

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kingsbury v. Kingsbury*,  
2025 BCSC 212

Date: 20250210  
Docket: 151003  
Registry: Victoria

Between:

**Angela Kathleen Kingsbury**

Claimant/  
(Respondent on Application)

And:

**Kristoffer James Kingsbury**

Respondent/  
(Applicant on Application)

Before: The Honourable Madam Justice D. MacDonald

## **Reasons for Judgment on Application**

Counsel for the Claimant:

S. Wright

Counsel for the Respondent:

G. Fogarty-Greenshaw

Place and Dates of Hearing:

Victoria, B.C.  
December 4 – 5, 2024

Place and Date of Judgment:

Victoria, B.C.  
February 10, 2025

**Table of Contents**

**OVERVIEW..... 3**

**ORDERS SOUGHT ..... 4**

**BACKGROUND TO THE NOTICE OF FAMILY CLAIM ..... 4**

**BACKGROUND TO THE APPLICATION ..... 6**

**STANDING IN THE PLACE OF A PARENT ..... 9**

**SETTING ASIDE A FINAL ORDER MADE IN THE ABSENCE OF A PARTY ..... 11**

    Legal principles ..... 11

    Analysis..... 12

**VARYING A PERMANENT ORDER FOR SUPPORT..... 14**

    Legal principles ..... 14

    Analysis..... 15

**RETROACTIVE VARIATION OF SUPPORT ..... 15**

    Legal principles ..... 15

    Analysis..... 17

**RESCISSION OF ARREARS ..... 19**

    Legal principles ..... 19

    Analysis..... 20

**DIVISION OF PROPERTY AND DEBT ..... 22**

**DISPOSITION..... 23**

**COSTS ..... 23**

**Overview**

[1] This is an application to set aside or, in the alternative, vary a final order of this Court in a family proceeding. The test to set aside a final order is onerous due to the objectives of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) [*Divorce Act*], which include the need for finality and certainty for the parties involved.

[2] By way of background the claimant, Angela Kathleen Kingsbury (now known as Angela Farley) filed a notice of family claim on March 16, 2015. Ms. Farley was seeking an order for divorce, child support, spousal support, and unequal division of property and debt. The notice of family claim was personally served on the respondent, Kristoffer James Kingsbury, on April 12, 2015. Although the respondent is the applicant and the claimant is the respondent on this application, for ease of reference I will simply refer to them by name.

[3] Mr. Kingsbury did not file a response to the proceeding. Consequently, Ms. Farley’s application for divorce and corollary relief was decided by Justice Bracken (as he then was) as an undefended family law case on June 3, 2016.

[4] Justice Bracken made a final order (the “Bracken Order”). His order included that:

- Mr. Kingsbury has no interest in the Family Residence;
- Mr. Kingsbury is solely responsible for the Family Debt and will indemnify the claimant for it;
- Mr. Kingsbury is the step-father of the children, a daughter born in 2005 and a son born in 2008;
- Mr. Kingsbury owes child support for both children in the amount of \$1,016 per month; and
- Mr. Kingsbury owes spousal support to Ms. Farley in the amount of \$500 per month.

[5] Robert Cocks, the biological father of the children, was not joined in the family claim. Ms. Farley had not requested that he pay child support for his children because, as she explained, he is on disability benefits and is not in a position to pay support. As a result, he was not ordered by Justice Bracken to pay child support in accordance with the *Federal Child Support Guidelines*, SOR/97-175 [*Child Support Guidelines*].

**Orders Sought**

[6] Mr. Kingsbury seeks:

- a) For the Bracken Order to be set aside or varied on the basis that it was an order made in a party's absence, pursuant to both s. 200(2) of the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*] and/or the Court's inherent jurisdiction;
- b) In the alternative, for the Bracken Order to be varied to reflect Mr. Kingsbury's decrease in income as a material change in circumstances since the Bracken Order, and for the decrease in support obligations to apply retroactively back to 2015; and
- c) For the cancellation of some or all of the arrears that Mr. Kingsbury currently owes, pursuant to s. 174 of the *FLA*.

**Background to the Notice of Family Claim**

[7] The parties began to live in a marriage-like relationship in April 2011. They were married on June 11, 2012 at Halfmoon Bay, British Columbia and lived in 100 Mile House. The parties separated on August 23, 2014 and were divorced in 2016.

[8] The parties do not have any biological children together. However, Ms. Farley has two children from her previous relationship with Mr. Cocks, namely:

- a daughter born in 2005; and
- a son born in 2008

(collectively the “Children”).

[9] During the relationship, Mr. Kingsbury contributed to the mortgage on the family residence. He also assisted with the Children’s care, although his involvement was limited because he worked in camps outside of town. He stated in his affidavit that he was seldom at home.

[10] Post-separation, Mr. Kingsbury's income decreased as he was not working due to addiction and mental health issues. He subsequently received treatment for his addictions and is currently on a methadone regime. Since July 2015, he has been receiving disability benefits. These benefits are Mr. Kingsbury’s only source of income. Mr. Kingsbury lives with his mother and is dependent on her for support.

[11] The Bracken Order requires Mr. Kingsbury to pay child support for the Children. The Bracken Order also requires Mr. Kingsbury to pay spousal support to Ms. Farley. Both are based on an imputed income to Mr. Kingsbury of \$67,000 per annum.

[12] Mr. Kingsbury was not earning \$67,000 at the time the Bracken Order was made, nor has he earned anywhere near that level of income since that time.

[13] Mr. Kingsbury’s income in relevant years was as follows, demonstrated by his tax returns:

2015	\$24,729.00
2016	\$9,140.00
2017	\$11,951.20
2018	\$13,346.00
2019	\$15,671.62
2020	\$17,901.66
2021	\$16,953.00
2022	\$17,003.00
2023	\$17,891.17
2024	\$19,140.00 (projected)

[14] Ms. Farley's income in 2021 was \$36,626, in 2022 it was \$31,746, and in 2023 it was \$44,369. In 2024, Ms. Farley's income decreased due to health issues and because she is going back to school to qualify for admission into a nursing program. I commend her for taking positive steps toward financial stability and becoming economically self-sufficient.

### **Background to the Application**

[15] Mr. Kingsbury was served with the notice of family claim on April 12, 2015. He did not respond. Ms. Farley's then-lawyer sent a letter dated June 29, 2015 to Mr. Kingsbury. The letter explained that if Mr. Kingsbury did not respond to the notice of family claim, an order would likely be made in his absence.

[16] Mr. Kingsbury has learning and mental health disabilities. At the time the Bracken Order was made, Mr. Kingsbury was actively suffering from addiction to illicit drugs. Mr. Kingsbury also deposed that he suffers from anxiety and bipolar disorder. According to Mr. Kingsbury, these disabilities, combined with his drug use, have left him with limited mental capacity.

[17] Given that Mr. Kingsbury had not filed a response or provided financial disclosure, the financial documents before Justice Bracken were provided by Ms. Farley. She had evidence of Mr. Kingsbury's income while the parties lived together but did not have access to his post-separation income. According to his personal income tax returns, Mr. Kingsbury's income in 2012 was \$66,000 and his income in 2013 was \$67,000. Those tax returns were before the Court when the monthly support amounts in the Bracken Order were calculated.

[18] Justice Bracken issued his final order on June 3, 2016. The Bracken Order required Mr. Kingsbury to indemnify Ms. Farley for all family debt, and debts which accrued in Ms. Farley's name following the parties' separation. The Bracken Order imputed an income of \$67,000 to Mr. Kingsbury and found that he stood in the position of a stepparent to the Children.

[19] For ease of reference, I set out the entire Bracken Order:

THIS COURT ORDERS that

Subject to section 12 of the Divorce Act (Canada), the claimant, Angela Kathleen Kingsbury, and the respondent, Kristoffer James Kingsbury, who were married at Halfmoon Bay, British Columbia, on June 11, 2012, are divorced from each other, the divorce to take effect on the 31st day after the date of this order.

THIS COURT ORDERS that:

1. Under section 95(1) of the *Family Law Act*, the family residence located 5741 Horse Lake Road, 100 Mile House, BC, Legal Description: Lot 1, District Lot 512, Lillooet District, Plan 18893, PID: 008-202-150 (the "Family Residence") is unequally divided such that Kristoffer Kingsbury has no interest in the Family Residence.
2. Under section 87(1) of the *Family Law Act*, the family debt is the Platinum Mastercard MBNA credit card debt in the amount of \$27,205.39 comprised of the principal amount of \$24,500 and the interest amount of \$2,705.39 ("Family Debt").
3. Under section 95(1) and 97(2) of the *Family Law Act*, Kristoffer Kingsbury is responsible for the Family Debt and will indemnify Angela Kingsbury for the family debt.
4. Kristoffer Kingsbury is responsible for the debt acquired after the date of separation in Angela Kingsbury's name and will indemnify Angela Kingsbury for this debt. These debts are specifically:
  - (a) Shaw cable debt in the amount of \$448.89;
  - (b) Telus debt in the amount of \$396.50;
  - (c) BC Hydro debt in the amount of \$171.60; and
  - (d) Fortis BC debt in the amount of \$126.03.
5. Kristoffer Kingsbury is the stepfather of [daughter], born June 25, 2005, and [son], born April 24, 2008. Kristoffer Kingsbury has a Federal and British Columbia Child Support Guideline income of \$67,000.
6. Kristoffer Kingsbury will pay child support for [the children] in the amount of \$1016 per month commencing April 1, 2015 and continuing on the first of each month thereafter.
7. Angela Kingsbury's income is from social assistance and amounts to \$12,186 annually.
8. Angela Kingsbury is entitled to spousal support from Kristoffer Kingsbury.
9. Kristoffer Kingsbury will pay Angela Kingsbury \$500 per month in spousal support commencing April 1, 2015 and continuing on the first of each month thereafter.
10. Kristoffer Kingsbury will not have any contact time with the children.
11. Angela Kingsbury's application for a name change is dismissed.

[20] Mr. Kingsbury has paid approximately \$52,000 in child support since the Bracken Order. The child support payments would have been closer to \$27,000 had they been based on his actual income. Mr. Kingsbury has made efforts to set aside the current order since he learned it had been issued.

[21] In February 2017, Mr. Kingsbury retained counsel through Legal Aid BC (“LABC”). That lawyer took no steps to advance Mr. Kingsbury’s case. Mr. Kingsbury made a complaint to LABC regarding the services he received from that lawyer.

[22] In March 2018, LABC appointed alternate counsel to Mr. Kingsbury. That lawyer took some steps to prepare application materials. However, he did not provide Mr. Kingsbury with a draft affidavit until April 2019. No significant further steps were taken.

[23] Mr. Kingsbury retained yet another lawyer in 2020. On October 1, 2021, the lawyer filed an application on Mr. Kingsbury’s behalf. Mr. Kingsbury served Ms. Farley with a notice of application on October 2, 2021, seeking to vary the Bracken Order. Mr. Kingsbury provided his first financial statement to Ms. Farley on October 28, 2021.

[24] Mr. Kingsbury’s application was heard on January 10, 2022. Both parties were represented by counsel. The application was dismissed without prejudice when it became clear that Mr. Kingsbury sought to set aside the final order rather than vary it. Mr. Kingsbury was ordered to pay \$1,000 in costs to Ms. Farley. To date he has not done so.

[25] Mr. Kingsbury was directed back to LABC to retain new counsel. That lawyer delegated conduct of the file to a junior associate. When Mr. Kingsbury expressed some concerns regarding the experience of the junior associate, the lawyer terminated the solicitor-client relationship.

[26] Mr. Kingsbury retained current counsel in October 2023. It took time to receive a transfer of the file from previous counsel and prepare the present

application. In the interim, efforts were made to negotiate a resolution with Ms. Farley, without success.

[27] The application was before me on December 4 and 5, 2024. Ms. Farley advised that she is willing to waive spousal support going forward. However, Ms. Farley is otherwise opposed to the orders sought by Mr. Kingsbury. She takes the position that there should be no variation in the support amounts and that there should be no cancellation of the support arrears. She argues that child support should continue in the amount stipulated by the Bracken Order.

[28] Mr. Kingsbury is not taking issue with the division of property and debts. His primary position is that the remainder of the Bracken Order should be set aside. He is prepared to allow Ms. Farley to retain the support payments she has already received but he is seeking a cancellation of all arrears.

**Standing in the place of a parent**

[29] Section 146 of the *FLA* defines a stepparent as follows:

"stepparent" means a person who is a spouse of the child's parent and lived with the child's parent and the child during the child's life.

[30] The *Child Support Guidelines* address the ability of a court to grant a child support order against a stepparent. Section 5 of the *Child Support Guidelines* states that "[w]here the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child."

[31] The obligations of a stepparent to provide child support are also addressed in s. 147 of the *FLA*:

...

(4) A child's stepparent does not have a duty to provide support for the child unless

(a) the stepparent contributed to the support of the child for at least one year, and

- (b) a proceeding for an order under this Part, against the stepparent, is started within one year after the date the stepparent last contributed to the support of the child.
- (5) If a stepparent has a duty to provide support for a child under subsection (4), the stepparent's duty
- (a) is secondary to that of the child's parents and guardians, and
  - (b) extends only as appropriate on consideration of
    - (i) the standard of living experienced by the child during the relationship between the stepparent and the stepparent's spouse, and
    - (ii) the length of time during which the child lived with the stepparent.

[32] A parent is not entitled to pass over a biological parent in favour of pursuing a stepparent for support: *B.P.E. v. A.E.*, 2016 BCCA 335; s. 147 *FLA*. In determining the quantum of support, the court should consider the standard of living experienced by the child during the relationship and the length of time during which the child lived with the stepparent.

[33] In *Sullivan v. Struck*, 2018 BCCA 256, the Court of Appeal confirmed that the correct approach under s. 5 of the *Child Support Guidelines* is one of flexibility and discretion. Evidence is required regarding the standard of living of the children and the arrangements in place for the support of the children by their natural parent. However, a stepparent's undertaking to support the children during the marriage is irrelevant to the analysis of whether support should be paid post-separation: *H.(U.V.) v. H.(M.W.)*, 2008 BCCA 177. Whether a stepparent is estranged from their children should only be considered in egregious circumstances: *Shaw v. Arndt*, 2016 BCCA 78.

[34] Unlike the discretionary approach for stepparents, a biological parent's obligation can be determined only in accordance with the non-discretionary "presumptive rule" of s. 3 of the *Child Support Guidelines*. The exceptions are if custody is being shared, the child is over age 19, or another 'discretionary' provision applies: *H.(U.V.)* at para. 38.

[35] Section 3 of the *Child Support Guidelines* provide:

**Presumptive rule**

**3 (1)** Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
- (b) the amount, if any, determined under section 7.

[36] In summary, under s. 147 of the *FLA* and s. 5 of the *Child Support Guidelines* a stepparent's obligation to pay child support is secondary to that of a biological parent, while under s. 3 of the *Child Support Guidelines*, a biological parent's obligation is determined independently of the obligations of the stepparent: *Chartier v. Chartier*, [1999] 1 S.C.R. 242, 1999 CanLII 707. Therefore, evidence relating to the attempts to obtain support from the biological parent as well as the biological parent's ability to pay should be before the court: *E.Z. v. P.Z.*, 2017 BCSC 375 at paras. 36–37; *Varga v. Varga*, 2009 BCSC 416. The other parent should either be before the court, or other evidence of that parent's status should be adduced: *H.(U.V.)* at para. 38. This is because the analysis should start with the income of the biological parents.

**Setting aside a final order made in the absence of a party**

**Legal principles**

[37] Section 200(2) of the *FLA* permits the court to vary, set aside, or suspend orders made in a party's absence. Furthermore, this Court has inherent jurisdiction to vary or set aside orders to prevent miscarriages of justice: *Nichol v. Nichol*, 2015 BCCA 278 at para. 28. At para. 35, the Court of Appeal in *Nichol* adapted the general factors<sup>1</sup> to set aside a default judgment to the family context:

- i. The respondent must establish that he or she did not willfully and deliberately fail to file a response to the notice of family claim. This inquiry

---

<sup>1</sup> The general factors were set out in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (B.C. Co. Ct.), [1979] B.C.J. No. 1965

is meant to focus on personal and actual intent of the respondent and not his or her counsel.

- ii. The *Divorce Act* requires the respondent to apply to set aside the final order as soon as reasonably possible after having obtained knowledge of the final order. Alternatively, the respondent must offer a reasonable explanation as to any delay in applying to set the order aside.
- iii. The respondent must establish that he or she has a meritorious defence or at least a defence "worthy of investigation".

[38] These factors are not immutable and are to be applied flexibly. A failure to meet a particular factor is not fatal and the court may consider additional factors in exercising its discretion to set aside a default judgment: *H.M.T.Q. In Right Of The Province of British Columbia v. Ismail*, 2007 BCCA 55 at para. 11. The relative strength in one factor may overcome the weakness or failure in another: *J Power Excavating & Trucking Ltd. v. Icon Projects Ltd.*, 2020 BCSC 1327 at para. 13.

### **Analysis**

[39] Applying the modified *Miracle Feeds* test set out in *Nichol*, I find that Mr. Kingsbury has not established that I should exercise my jurisdiction to set aside the Bracken Order.

[40] First, Ms. Farley takes the position that Mr. Kingsbury willfully and deliberately failed to file a response in this proceeding. Mr. Kingsbury acknowledges that he was served with the court documents. Nevertheless, he claims he could not read properly due to his learning disability. A 2010 assessment found that his reading fluency was "negligible". According to Mr. Kingsbury, he did not understand how to respond to these materials, or that a response was required.

[41] I agree with Ms. Farley on this issue. While Mr. Kingsbury's failure to file a response to the notice of family claim was no doubt affected by his learning disability, there is evidence that Mr. Kingsbury was well aware of the notice of family

claim. This is clear in Mr. Kingsbury's communications with Ms. Farley prior to Justice Bracken issuing his order. Mr. Kingsbury had more than a year in which to file his response and, during that period, he communicated with Ms. Farley about the substance of her claim and made references to having to go to court. In fact, he sent her specific, detailed, and credible threats in an attempt to dissuade her from seeking child and spousal support.

[42] Moreover, while it is common ground that Mr. Kingsbury suffers from addiction and mental health issues, there was insufficient medical evidence before me to establish incapacity. I do not have enough evidence before me to determine that a disability prevented Mr. Kingsbury from understanding the claim, its potential consequences, or his responsibility in ignoring the proceeding.

[43] Second, Mr. Kingsbury contends he took steps within a reasonable period of time to set aside the Bracken Order, but his attempts were thwarted by his legal counsel. He argues that legal counsel were inexperienced or otherwise unable to properly pursue the matter in a timely fashion. He also argues that he has a meritorious defence to the claims advanced in the notice of family claim.

[44] Here I agree with Mr. Kingsbury. He did take steps to set aside the Bracken Order within seven months of becoming aware of the Bracken Order. He retained counsel in February 2017. Unfortunately for Mr. Kingsbury, his claim was not significantly advanced by several counsel.

[45] Mr. Kingsbury retained a different lawyer in 2020. On October 1, 2021 this lawyer filed an application on Mr. Kingsbury's behalf. Mr. Kingsbury also provided his financial statement to Ms. Farley in October 2021. When Mr. Kingsbury was finally able to have the matter heard by a chambers judge in January 2022, the application was adjourned because Mr. Kingsbury sought to set aside the Bracken Order and not merely vary the Order.

[46] In my view, retaining six lawyers in succession establishes that Mr. Kingsbury has a reasonable explanation for any delay there may have been before the matter came before me.

[47] In terms of the last *Miracle Feeds* factor, as modified in *Nichol*, Mr. Kingsbury has persuaded me he has a meritorious defence to the claim. Although he assisted with the mortgage and family expenses, he did not receive any portion of the proceeds from the family home and he was found responsible for the lion's share of the family debt. The spousal support was ordered without an end date, despite a very short relationship between the parties. Moreover, Mr. Kingsbury was ordered to pay as a stepparent while payment from the biological father was not pursued by Ms. Farley.

[48] Even taking all of the above factors into account, I find that Mr. Kingsbury has not met the requirements to have the Bracken Order set aside under s. 200(2) of the *FLA*. I also find this is not an appropriate circumstance to exercise this Court's inherent jurisdiction to prevent a miscarriage of justice. I say this based on the first step of the *Nichol* test: Mr. Kingsbury simply ignored the notice of family claim, to his detriment. I am therefore not prepared to set aside the Bracken Order regarding child and spousal support. Mr. Kingsbury is responsible for his choice not to respond to the notice of family claim.

### **Varying a permanent order for support**

#### **Legal principles**

[49] Even though I have declined to set aside the final Bracken Order, I may vary the support provisions of the Bracken Order on the basis of a material change in Mr. Kingsbury's financial circumstances: *FLA*, ss. 152, 167; *Divorce Act*, s. 17(4). Section 167 of the *FLA*, which applies to spousal support, mirrors s. 152, which applies to child support.

[50] To form the basis of a variation in child support, a payor's decrease in income must be significant, continuous, and not the result of a payor's choice. Trivial or

temporary changes are not sufficient to justify a variation: *Colucci v. Colucci*, 2021 SCC 24 at para. 61.

[51] To constitute a material change in circumstances for spousal support, there must have been a change in the conditions, means, needs, or other circumstances of either former spouse since the making of the spousal support order: *L.M.P. v. L.S.*, 2011 SCC 64 at para. 29. As with child support, the change must have a degree of continuity and not merely be a temporary set of circumstances: *L.M.P.* at para. 35.

### **Analysis**

[52] At the hearing before Justice Bracken, Ms. Farley submitted evidence regarding Mr. Kingsbury's employment and income, including evidence regarding Mr. Kingsbury's addiction and mental health issues. Mr. Kingsbury's income was imputed based on his personal income tax returns for 2012 and 2013, which contained the most recent information available to Ms. Farley. Unfortunately, this information is not reflective of Mr. Kingsbury's actual income since 2015.

[53] Mr. Kingsbury has been unemployed since 2015 and is receiving disability benefits. His significant drop in income, which has been continuous for almost ten years, establishes that the change in his income is not trivial nor temporary. Moreover, Mr. Kingsbury's learning disability is beyond his control and I take judicial notice of the fact that addiction is a disease, not a choice: *Colucci* at para. 61.

[54] I therefore accept that Mr. Kingsbury's financial circumstances have significantly changed in the years since the Bracken Order was made. In these circumstances I am prepared to vary the Bracken Order to reflect Mr. Kingsbury's actual income.

### **Retroactive variation of support**

#### **Legal principles**

[55] When the payor meets the threshold of establishing a material change in circumstances, a presumption arises in favour of retroactively decreasing child

support to the date the payor gave the recipient effective notice of this material change. The presumption of retroactivity arises on the day of effective notice and up to three years prior to formal notice. Effective notice requires a disclosure of the change in circumstances: *Colucci* at paras. 71, 113. Put simply, effective notice requires clear communication as well as disclosure to substantiate the material change in circumstances: *Colucci* at para. 113. If effective notice is not provided, child support should be varied retroactively to the date of formal notice, i.e., when the payor filed their application to vary the support obligations: *Colucci* at para. 113.

[56] Lastly, the court retains discretion to depart from the presumptive date of retroactivity in circumstances where the result would be unfair: *Colucci* at para. 113. At this point, the court must apply the four factors from *D.B.S. v. S.R.G.*, 2006 SCC 37 to determine whether this discretion should be exercised. The *D.B.S.* factors are as follows:

- i. The payor's reasons for the delay in providing effective notice or seeking judicial relief;
- ii. The payor's conduct;
- iii. The recipient's circumstances; and
- iv. Any hardship to the payor entailed by a retroactive award.

[57] The purpose of departing from the presumptive date of retroactivity for a decrease in support was articulated by Justice Martin in *Colucci*:

[71] ...The *D.B.S.* factors are then concentrated on one question: should the court depart from the presumptive date of retroactivity to achieve a fair result? It is on this question only that the factors of delay, payor conduct, the child's circumstances and potential hardship are brought to bear.

[58] The same principles apply to spousal support, although the weight given to the factors may differ, with concerns about notice, delay, and misconduct generally carrying more weight in relation to claims for spousal support: *Kerr v. Baranow*, 2011 SCC 10 at paras. 207–208; *Willms v. Willms*, 2020 BCCA 51 at paras. 28–31. There

is also an additional restriction applied to cases where spousal support has expired, and there may be an additional factor to consider when a former spouse's income has increased, though neither of these considerations are relevant here: *Michel v. Graydon*, 2020 SCC 24 at para. 26; *Judd v. Judd*, 2010 BCSC 153 at para. 23.

### Analysis

[59] Effective notice requires a disclosure of the change in financial circumstances necessary to substantiate the change. This allows the recipient to assess what the change will mean for support payments and avoids informational asymmetry.

[60] Prior to the claim being heard and default judgment being rendered, Mr. Kingsbury advised Ms. Farley on several occasions that his financial circumstances had changed. Nevertheless, he did not provide financial disclosure of his change in circumstances. There is no evidence that he, for example, provided her evidence of his termination of employment. Consequently, Mr. Kingsbury did not provide effective notice of his change of circumstances to Ms. Farley. The presumptive date of retroactivity is the date of formal notice, i.e., the date of Mr. Kingsbury's application (October 1, 2021).

[61] I must next consider whether I should depart from the presumptive date of retroactivity to achieve a fair result. In doing so, I apply the four *D.B.S.* factors above, as adapted in *Colucci* to suit the retroactive decrease context.

[62] Regarding the first factor, understandable reasons for delay may include health problems or other difficulties that prevent the payor from confronting the situation, or an unwillingness to disrupt a fragile parent-child relationship: *Colucci* at para. 98. Here, Mr. Kingsbury took reasonably diligent steps to set aside the order. He retained counsel within seven months of the Bracken Order to address the issue. Unfortunately, his efforts did not bear fruit. Blame for the delay of counsel does not rest at Mr. Kingsbury's feet.

[63] In terms of the second factor, Mr. Kingsbury's conduct has not met the threshold to be considered blameworthy. Blameworthy conduct is conduct that has

“the effect of privileging [the payor’s] interests over the child’s right to support”: *Colucci* at para. 101. This factor usually applies where the payor’s income has increased but the payor has delayed in disclosing their new income to the recipient. Here Mr. Kingsbury’s delay, although not significant, cannot be said to privilege his interests over a child’s right to support nor over Ms. Farley’s interests. Rather he continued to pay a higher amount of support than his actual income required.

[64] In terms of the Children’s and Ms. Farley’s needs, the third factor, Mr. Kingsbury is unaware of the Children’s exact circumstances but he is aware their mother is struggling financially. However, Ms. Farley’s financial circumstances are largely offset by the short duration of the parties’ relationship. Moreover, the Children are not Mr. Kingsbury’s biological children and the biological father has not been asked to contribute to the Children’s financial wellbeing. I also note that Mr. Kingsbury’s connection to the Children is tenuous based on the short relationship of the parties and the fact that Mr. Kingsbury worked out of town during the relationship.

[65] Another relevant consideration is whether the retroactive decrease would result in an order requiring the recipient to repay support to remedy an overpayment: *Colucci* at para. 105. While there is a chance that a retroactive decrease all the way to 2015 could lead to an overpayment by Mr. Kingsbury, in this case Mr. Kingsbury has agreed that he will not be seeking the return of any overpayment from Ms. Farley. Therefore, I need not consider this factor here.

[66] Finally, with respect to the fourth factor, I emphasize Mr. Kingsbury will be in a position of significant financial hardship if the decrease in child and spousal support is not applied retroactively.

[67] I conclude it would be unfair to limit Mr. Kingsbury’s claim for a retroactive decrease in support to October 1, 2021. I make this conclusion primarily based on Mr. Kingsbury’s repeated attempts to initiate formal legal proceedings to challenge the Bracken Order based on his actual income. His attempts were thwarted by his legal counsel through no fault of his own. Considering the certainty interest of the

Children and the recipient as well as hardship to the payor, the fair date in this case is the date when Mr. Kingsbury could have expected to have given Ms. Farley notice of his change of income, had his counsel taken the appropriate steps to do so. Mr. Kingsbury contacted counsel in February 2017. A fair estimation would therefore be that Ms. Farley would have had formal notice by 2018. In the circumstances of this case, it is fair to apply Mr. Kingsbury's decrease in income retroactively back to 2018.

### **Rescission of arrears**

#### **Legal principles**

[68] The final question is whether I should cancel the arrears that remain after the retroactive adjustment I have applied above.

[69] A cancellation of support arrears often occurs when the payor seeks a decrease in support due to a change in their financial circumstances. As Justice Wilcock explained in *MacCarthy v. MacCarthy*, 2015 BCCA 496:

[54] The factors to be considered in granting an order cancelling arrears are set out in *Burgie v. Argent*, 2013 BCCA 247, at paras. 15 and 23, namely, (a) whether there is a material change in circumstances, and (b) whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future": *Semancik v. Saunders*, 2011 BCCA 264 at para. 25. The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold".

[70] In a claim for rescission of arrears, the onus is on the payor to establish that their ongoing financial capacity makes it clear the arrears cannot be paid. If the payor establishes that their ongoing financial capacity means the arrears cannot be paid, the court should reduce or cancel arrears of support if it is satisfied that it would be grossly unfair not to do so: *FLA*, s. 174(1). As Justice Martin explained in *Colucci*:

[138] ... [T]he payor must overcome a presumption against rescinding any part of the arrears. The presumption will only be rebutted where the payor parent establishes on a balance of probabilities that — even with a flexible payment plan — they cannot and will not ever be able to pay the arrears.... Present inability to pay does not, in itself, foreclose the prospect of future

ability to pay, although it may justify a temporary suspension of arrears... This presumption ensures rescission is a last resort available only where suspension or other creative payment options are inadequate to address the prejudice to the payor.

[71] There remains some uncertainty in the authorities regarding whether, or to what extent, *Colucci* applies to cancelling the arrears for spousal support. I note that Justice Marzari applied the *Colucci* principles to spousal support arrears in *De Cotiis v. De Cotiis*, 2023 BCSC 1436 at para. 163. I will adopt the same approach.

[72] The payor faces a high threshold to establish that they are likely unable to ever pay the arrears. If the court cancels arrears, it may also cancel interest that has accrued if satisfied that it would be grossly unfair not to cancel the accrued interest: *FLA*, s. 174(4).

### Analysis

[73] Mr. Kingsbury has not complied with his support obligations, apart from the money BCFMA was able to deduct from his ICBC settlement payment. This has resulted in a significant amount of child and spousal support arrears owing to Ms. Farley, approximately \$130,000.

[74] I consider the two criteria established in *Burgie v. Argent*, 2013 BCCA 247, namely that there must be a material change in circumstances and the payor must establish it would be grossly unfair not to reduce or cancel the arrears.

[75] I have already determined that Mr. Kingsbury meets the first criterion, as he has established a material change in circumstances.

[76] Given that I have concluded that Mr. Kingsbury's decrease in income should be retroactively applied back to 2018, his child and spousal support arrears have decreased. I estimate the amount that Mr. Kingsbury owes for child support under the retroactive application of his decrease in income as follows, using the *Child Support Guidelines*:

Year	Monthly payment amount	Annual payment amount
2015	\$1,016 (Bracken Order)	\$12,192
2016	\$1,016 (Bracken Order)	\$12,192
2017	\$1,016 (Bracken Order)	\$12,192
2018	\$123.01 (actual income)	\$1,476.12
2019	\$205.55 (actual income)	\$2,466.60
2020	\$279.37 (actual income)	\$3,352.44
2021	\$248.07 (actual income)	\$2,976.84
2022	\$252.05 (actual income)	\$3,024.60
2023	\$279.05 (actual income)	\$3,348.60
2024	\$317.12 (actual income)	\$3,805.44
	<b>Total support owed</b>	<b>\$57,026.64</b>

[77] Mr. Kingsbury has paid approximately \$52,700 in support. Approximately \$4,300 of child support arrears remain after taking the \$52,700 into account. I estimate the amount that Mr. Kingsbury owes for spousal support under the retroactive application of his decrease in income as follows, using the *Spousal Support Advisory Guidelines*:

Year	Monthly payment amount	Annual payment amount
2015	\$500 (Bracken Order)	\$6,000
2016	\$500 (Bracken Order)	\$6,000
2017	\$500 (Bracken Order)	\$6,000
2018	\$0 (actual income)	\$0
2019	\$0 (actual income)	\$0
2020	\$0 (actual income)	\$0
2021	\$0 (actual income)	\$0
2022	\$0 (actual income)	\$0
2023	\$0 (actual income)	\$0
2024	\$0 (actual income)	\$0
	<b>Total support owed</b>	<b>\$18,000</b>

[78] To demonstrate that it would be grossly unfair not to cancel arrears, the payor must establish, on a balance of probabilities, that they cannot and will not ever be able to pay the arrears: *Colucci* at para. 138.

[79] Despite the fact that the rescission of arrears is a “last resort in exceptional cases”, Mr. Kingsbury has proven that he will never be able to pay his outstanding support arrears even if a reasonable payment plan is implemented: *Colucci* at para. 141.

[80] Mr. Kingsbury argued, and I accept, that he is not in a position to pay this amount of arrears which I estimate totals \$22,300. His only income comes from disability benefits. Although his medical evidence was scant, it does confirm that he has some mental disabilities (although the severity is unclear), as well as long-standing addiction issues. There is little likelihood of Mr. Kingsbury securing and maintaining a job in the future.

[81] The amount of child and spousal support arrears based on the Bracken Order is premised on financial and life circumstances that Mr. Kingsbury has not sustained since at least 2015. It is very unlikely he will achieve this financial stability again.

[82] In my view, Mr. Kingsbury has met the onus of establishing that the arrears of child and spousal support should be cancelled. Mr. Kingsbury cannot now and likely will never be able to pay the arrears of support which have accrued under the Bracken Order. I find that this is one of those rare cases where it would be grossly unfair not to make the order cancelling the support arrears.

**Division of property and debt**

[83] Mr. Kingsbury is not taking issue with the division of property and family debt. As a result, I need not address these matters in these reasons.

**Disposition**

[84] My orders are as follows:

- i. Based on a material change in circumstances, Mr. Kingsbury’s child support and spousal support are adjusted to be based on his actual income, as per the table in paragraph 13.
- ii. Mr. Kingsbury’s decrease in income shall be applied retroactively to 2018.
- iii. Mr. Kingsbury’s outstanding spousal and child support arrears are rescinded.
- iv. Ms. Farley will keep all the payments she has received from Mr. Kingsbury to date.
- v. By consent, Mr. Kingsbury has no ongoing obligation to pay spousal support to Ms. Farley.
- vi. Mr. Kingsbury has no ongoing obligation to pay child support to Ms. Farley.
- vii. Mr. Kingsbury shall pay the \$1,000 costs order from his January 10, 2022 application.

**Costs**

[85] Rule 16-1(7) of the *Supreme Court Family Rules* provides that costs are payable to the successful party. “Successful” in this context refers to substantial success: *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45.

[86] In making a costs award, the court should consider “[f]actors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award”: *Gold v. Gold* (1993), 106 D.L.R. (4th) 452, 1993 CanLII 1248 (BC CA) at para. 20.

[87] Mr. Kingsbury has achieved substantial success on this application. If there are any further considerations that I am unaware of that would affect the costs award

and which the parties are unable to resolve, within eight weeks of these reasons they may apply through Scheduling to make submissions on costs.

“D. MacDonald J.”