

CANADA / JUDGMENT

Weichel v. Mazzucco

2023 BCSC 2269

COURT

Supreme Court of British Columbia

DECIDED

22 December 2023

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2023 BCSC 2269 *Weichel v. Mazzucco* IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: *Weichel v. Mazzucco*, 2023 BCSC 2269 Date: 20231222 Docket: E3460 Registry: New Westminster Between: Celina Dawn Weichel Claimant And Tony Raphael Mazzucco Respondent Before: Master Hughes Reasons for Judgment Counsel for Claimant: T. Sediqi Counsel for Respondent: R. Lai Place and Date of Hearing: New Westminster, B.C. November 30, 2023 Place and Date of Judgment: New Westminster, B.C. December 22, 2023

Introduction

- [1] The respondent applies, by notice of application dated February 8, 2023, to cancel or reduce arrears of child support owing by him pursuant to an interim order made in 1996. The claimant is opposed to any reduction in the arrears owing to her.

Background

- [2] The parties to this action commenced cohabitation in or about 1993. They separated in 1995, prior to the birth of the parties' son, Cole, who was born on June 4, 1996. The respondent never lived with or had any parenting time with Cole.
- [3] The respondent had two children from a prior relationship with Laura McCrea. A November 1995 order required him to pay child support of \$600 per month for the support of those two children.
- [4] On September 18, 1996, Master Joyce, as he then was, granted an interim order in this action. Pursuant to the Family Relations Act, RSBC 1996, c 128, Master Joyce ordered that the claimant had interim sole custody of Cole, and that the respondent was to pay the sum of \$400.00 per month in child support, commencing September 1, 1996. The order also provided that the respondent was to pay \$600 for a portion of the costs arising from and incidental to the child's birth, and that the respondent was at liberty to apply to the court with respect to what was then called "access" to the child. He never did so.

- [5] Mr. Mazzucco has a grade 8 education and was a heavy-duty mechanic. In early 1996, he became maintenance supervisor for Wastech Services in Coquitlam, which involved working overtime of 20 or more hours per week, in addition to being on call 24/7. He commuted daily from his home in Chilliwack.
- [6] Following his relationship with Ms. Weichel, Mr. Mazzucco married another woman, Lisa Clements, and had a child with her in 2003. Mr. Mazzucco's undisputed evidence is that, until 2004, he was current in his child support payments, which totalled \$1,000 per month, in addition to supporting Ms. Clements and their daughter.
- [7] On July 12, 2004, Mr. Mazzucco was injured in a life-altering workplace accident. He broke both of his hands at work, and his right hand required surgery.
- [8] Mr. Mazzucco's evidence is that his workplace injury and subsequent inability to work led him to start drinking heavily. The combination of heaving drinking and financial pressures caused significant stress in his marriage and ultimately led to its breakdown. Around the time of their separation, Mr. Mazzucco assaulted Ms. Clements and was criminally charged. His release conditions precluded him from being at the family home.
- [9] Mr. Mazzucco was then homeless, living in his truck, and starting to use drugs in addition to drinking. A few weeks later, he had a second surgery on his right hand. On March 2, 2006, he was involved in a fatal pedestrian accident and his truck was impounded. The respondent's evidence is that by late 2006 he was a hard-core drug addict and living on the streets. He breached the terms of his probation for the assault charge a number of times, and was in and out of jail. He was eventually found to be not at fault for the pedestrian accident, although it continued to affect him. On August 29, 2006, he had a third surgery on his right hand.
- [10] On May 4, 2007, Mr. Mazzucco and Ms. Clements were divorced. The divorce order included a term that Mr. Mazzucco pay child support of \$418 per month to Ms. Clements, and that the former family home was to be sold. Following the sale of the home, Mr. Mazzucco was able to get caught up on the arrears of child support in this action. The arrears at issue started accruing on August 1, 2007.
- [11] Mr. Mazzucco's evidence is that he started seeking help for his drug addiction in 2008. There was a considerable wait list for treatment and he relapsed a number of times. The respondent finally reached out to his parents for help, and has been clean since 2011.
- [12] The respondent has provided a number of records which corroborate his evidence. These records include medical records from Fraser Health, letters from various doctors regarding his hand injury, WorkSafe BC records, records from the Ministry of Public Safety and Solicitor General regarding his conditional sentence order and probation reports, and records from the Ministry of Social Development and Social Innovation regarding financial support they provided to the respondent between 2006 and 2014.

- [13] The respondent has also provided a letter from his general practitioner, Dr. Spooner, dated April 23, 2023. The respondent has been a patient of Dr. Spooner since 2006. Dr. Spooner reports that, following the respondent's workplace accident in 2004, he diagnosed the respondent with depression in 2006 and referred him to a psychiatrist. That psychiatrist, Dr. Oduwole, saw the respondent in January 2007 and assessed him as being severely depressed and unemployable. Dr. Spooner reports "Mr. Mazzucco has continued to experience right hand pain and decreased function. He has severe depression including symptoms of fatigue, sleep disturbance, poor motivation, and poor concentration". The depression symptoms have been unresponsive to a number of different medications.
- [14] In addition to his mental health issues, Dr. Spooner notes further injuries to the respondent's hands. In 2017, Mr. Mazzucco suffered dog bites to both hands, resulting in muscle and nerve injuries requiring surgery. More recently he has continued to experience pain, stiffness and decreased function in both hands. X-rays in February 2023 confirm osteoarthritis in both hands and wrists. Dr. Spooner notes that chronic pain and decreased function of both hands and wrists is permanent and progressive, and not likely to improve with any surgical intervention. Dr. Spooner's summary is that Mr. Mazzucco has been unable to work at a regular job since his workplace injury in 2004 due to his medical problems.
- [15] With respect to the respondent's financial circumstances, he has provided his Notices of Assessment from the Canada Revenue Agency for the years 2003 through 2022. Earlier records are unavailable, but are not relevant as the arrears in issue started accruing in 2007. The respondent's income for the relevant years is as follows:
- | Year | Employment Income | Interest and Investment Income | Social Assistance | Benefits | Workers' Compensation | Benefits | Total Income |
|------|-------------------|--------------------------------|-------------------|----------|-----------------------|----------|--------------|
| 2007 | \$2,850 | \$33,580 | \$36,430 | | | | \$36,430 |
| 2008 | \$5,041 | \$5,041 | | | | | \$5,041 |
| 2009 | \$6,846 | \$6,846 | | | | | \$6,846 |
| 2010 | \$6,275 | \$14,896 | \$21,171 | | | | \$21,171 |
| 2011 | \$2,681 | \$4,381 | \$7,062 | | | | \$7,062 |
| 2012 | \$2,657 | \$4,464 | \$7,121 | | | | \$7,121 |
| 2013 | \$2,292 | \$1,956 | \$4,471 | \$8,720 | | | \$8,720 |
| 2014 | \$4,471 | \$4,471 | | | | | \$4,471 |
| 2015 | \$4,532 | \$4,532 | | | | | \$4,532 |
| 2016 | \$144 | \$4,534 | \$4,678 | | | | \$4,678 |
| 2017 | \$4,556 | \$4,556 | \$4,574 | \$4,574 | | | \$4,574 |
| 2018 | \$4,574 | \$4,574 | | | | | \$4,574 |
| 2019 | \$4,640 | \$4,640 | | | | | \$4,640 |
| 2020 | \$4,680 | \$4,680 | | | | | \$4,680 |
| 2021 | \$4,680 | \$4,680 | | | | | \$4,680 |
| 2022 | \$4,680 | \$4,680 | | | | | \$4,680 |
- [16] The respondent's evidence as to his more recent and current circumstances is limited. He says that he has been living with his parents since 2011, his father has Parkinson's disease, and he has been looking after his parents and their property since he got clean in 2011. The respondent is now 61 years old, and receives free room and board from his parents. His only declared income is \$432.13 per month from WorkSafe BC. Although not in evidence, in oral submissions the respondent's counsel admitted that he is paid \$100 per month in cash to cut a neighbour's lawn during the summer months.
- [17] The respondent's Form F8 Financial Statement filed July 7, 2023 lists no monthly expenses. He has no vehicle or bank accounts. His only assets are a locked-in retirement account, which his counsel says was from his work at Wastech, having a balance of just over \$130,000, and \$5,719 in WorkSafe retirement benefits.

- [18] An account statement from the Family Maintenance Agency shows a total balance outstanding to the Claimant on account of arrears of child support of \$41,355.33 as at July 5, 2023, including interest to that date. Ongoing child support for Cole ceased after Cole's 19th birthday in June 2015. Sadly, Cole died in a motor vehicle accident just a few months later.
- [19] Ms. Weichel is opposed to any reduction in the arrears owing. Her evidence in support of her position is scant, to say the least. She filed a 1 ½ page affidavit just two days before the hearing of this application, despite having been served months earlier. Her evidence is that it has been over 20 years since she had any contact with the respondent. She raised Cole on her own. The respondent barely paid any child support since Cole turned 7 years old. She had to work 8 to 9 hours a day, 7 days a week waitressing in order to support Cole, and barely got to spend any time with him. That is the extent of her evidence with respect to her financial circumstances. Legal Principles
- [20] Mr. Mazzucco's application is governed by ss. 152 and 174 of the Family Law Act, SBC 2011, c 25 [FLA]: 152 (1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.
- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
- (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
- (b) evidence of a substantial nature that was not available during the previous hearing has become available;
- (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made. 174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.
- (2) For the purposes of this section, the court may consider
- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
- (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
- (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.

- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.
- [21] The principles applicable to applications to retroactively reduce or cancel accumulated arrears of child support were reviewed in depth by the Supreme Court of Canada in *Colucci v. Colucci*, 2021 SCC 24 [Colucci].
- [22] Although *Colucci* was decided under the Divorce Act, RSC 1985, c 3 (2nd Supp), the principles applicable are substantially the same under the FLA.
- [23] Mr. Justice Verhoeven helpfully summarized the *Colucci* decision in *Kelly v. Martel*, 2022 BCSC 756 at paras. 45 to 49 as follows:
- [45] As the court explains in *Colucci*, there are two types of applications, which (as in this case) are often brought at the same time. The first is for a retroactive variation of a child support order. This is the type of application referred to in s. 152. The court in *Colucci* explains that an application for retroactive variation is based upon a material change in circumstances, most often a material change in income. If the payor gives effective notice, which includes financial disclosure sufficient for the payee to evaluate the circumstances, there is a presumption that retroactive variation may take place to the date of effective notice, up to three years prior to the date of the formal application. However, the court retains a discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair; in such cases, the factors from *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.] are relevant.
- [46] The second type of application is a "rescission" application. As the court explains in *Colucci*, these applications differ from retroactive variation applications. This, I observe, is reflected in the differences between ss. 152 and 174 of the FLA - s. 174 refers to reduction or cancellation of arrears, while s. 152 refers to "change" or in other words, variation of a prior order. A rescission application is one where the prior order corresponds with the payor's income, but the payor is seeking cancellation. It is a form of hardship application, not based upon a past material change of circumstances justifying a retroactive decrease (*Colucci* at para. 134).
- [47] *Colucci* notes that courts across the country "have taken a highly restrictive approach to the availability of rescission or suspension of child support based solely on current and ongoing inability to pay": para. 136. The court cites *Semancik v. Saunders*, 2011 BCCA 264 [Semancik], among other cases.
- [48] As the court notes "these cases demonstrate that any discretion to grant relief in this context is narrow": *Colucci* at para. 136. There is a presumption against rescinding any part of the arrears: para. 138.

[49] At paragraph 140, the court in Colucci notes that a court has a broad range of available options when faced with a proven payor hardship, including temporary suspension, periodic payments "or other creative payment options". Rescission is a "last resort in exceptional cases, such as where the payor suffers a 'catastrophic injury'": para. 141.

Analysis

- [24] As in *Kelly v. Martel*, I have no difficulty concluding that Mr. Mazzucco has established a past material change in circumstances. His life took a catastrophic turn when he suffered his workplace injury in 2004. That caused not only permanent physical impairment, but also triggered a downward spiral into alcoholism, drug addiction, depression and homelessness. To his credit, Mr. Mazzucco sought help for his addiction issues and by all accounts has been clean since 2011. That is no small feat.
- [25] Nonetheless, he has been largely unable to work since 2004. Other than 2010, when Mr. Mazzucco received WCB benefits of approximately \$15,000, his line 150 income has not exceeded \$10,000 since 2007, and has not exceeded \$5,000 since 2013.
- [26] However, Mr. Mazzucco failed to give any notice to Ms. Weichel of his intention to apply for a variation of the child support order until his counsel contacted the claimant by email in July 2022.
- [27] The respondent's evidence is that he intended to apply for a variation of support in 2010, but was unfamiliar with court processes, has limited education, and was unable to get legal assistance until he recently qualified for legal aid.
- [28] Mr. Mazzucco's application under s. 152 fails the Colucci test, as effective notice of his application was not given until 2022, long after child support ended. Other than interest, child support arrears stopped accumulating in 2015.
- [29] Accordingly, Mr. Mazzucco's application must be decided as an application for a reduction or cancellation of arrears pursuant to s. 174 of the FLA.
- [30] In order to be successful on an application under s. 174, the applicant must establish that he cannot pay now or in the future. This principle is set out in *Earle v. Earle*, 1999 CanLii 6914, and many cases that have followed it.
- [31] I am satisfied on the evidence before me that Mr. Mazzucco cannot pay presently. His medical conditions, primarily the ongoing issues with his hands, interfere with his ability to do remunerative physical work. His only income is a very small monthly payment from WorkSafe BC. The seasonal, casual lawn-cutting work that he admitted to is not indicative of a greater capacity for employment.

- [32] The question that remains is whether he can pay in the future. The respondent disclosed in his form F8 financial statement filed July 7, 2023 that he has a Locked-in Retirement Account (LIRA) through Sun Life Financial Investment Services worth \$131,242.00 and a WorkSafe BC retirement benefit worth \$5,719.02, to which WorkSafe BC continues to contribute a small amount annually.
- [33] Copies of the respondent's statements for those two assets were attached to an earlier financial statement filed June 17, 2022. The claimant suggests that these are capital assets that will be available to satisfy the child support arrears in the future.
- [34] What the claimant fails to realize is that neither of these assets will provide the respondent with a lump sum of available cash, either now or in the future. What they will provide is a modest, highly regulated income stream in the future.
- [35] The respondent is not able to access either of these funds until he turns 65. After his 65th birthday, the respondent will be eligible to transfer the LIRA funds into a Life Income Fund (LIF) or a life annuity, which will provide him with a monthly payment for his support during his retirement years. The amount of that monthly payment is subject to provincial regulation. With respect to the WorkSafe BC retirement benefit, the respondent's monthly disability benefit will end when he turns 65 and will be replaced by the retirement benefit.
- [36] Accordingly, the capital value of those funds is not available to the respondent. The claimant also suggested that the respondent may stand to receive an inheritance from his parents in the future, but there is no evidence before me as to their circumstances. Any such suggestion is speculative at best.
- [37] The issue is whether the respondent has met the test of establishing that it would be grossly unfair not to reduce or cancel the arrears.
- [38] Mr. Mazzucco was a very hard worker until his injury in 2004. He did not choose to be injured, or to have physical and mental health issues. Likewise, he did not choose to become addicted to drugs and become homeless. He did not choose to become financially destitute, which is the reason for his failure to pay child support. It is notable that the record of payments from the Family Maintenance Agency shows that there were voluntary child support payments made by the respondent, even after his workplace accident.
- [39] I must also consider the circumstances of the claimant and Cole. Brief as her evidence is, Ms. Weichel says she worked hard for many years to support Cole, with very limited financial assistance from the respondent past 2007. Although there is no evidence of the financial impact on Cole, Ms. Weichel's evidence is that she was not able to spend as much time with Cole as she wished as a result of having to work long hours to support him. That is an impact on Cole that cannot be quantified.
- [40] As Verhoeven J. noted in *Kelly v. Martel* at para. 79:

- [79] As Colucci further emphasizes, cancellation should not be ordered lightly. The standard should be stringent. Child support orders are to be taken seriously. The rule should not allow or encourage debtors to wait out their obligations: Colucci, para. 141.
- [41] At the age of 61, with his current medical conditions and progressive deterioration in his hands, I see no realistic prospect that Mr. Mazzucco's financial circumstances will improve such that will be able to pay the arrears in the future. In my view, this is one of those rare and exceptional cases of catastrophic injury that warrants a cancellation of the arrears, including interest, in their entirety, and I so order.
- [42] With respect to costs, I appreciate that Ms. Weichel has retained counsel to oppose this application. Not to add insult to injury, I am going to depart from the usual rule that costs follow the event. Although Mr. Mazzucco has been wholly successful on this application, I find it appropriate that each party will bear their own costs. "Master Hughes"

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Prepared on 27 October 2026 · Esheria