order was the "initial order" addressing child support after the writ and statement of claim were filed on January 21, 2008.
- [73] Counsel for the claimant does not rely upon any agreement, written or oral, for child support in the period between December 1, 2008 and the child turning 19.
- [74] This is understandable in light of the claimant's rejection of the respondent's offer to pay \$225 per month in February 2009 (Ex. 4, Tab 20.2) and further correspondence just prior to the child turning 19 on April 2, 2017 (Ex. 4, Tab 42) about which the claimant testified that she just "picked a number" when citing the \$60,000 amount she put to the respondent. This testimony arose in relation to counsel for the respondent suggesting the \$60,000 figure was approximately equal to the difference between \$821 per month and \$225 per month (\$596) multiplied by 101 months (\$60,196).
- [75] In their submissions, both parties rely upon leading cases on this issue: *DBS v. SRG*, 2006 SCC 37 and *Michel v. Graydon*, 2020 SCC 24.
- [76] Other relevant cases were referred to, including: *Dring v. Gheyle*, 2018 BCCA 435 and *Deng v. Zhang*, 2022 BCCA 271 (application for leave dismissed, 2023 CanLII 8269 (SCC)).
- [77] The claimant relies upon *DBS*, submitting that retroactive awards are not truly retroactive, but that they merely hold the paying parent to an obligation that parent always had, and that child support is the right of the child. She submits that such orders are not "exceptional", and that she made the initial application by virtue of the writ of summons and statement of claim in 2008, long before the child turned 19, seeking "child support or maintenance".
- [78] The respondent submits that although this Court has jurisdiction to vary a child support order after the child is no longer a child of the marriage, this Court has no jurisdiction to make a retroactive child support order on application brought at first instance after the child was no longer a child of the marriage.

Discussion

- [79] In Dring, the son was born in July 1996. The circumstances set out by Mr. Justice Goepel for the majority at paras. 6 to 18 have relevant similarities to the case at bar:
- [6] The Mother commenced this action on October 29, 2003. In her statement of claim she sought an order for interim and permanent child support, together with sole custody, guardianship and day-to-day care of the Son.
- [7] On November 20, 2003, the Father filed his statement of defence and counterclaim. He sought joint custody and guardianship and specified access. He agreed to pay child support under the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. His pleading indicated he was presently unemployed. He proposed an interim and permanent order of child support commencing on his return to work. His pleading stated that he anticipated returning to work after the 2003 Christmas holidays.
- [8] On January 26, 2004, a Judicial Case Conference (JCC) took place before Mr. Justice Hutchison. No applications had been filed in advance of the JCC. At the JCC, based on the Father having a guideline income of \$46,000, the parties consented to the following order (the "Hutchison Order"):
1. The [Father] shall pay to the [Mother] basic child support for and on behalf of the infant child, [the Son], the sum of \$393.00 per month as follows:
 - a) for the month of January 2004;
 - i) \$150.00 on January 15, 2004, payment of which has already been made by the [Father]; and
 - ii) \$243.00 on January 31, 2004.
 - b) \$393.00 on February 15, 2004; and
 - c) \$393.00 on March 15, 2004.
 2. The [Father] shall forthwith provide to the [Mother], through her legal counsel, post-dated cheques in the said amounts;
 3. The [Father] shall provide to the [Mother], through her legal counsel, confirmation of his actual current income from all sources and continuing employment prospects no later than March 31, 2004.
 4. The amount of child support herein directed shall be adjusted (increased or decreased) upon provision by the [Father] of his actual current income information as herein directed.
 5. Further child support after March 15, 2004 shall be as agreed upon between the parties or, failing agreement, shall be determined upon application by either party to this Court.

The [Father] shall have access to the child, [the Son], over the weekend of February 21/22, 2004 as follows:

- a) the [Mother] shall facilitate travel by the child on the 9:00 a.m. ferry leaving from Swartz Bay to Tsawwassen on Saturday, February 21, 2004 for pick up by the [Father] at the Tsawwassen Ferry Terminal;
 - b) the [Father] shall facilitate travel by the child on the 5:00 p.m. ferry from the Tsawwassen Ferry Terminal on Sunday, February 22, 2004 for pick up by the [Mother] at the Swartz Bay Ferry Terminal;
 - c) the [Father] shall pay to the [Mother] reasonable bus and ferry costs incurred by her to facilitate the access as directed.
- [9] The Hutchison Order required the Father to pay child support of \$393 for the months of January, February and March 2004. He was also ordered to provide certain financial information by March 31, 2004. The Hutchison Order did not require the Father to make ongoing financial disclosure. Nor did the Hutchison Order require him to pay child support after March 15, 2004. Further child support was left to the parties to determine by agreement. Failing an agreement, either party was at liberty to apply to court to have child support determined. However, after the Hutchison Order, no further applications were made to court until January 2016.
- [10] The Father provided to the Mother sworn financial statements dated January 21, 2004 and May 8, 2004. Both financial statements indicated a guideline income less than the amount used in the Hutchison Order. The January 21 financial statement showed the Father's guideline income to be \$42,000. The May 8 financial statement indicated a guideline income of \$35,000.
- [11] At some date after the JCC, the parties reached an oral agreement pursuant to which the Father agreed to pay ongoing child support of \$393 per month. The agreement was never reduced to writing. There was no agreement between the parties that the Father would provide updated financial information or that the Father would increase his support payments if his income increased.
- [12] After 2004 the Father made no further financial disclosure to the Mother. The Mother testified that she verbally requested information about his income. The Father denies that she did. The trial judge did not resolve that factual dispute. It is common ground that the Mother never made a written request or demand for financial disclosure.
- [13] In 2010, at the Mother's request, the Father increased the payment to \$450 per month. The Father paid \$450 per month until June 2014, just before the Son turned 18 years old. In August 2015, the Mother advised the Father that child support should have continued until the Son's 19th birthday. The Father then provided the Mother with two cheques totalling \$5,400, constituting a further 12 months of child support at \$450 per month.
- [14] I would note that under the Guidelines, \$450 is the monthly amount payable by an individual earning \$48,000.

- [15] The Son graduated from high school in June 2014. His high school attendance was poor, and he did not achieve good marks. Prior to the Mother bringing her application for child support in January 2016, the Son since high school had not taken any steps to continue his education. From the time he graduated high school until the time of trial, the Son was employed for less than a month.
- [16] The Son turned 19 on July [X], 2015.
- [17] On January 13, 2016, the Mother filed an application seeking financial disclosure and child support arrears. The application did not seek ongoing child support. At the time of the application, the Son was neither attending school nor employed.
- [18] On February 2, 2016, the Father's counsel, in response to the application, wrote to the Mother's counsel advising that since the Son was no longer a "child", the Mother could not claim retroactive child support. The letter made specific reference to the decision in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37 [D.B.S.], and requested immediate withdrawal of the application.
- [80] The next several paragraphs of Dring address the son's status after turning 19.
- [81] As mentioned earlier, neither party in this case contends that the child was a child of the marriage after they turned 19 on April 14, 2017. Accordingly, the analysis of the son's status in Dring as a child of that marriage after reaching the age of majority is irrelevant to my determination.
- [82] Goepel, J.A. continued at para. 96-99:
- [96] As set out at the beginning of this section, the issue for determination is whether the court has jurisdiction to consider a claim for retroactive child support made after the child has become an adult, when the application is one that seeks to vary an existing order. This Court must determine whether the answer to the jurisdiction question should differ depending on whether the parties in the first instance had obtained a court order.
- [97] In my respectful opinion the court does not have jurisdiction to make a statutory retroactive award unless at the date of the application the child retains the status of a child, or there has been a prior application which brings the matter under the "Henry exception". The answer to the jurisdiction question is the same regardless of whether the application is an original application or for a variation of an existing order. There is no juridical or rational reason to distinguish the two situations. Parties are encouraged to settle their disputes outside the court process. When parties have reached an agreement concerning child support it is often pure happenstance whether they take the additional step of having their agreement embodied in a court order. I would suggest this is particularly so in the case of unmarried parents when child support is the only issue they need resolve. This conclusion is consistent with *D.B.S.* and *Hartshorne*. While a five judge division is not bound to follow *Hartshorne*, *D.B.S.* is binding on this Court.

- [98] The language of s. 152 of the FLA closely aligns with that in s. 17(1) of the Divorce Act. They are both application-based and are captured by the ratio in D.B.S. In my respectful opinion, they should be interpreted in the same way.
- [99] In this case, the application was not brought until January 13, 2016. As of that date the Son had reached the age of majority. He was neither employed nor attending school. There is no evidence that he was unable as of that date to withdraw from his parents' charge. On the date the application was brought, the Son was therefore no longer a "child" as defined in the FLA, and accordingly the court did not have jurisdiction to entertain the application. The award for retroactive support must be set aside.
- [83] The scope of Dring was pared down by the Supreme Court of Canada's decision in Graydon, but there remains a jurisdictional distinction between:
1. A variation, after the child is no longer a child of the marriage, of an order made when the child was still a child of the marriage;
 2. An original order for retroactive child support made after the child is no longer a child of the marriage.
- [84] In Deng:
1. The claimant, Mr. Zhang, filed a Notice of Family Claim on July 18, 2018. He did not seek child support (para. 17).
 2. The respondent, Ms. Deng, filed her response and counterclaim on September 7, 2018, taking the position that Rachael was a child of the marriage and in her counterclaim seeking retroactive and prospective child support (para. 20).
 3. Rachael was 19 years old at that time the counterclaim was filed, having been born December 18, 1998 (paras. 6 and 21).
- [85] Again unlike in this case, there was a live issue about whether 19-year-old Rachael was still a "child of the marriage" when the counterclaim for child support was filed in Deng.
- [86] Having determined that Rachael was not a child of the marriage at the time the counterclaim was filed seeking retroactive child support, the Court of Appeal in Deng discussed, at para. 72, the jurisdiction of the trial judge to make an order for retroactive child support with reference to Dring and subsequent cases.
- [87] At paras. 86 to 87 the Court stated:
- [86] In Michel v. Graydon, 2020 SCC 24, the Court confirmed that a retroactive variation of a support order may be made even though the child in question was no longer a "child" when the application was brought, overturning Dring on this point. However, as noted by the Supreme Court of British Columbia in L.L.M. v D.R.M, 2022 BCSC 143 at paras. 60-67, the decision in Michel did not overturn the point made by this Court in Dring that this Court does not have jurisdiction to make a statutory retroactive award unless at the date of the

application the child was still a "child" for the purposes of s. 146. As explained by Justice Lyster in *L.L.M.*:

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

jurisdiction to entertain an original application for child support under the FLA where the would-be beneficiary is no longer a "child".

[67] [Bound as I am by both Michel and the aspect of Dring that has not been overturned, I find that this Court has no jurisdiction to grant an order for retroactive support for N.

[87] I agree with Justice Lyster's analysis of this issue.

[88] The Court in Deng continued:

[107] I referred above to L.L.M. which, in my view, accurately summarizes the legal framework relating to this jurisdictional issue post-Colucci. It may be, as this Court observed in Dring, that there is no principled reason to differentiate between an originating application for retroactive child support and a variation of an existing order, but the distinction clearly remains; Martin J., in her concurring reasons in Michel, specifically left it to be decided another day: at para. 107.

[89] And further at para. 115:

[115] It follows, in my view, that the jurisdictional question as to whether the statutory conditions had been met as of September 2018, needs to be addressed by the trial judge. If Mr. Zhang's argument is successful, then the judge had no jurisdiction to make any award for retroactive child support.

[90] In Deng, the Court of Appeal remitted the matter to the trial judge on "the entire question of retroactive child support, not just the jurisdictional issue" (para. 120).

[91] Paragraph 107 in Deng referred to the passages above in L.L.M. in the course of finding that Lyster, J. accurately summarized the "legal framework post-Colucci." The following paragraphs from L.L.M. (not included in the above excerpts) are noteworthy to the circumstances in this case.

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

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

- [28] More significantly, the application raised the issue of whether K.C., who was born on April 17, 1991, and therefore was over the age of majority when the application was brought in May 2010, continued to have the status of a child of the marriage under the Divorce Act. This was a threshold issue that had to be determined before the merits of the application could be considered.
- [29] In order to grant an award of retroactive child support, the court must be satisfied that the child was a child of the marriage as defined by the Divorce Act at "the material time". The material time is when the application for child support is made: See *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231 at para. 89. In most instances this is not an issue for a child who is under the age of majority at the time of the application. However, where an application seeks an award of retroactive support for an adult child, the court must first determine if the adult child meets the definition of a "child of the marriage" under the Divorce Act.
- [underlined emphasis added by Lyster, J.]
- [61] There is no suggestion that N. was a child at the time this application was filed. Crepnjak was decided under the Divorce Act, not the FLA. That potentially distinguishing feature aside, under Crepnjak, this Court has no jurisdiction to make an order for retroactive child support for N. as he was not a child at the time the application was filed.
- [92] With regard to the Divorce Act and the FLA, Dring noted at para. 98 the comment of Lyster, J. in *L.L.M.* at para. 63 (above).
- [93] I also note the comments of Mr. Justice Schultes in *Segura v. Segura*, 2020 BCSC 650. He notes at para. 65 that, as of the date of his reasons, the Supreme Court of Canada had released only its brief oral judgment reversing Graydon "thus impliedly overturning Dring", with reasons to follow not yet released. In considering the jurisdiction issue at para. 87 he states:
- [87] As I have explained, although Dring has clearly been reversed on the availability of a retroactive variation of an order in respect of an adult child, its reliance on the explicit language in *D.B.S.* to preclude applications for initial orders likely remains undisturbed. As the relief sought in this case would amount to an initial order, I have no jurisdiction to award retroactive support in relation to the oldest child.
- [94] On the evidence in this case, there is no question that the claimant filed the July 10, 2020 application for retroactive child support well after the child ceased being a child of the marriage upon turning 19 on April 14, 2017.
- [95] The claimant submits that the "initial" or "original" application for child support was made upon filing of the writ of summons and statement of claim on January 21, 2008.
- [96] In Dring, there had been child support orders, though not retroactive child support orders. Those earlier child support orders were not extant when the application for retroactive support was filed after the child was no longer a child of the marriage.

- [97] In this case, the application for retroactive child support filed July 10, 2020 was for the period between December 1, 2008 to April 14, 2017. No application for child support was made between January 21, 2008 and April 14, 2017. No initial court order or agreement existed from January 21, 2008 until the March 2021 Order.
- [98] By the time the application for retroactive child support was made, the child had not been a child of the marriage for over three years.
- [99] The claimant's evidence is consistent with the Court record that she made no application in these proceedings to claim retroactive child support until July 10, 2020. By that time, the child was no longer a child of the marriage and had not been since April 14, 2017.
- [100] In *Dring*, the parties were never married. As such, there was no prayer for divorce in the pleadings, as there was in this case when the writ and statement of claim were filed on January 21, 2008.
- [101] I am mindful that these parties were, and still are, married. Despite both seeking divorce in their initial pleadings, no divorce has been granted. Divorce is not even mentioned in the Trial Briefs. The clearance certificate on file is dated January 25, 2008.
- [102] I am also mindful that if a divorce is sought, this Court is mandated to satisfy itself with regard to reasonable arrangements having been made for "children of the marriage" (s. 11(b), Divorce Act) before granting a divorce. If and when that divorce application is made in this case, the child will not have been a child of the marriage for more than eight years. In my view, the prospect of an eventual divorce does not vary the current principles established by the seminal cases discussed above.
- [103] The initial order for retroactive child support was the March 2021 Order. The child was no longer a child of the marriage at that time.
- [104] On the principles set out above, applied to the circumstances of this case, this Court has no jurisdiction to make an order for retroactive child support. There was no application for that relief until well after the child was no longer a child of the marriage.
- [105] An alternative submission by the claimant is that if the March 2021 Order was an interim order, the application the respondent made on September 21, 2021, unsuccessfully, makes any application here *res judicata*.
- [106] For the reasons outlined above, since there was no summary trial, this trial is the first occasion upon which this Court has the ability to make a final order. It is trite that a final order need not be the same as an interim order.

[107] At the time of the March 2021 Order, both parties were self-represented. The claimant relied upon materials that were, as acknowledged by her counsel's submissions, without prejudice communications. The respondent did not even bother to show up by telephone on March 26, 2021. Relatively complex legal issues, the subject of many appellate and trial court rulings before and since, were not raised for consideration until this trial.

Conclusion

[108] In summary, I find that:

- a) The March 2021 Order was an interim order for retroactive child support;
- b) This Court has no jurisdiction to make a final order for retroactive child support, and the claimant's application in that regard is dismissed.

[109] As noted earlier, after the March 2021 Order \$82,921 was seized from the respondent and provided to the claimant consequent to the Family Maintenance Enforcement Program Notice of Filing on May 19, 2021. Given my finding above, the claimant must re-pay that \$82,921 amount to the respondent,

[110] The matters of interest and/or costs can be set down before me by the parties within 30 days, should either of them choose to do so. I am mindful of the Court of Appeal's comments in Deng at para. 128, where the Court noted that the successful ground of the cross appeal was caused by Mr. Zhang not raising the jurisdictional issue with the judge. In this case, the respondent did not even bother to attend the March 26, 2021, hearing.

"Doyle J."

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