

## Reconciling Spouses and Retroactive Child Support

How are child support obligations affected when formerly married couples reconcile numerous times? When do children of the marriage become independent? In a recent case heard by the Supreme Court of British Columbia, the court was asked to determine cross-applications regarding child support.

### Factors considered when canceling child support arrears

In *K.M. v. N.M.*, 2024 BCSC 1650, the formerly married couple separated in 2007, and they had two children together. For periods after separation, the parties agreed that no child support was payable because the parties had reconciled. A child support review had never occurred, although it was included in their separation agreement, and the mother alleged she had made several requests for the father's financial information to review child support. The mother sought an order for retroactive child support and section 7 expenses. The father sought orders reducing or canceling support arrears and interest.

The court considered the Family Maintenance Enforcement Program record as evidence of periods of reconciliation. The FMEP record did not indicate that child support was payable during any of the reconciliation periods alleged by the parties. The court relied on this record, along with other documents showing the claimant's mailing address at various points, to determine the periods of reconciliation. The court found that child support was payable for the periods when the parties were separated and not while they were reconciled.

### Was child support payable for the children?

Section 146 of the Family Law Act (FLA) defines a *child* to include a person under 19 years of age or older and unable, due to illness, disability, or another reason, to obtain the necessities of life or withdraw from the charge of the person's parents.

The court considered evidence showing that the parties' daughter moved out to live with her boyfriend in December 2021 and previously would stay with him on occasion while living with her mother. The daughter paid her own tuition in 2022 and covered her own expenses. In the court's view, it was not unreasonable for an adult child to have relationships that might involve spending some time away from their usual housing arrangement. During that time, the court found that she was not living away from home on an indefinite basis and could not withdraw from the care of her parents. The court concluded that the daughter remained a child until January 2022.

The second child had at all times remained a child due to his being under the age of 19 years and, after attaining that age, registering for a study and apprenticeship program to obtain a trade qualification. The court found that the son could not withdraw from his parents' care and remained a child.

### Does the court have Jurisdiction?

The father argued that the court could not grant the mother's request for retroactive child support because the children were not *children of the marriage* for whom child support was payable at the time of the application.

Section 152 of the FLA authorizes a court to retroactively vary a child support order whether or not the beneficiary is a child at the time of the application. Prior case law determined 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. Since the daughter was no longer a child, the court lacked jurisdiction to grant child support for their daughter, but it did have jurisdiction for the second



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child.

## Factors considered for retroactive child support

The court accepted the calendar kept by the mother as evidence showing that the son had primarily lived with the mother.

A payor's failure to disclose financial information is relevant when considering whether to retroactively increase support, but delay in bringing the application is also relevant. The mother requested the father's financial information in early 2018 for purposes of a child support review and made further requests in 2021, but the father did not provide it. The court considered the father's failure to provide disclosure and the tenor of communications to find that there was a reasonable excuse for the mother's delay in bringing an application.

## Section 7 Expenses

The mother claimed retroactive section 7 expenses for the daughter, including tuition expenses not covered by the RESP. The father argued that he solely contributed to the RESP, which the court accepted, to find that the father owed nothing for the daughter's tuition expenses. The father was required to contribute to the daughter's orthodontic expenses.

The son was an elite baseball player on a Junior World Championship team. The court found that the son's private school and baseball expenses were all appropriate extraordinary section 7 expenses, and the father was responsible for paying his proportionate share based on the parties' Guideline income. Their son's extracurricular math tutoring and math lesson expenses were not special expenses.

## Reducing or Cancelling Arrears

The court found that the father had not established a material change in circumstances or that it would be grossly unfair not to cancel or reduce arrears and dismissed his application.

## Conclusion

This case provides helpful guidance for parents facing a possible retroactive variation of child support.

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**If you require assistance with a child support review, please contact a member of our Canadian Family Practice.**