S.C.C. File No.: 38498

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

DANELLE MICHEL

Appellant
(Appellant)

AND:

SEAN GRAYDON

Respondent
(Respondent)

WEST COAST LEGAL EDUCATION AND ACTION FUND

Intervener

APPELLANT'S REPLY FACTUM

(Pursuant to Rules 29(3) and 35(3) of the *Rules of the Supreme Court of Canada*)

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REPLY FACTUM

A. Overview

1. The question on appeal is whether the British Columbia Court of Appeal correctly held that a British Columbia court has no jurisdiction to retroactively vary a child support order under s. 152 of the *Family Law Act*. However, the Respondent's factum seeks to uphold the judgment appealed from on grounds not relied on in the reasons for judgment of the Court of Appeal. Specifically, the Respondent is now arguing that the original support order was spent with the result that there is no order to vary under s. 152. The Respondent also challenges the trial judge's exercise of discretion, contending that there was no basis for making a variation order. Finally, the Respondent argues that the trial judge erred by using 2001 as the date from which the retroactive order should run. As these grounds were not considered by the Court of Appeal, the Appellant submits this reply factum to address each of these submissions pursuant to Rules 29(3) and 35(3) of the *Rules of the Supreme Court of Canada*.

B. Nature of the Order Under Appeal

2. The Respondent argues that child support orders are "spent" and automatically terminate when a child becomes independent, and further that the original support order of March 29, 2001 was terminated by the order of PCJ Woods in 2012. As a result, the Respondent contends, the order of PCJ Smith could only have been made pursuant to s. 149 of the *Family Law Act*. Under that section an application may be made by "a child's parent or guardian" or by "the child or a person acting on behalf of the child" (s. 149(2)(a) and (b)). As Alyssa was not a child at the time of the application, the Respondent argues, there was no jurisdiction to make an order for child support.[1]

3. With respect to the Respondent's argument that a child support order automatically terminates once it is "spent, and no funds are owing under it,"[2] Justice Bastarache's comments in *DBS* are apposite:

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[1] *Respondent's Factum* at paras. 70, 74, 79.
[2] *Ibid.* at paras. 81-86.

> [68] ...a payor parent always has the obligation to pay — and the dependent child always has the right to receive — child support in an amount that is commensurate to his/her income. This obligation is independent of any court order that may have been previously awarded. Accordingly, even where the payor parent has made payments consistent with an existing court order, (s)he would not have been fulfilling his/her obligation to his/her children if those payments did not increase when they should have, according to the applicable law at the time. Thus, the support obligation of a payor parent, while *presumed* to be the amount ordered by a court, will not necessarily be *frozen* to the amount ordered by a court...

4. Justice Bastarache confirmed that a payor's obligations exist independently of the amount ordered by a court. A child support order cannot be considered "spent" while a payor continues to have outstanding child support obligations which should have been fulfilled earlier. Even if the order could be considered "spent" this would not be determinative of whether it could be varied given the nature and purpose of a retroactive award as explained by Justice Bastarache. Further, there is nothing in the language of the *Family Law Act* to suggest that a child support order terminates automatically.[3] Indeed, a person may revert to being a "child" entitled to support upon returning to school after a period of work.[4] Given this reality, it is wrong to conclude that a child support order automatically terminates at any given point.

5. The Respondent argues further that the support order in this case was terminated by PCJ Woods in 2012 and thus there was no order to vary at the time the application for retroactive variation of child support was made. The Respondent is not permitted to make this argument on this appeal. The Court of Appeal accepted that there was a child support order that the Appellant was seeking to vary. It thus identified the issue as whether "the trial judge had the jurisdiction to order a retroactive variation of the child support order notwithstanding that at the time of the application, A.G., who was the subject of the child support order, no longer met the definition of 'child' in the *Family Law Act*."[5] It found that "[t]he statutory basis under the *FLA* for Ms. Michel's application was s. 152 of the *FLA*."[6]

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[3] See *West Coast LEAF's Factum* at para. 11, sections 187(4) and 167(3) of the *Family Law Act*, and *Smith v. Smith*, 2008 SKCA 141 at para. 27 which confirms that it is the payor's responsibility to terminate a child support order.

[4] See, for example, *Brandner v. Brandner*, 2002 BCCA 394 and *Renouf v. Bertol-Renouf*, 2004 ABQB 885, as well as Justice Hunter's comments in *Dring* at para. 140.

[5] *Graydon v. Michel*, 2018 BCCA 449 at para. 28.

[6] *Ibid*. at para. 12.

6. The Respondent was required to obtain an order for leave to cross-appeal to challenge this finding in this Court. He did not do so, and he is thus barred from challenging the basis upon which the Court of Appeal decided the Appellant's application for a retroactive variation of child support.

7. Even if the Respondent had cross-appealed, his argument could not succeed. The order of PCJ Woods expressly stated that the Appellant could claim retroactive child support in the future:[7]

> THIS COURT ORDERS that the obligation of SEAN GRAYDON to pay child support for the child, ALYSSA GRAYDON born December 27, 1991, terminates as of April 30, 2012;
>
> THIS COURT FURTHER ORDERS that this order is made on a without prejudice basis to any claims for retroactive support that may be pursued by the Respondent, DANELLE MICHEL as against the Respondent, SEAN GRAYDON.

8. While the phrase "without prejudice" cannot grant jurisdiction for a cause of action that does not exist, the inclusion of this phrase demonstrates that PCJ Woods was not terminating the child support order of March 29, 2001 for any and all purposes. PCJ Woods was bringing to an end the Respondent's present obligation to pay ongoing support as of April 30, 2012; he was not bringing to an end the Respondent's liability to pay an increased amount for his past obligations. Thus, the Appellant was permitted to bring a subsequent application for retroactive variation of a child support order. The hearing in 2016 proceeded on this basis.[8]

C. Unreasonable Delay

9. The Respondent appears to suggest that PCJ Smith misapprehended the evidence with respect to the Appellant's delay in applying for a retroactive award.[9] The Respondent submits that this constitutes an error of law.[10] No authority is cited to support this contention. This Court has confirmed that significant deference is owed to the trier of fact in family law matters. As this Court stated in *Hickey v. Hickey*:[11]

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[7] *AR*, Tab 16, page 61.
[8] The application filed by the Appellant was on a court form entitled "Application Respecting Existing Orders or Agreements" *AR*, Tab 8, pages 48-49.
[9] *Respondent's Factum* at para. 92.
[10] *Ibid.* at para. 87.
[11] *Hickey v. Hickey*, [1999] 2 SCR 518 at para. 12, quoted with approval in *DBS* at para. 136.

> Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

10. This Court has further confirmed that omissions in reasons for judgment are only material if they give rise to the reasoned belief that the trial judge "must have forgotten, ignored or misconceived the evidence in a way that affected the conclusion."[12] No such reasoned belief arises in this case.

11. With respect to the Appellant's reasonable excuse for why support was not sought earlier, PCJ Smith noted that the Appellant had signed her rights over to the Ministry, had intended to apply in 2009 but had suffered a severe injury, and that there was a history of abuse with the Respondent which occurred when she was a minor. On this evidence, PCJ Smith held that there was no unreasonable delay.[13]

12. Further, there are four factors which a court will consider when exercising its discretion to award retroactive child support:[14]

a. whether there is a reasonable excuse for why support was not sought earlier;

b. the conduct of the payor;

c. the circumstances of the child; and

d. whether there will be hardship to the payor if a retroactive award is ordered.

Justice Bastarache stated that none of these factors is decisive and courts should "strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix."[15]

13. PCJ Smith found that the other three *DBS* factors favoured a retroactive award:

a. since 2001, the Respondent had underpaid child support despite being aware of the *Child Support Guidelines*;

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[12] *Van de Perre v. Edwards*, 2001 SCC 60 at para. 15.
[13] *BCPC Reasons* at para. 19-21.
[14] *DBS* at paras. 94-116.
[15] *Ibid.* at para. 99.

b. the Respondent was aware that Alyssa was living in poverty and even made jokes about her living in the "ghetto", and that Alyssa had "lived for many years in poverty and may not have had to if Mr. Graydon paid child support in accordance with his annual income as it fluctuated";[16] and

c. the Respondent would not suffer hardship if he was ordered to pay retroactive child support.

14. PCJ Smith heard the testimony of both (unrepresented) parties, reviewed the evidence in his reasons for judgment, and made findings of fact related to the four factors in *DBS*. There is no basis for concluding that PCJ Smith's failure to find unreasonable delay constitutes an "error of law," and there is no material error (or any error) which would justify a reconsideration of PCJ Smith's exercise of discretion.

D. Date of Retroactivity

15. The Respondent takes issue with PCJ Smith's determination that the date of effective notice for seeking retroactive support was 2001. Respectfully, the Respondent has misunderstood the law on the date of retroactivity.

16. In *DBS*, Justice Bastarache explained that the date of effective notice should ordinarily be used as the date of retroactivity, however a finding of blameworthy conduct changes the analysis:

> [124] The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct…Not disclosing a material change in circumstances - including an increase in income that one would expect to alter the amount of child support payable - is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

[16] *BCPC Reasons* at para. 37.

17. Justice Bastarache stated that courts should adopt an "expansive view" of what constitutes blameworthy conduct, which includes anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support.[17]

18. The Respondent suggests that he "diligently paid his support at all times, pursuant to the court order in place."[18] However, PCJ Smith found that the Respondent's actions had been blameworthy. The Respondent was aware of the *Child Support Guidelines* but failed to pay the proper amount. He privileged his own interests above his daughter and failed to disclose increases in his income. Under *DBS*, the presumptive date for retroactivity was the date when increased support should have been paid. Other judges have made similar awards in both British Columbia and other jurisdictions.[19]

19. Finally, with respect to *Brown v. Kucher*, 2016 BCCA 267, relied on by the Respondent, Justice Newbury found that the trial judge had mischaracterized Mr. Brown's "doing nothing" as being at the high end of blameworthiness. PCJ Smith did not make this error; he characterized the Respondent's conduct as being blameworthy "but only to a small degree."[20] Again, the Respondent's relative blameworthiness is only one factor in the overall analysis. PCJ Smith made no error with respect to the evidence, his exercise of discretion, or the date of retroactivity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, this 4th day of November, 2019.

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Peter M. Mennie
Counsel for the Appellant

[17] *DBS* at para. 106.
[18] *Respondent's Factum* at para. 96.
[19] See, for example: *A.J.D. v C.D.*, 2017 BCSC 1559 (partially reversed on appeal but not on this point, 2018 BCCA 262), *Diaz v. Pena*, 2016 ONCJ 88, and *Fairfex v Garland*, 2018 NSSC 168.
[20] *BCPC Reasons* at para. 26.

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