COURT OF APPEAL OF YUKON

Citation: *S.L.H. v A.W.H.*,
2026 YKCA 13

Date: 20260925
Docket: 25-YU929

Between:

S.L.H.

Appellant
(Plaintiff)

And

A.W.H.

Respondent
(Defendant)

Before: The Honourable Justice Griffin
The Honourable Justice Manocchio
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of Yukon, dated May 1, 2025 (*SLH v AWH*, 2025 YKSC 22, Whitehorse Docket 18-D5076).

Counsel for the Appellant:	S. Stikeman
The Respondent, appearing in person:	A.W.H.
Place and Date of Hearing:	Whitehorse, Yukon June 25, 2026
Place and Date of Judgment:	Whitehorse, Yukon September 25, 2026

Written Reasons by:
The Honourable Justice MacNaughton

Concurred in by:
The Honourable Justice Griffin
The Honourable Justice Manocchio

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Summary:

The appellant appeals from a decision retroactively varying the child support payable by the respondent for their three children based on a material change in the respondent's imputed income.

Held: Appeal allowed in part. The judge erred in concluding that the respondent's receipt of Canada Pension Plan disability benefits was determinative of his inability to work in any capacity. The respondent remained capable of part-time work, and income was imputed to him on that basis. There was no error in the judge's conclusion that the evidence no longer supported an imputation of income based on his investment of capital. The evidence did not support a likely return on that investment.

Reasons for Judgment of the Honourable Justice MacNaughton:

Introduction

[1] Since their separation on April 3, 2018, the parties have engaged in contentious litigation resulting in a number of interim orders, a trial order, and the post-trial order that is the subject of this appeal.

[2] The issue on appeal is a narrow one. The appellant, S.L.H., who now goes by S.L.S., appeals a chambers judge's retroactive variation of a child support order. The child support order was made after a five-day trial. Prior to its variation, the order imputed income to the respondent, A.W.H., for the purposes of child support.

[3] S.L.S. contends that there was no material change in the respondent's circumstances warranting a retroactive variation in child support and the chambers judge erred in her application of the Supreme Court of Canada's decision in *Colucci v Colucci*, 2021 SCC 24 [*Colucci*] by treating previously determined issues as a material change.

[4] In the alternative, S.L.S. argues that if a material change were established, the chambers judge erred in declining to impute income to A.W.H. for the purpose of calculating ongoing child support.

[5] A.W.H. contends that the chambers judge did not err in her findings and seeks dismissal of the appeal with an "elevated" costs award.

[6] For the reasons that follow, I would allow the appeal in part, impute an income of $50,000 to A.W.H. retroactively to September 27, 2023 and vary child support accordingly, thereby reducing S.L.S.'s obligation to repay child support.

Background

[7] Many of the material facts are not in dispute. The parties married on July 4, 2012 and separated on April 3, 2018. They have joint custody and guardianship of

their three children, two of whom are twins, and all three of whom are still in elementary school (the “Children”).

[8] In 2019, the parties attended a five-day trial before Justice D.R. Aston. The trial judge’s reasons are indexed at *S.L.H. v A.W.H.*, 2019 YKSC 43 (the “Aston Reasons” and the “Aston Order”).

[9] Although many issues were in dispute at trial, a primary issue was determining the parties’ respective incomes for the purpose of child support, based on a detailed parenting schedule that had the Children primarily residing with their mother, thereby entitling her to child support.

S.L.S.’s Income at Trial

[10] Determining S.L.S.’s income was relatively straightforward. She was employed as a dental hygienist. After qualifying, and initially working part-time, she worked full-time until the years in which she took maternity leaves. After the births of the Children, 2018 was her first calendar year of full-time employment. Justice Aston found that her 2019 full-time earnings were approximately $90,000, out of which she was required to pay for her professional licence, liability insurance, and her contribution to her employer’s medical benefits package: at paras 38-42.

A.W.H.’s Income at Trial

[11] Determining A.W.H.’s income was more complex, primarily due to his “concerted effort to avoid complete disclosure and to portray an inaccurate or misleading picture of his financial resources.”: at para 43.

[12] In an updated Financial Statement, sworn the week before trial, A.W.H. claimed investment income of less than $3 per month, and net rental income of less than $500 per year. He failed to provide an accounting of expenses he paid for a rental property, despite S.L.S.’s long-standing demands. His financial statement listed expenses in excess of $13,000 per month, and he said that he was living off his capital and incurring debt. He valued his real estate at substantially below his own professional appraisal evidence. Justice Aston concluded that A.W.H.’s

Financial Statement was “completely unreliable as evidence of his true financial circumstances”, demanding adverse inferences: at para 44.

The Bore Path Investment

[13] A.W.H. was a licensed chiropractor. He was injured in a 2009 accident and stopped working in 2013. In 2016, litigation regarding his accident injuries settled for $2.2 million, from which he netted $1,661,626.77, some portion of which related to future loss of income. As described by the trial judge, after paying some debts, and making some extravagant purchases, he had about $1.3 million remaining to invest.

[14] A.W.H. testified that, at a return of 3%, which he said was the then-going rate of return on investments, his capital would not generate the income he aspired to for himself and his family. Seeking a higher rate of return, he invested $1 million in a venture, Icefield Tools, which had developed technology that would “revolutionize the direct drilling industry”. He said his investment promised to grow to $5 million USD within three years.

[15] The CEO of Icefield Tools and Icefield Tools’ sales representative, Justin Hoopes, came up with a plan for A.W.H. and Mr. Hoopes to profit from Icefield Tools’ technology despite not being shareholders. They were to incorporate a new company, which would be granted exclusive distribution rights for Icefield Tools’ products, and a service company to provide directional drilling services using the products. At trial, A.W.H. testified that he and Mr. Hoopes entered a “Partnership Agreement” to this effect on October 4, 2016.

[16] Pursuant to the Partnership Agreement, A.W.H. and Mr. Hoopes incorporated three companies—a parent and two subsidiaries. The parent was Yukon-based 536138 Yukon Inc., also known as Bore Path Holdings (“BPH”). The subsidiaries were Yukon-based Bore Path Technologies Inc. (“Technologies”) and Louisiana-based Bore Path Services Inc. (“Services”). In these reasons, I will refer to A.W.H.’s investment as the “BP Investment” and collectively to the three companies as the “BP Companies”.

[17] In an affidavit sworn by A.W.H. on June 17, 2024, in support of his application he swore that, in exchange for his $1 million investment, he received 40% of the shares in the BP Companies and Mr. Hoopes received the remaining 60%, in exchange for working full-time for the companies. The record is unclear whether A.W.H. was a direct shareholder in Technologies and Services. His affidavit suggests that he was, but other documents suggest otherwise.

[18] A.W.H. swore that BPH secured the exclusive distribution agreement with Icefield Tools, but, by the end of October 2016, it was clear there were problems with the BP Investment. Mr. Hoopes began paying himself a salary of $15,000 USD monthly out of the investment funds and refused to give A.W.H. a say in the matter. In addition, they paid Icefield Tools $750,000 to buy ten tools for the BP Companies to resell, rent, or with which to provide services to customers, but it was used by Icefield Tools to pay off debts and manufacture tools for other customers.

[19] A.W.H. swore he consulted three lawyers regarding options for recouping his investment funds, and they all advised that this would be difficult given the alleged indebtedness of the other parties involved. He said that the third lawyer advised him that his best option would be to try to negotiate a deal to recoup at least the $100,000 that remained in BPH’s Canadian bank account.

The Share Purchase Agreement

[20] A.W.H. negotiated a Share Purchase Agreement with BPH, executed on February 22, 2018 (the “SPA”), related to his BPH shares. Pursuant to the SPA, BPH was to pay A.W.H. between $1.3 and $1.8 million to redeem his 40 shares. The price depended on how quickly the redemption occurred. Under the SPA, BPH was to pay $100,000 immediately, and 10% of its revenue quarterly, with an annual minimum payment of 20% of the outstanding redemption balance. Upon successfully redeeming all of A.W.H.’s shares, BPH would pay him a 4% royalty on its gross revenues in the following five years.

[21] A.W.H. acknowledges receiving the following payments from BPH:

a) $100,000 on March 1, 2018;

b) $17,836 on April 30, 2018;

c) $60,000 on June or July 24, 2018;

d) $12,500 on December 17, 2018;

e) $14,000 on March 5, 2019;

f) $6,500 on April 16, 2019;

g) $64,500 on May 22, 2019; and

h) $4,985 on December 24, 2019.

[22] Because A.W.H. owned the BPH shares, under the terms of the parties' domestic contract, which was upheld by Aston J., S.L.S. had no interest in the BPH shares and no entitlement to spousal support.

[23] From the outset of the family litigation, A.W.H. attempted to characterize payments from the $1 million BP Investment as returns of capital as opposed to income.

History of Child Support Orders

Income for Interim Child Support

[24] The parties appeared before Justice Campbell on December 7, 2018, on S.L.S.'s interim application for child support and interim relief. At the hearing, A.W.H. admitted to receiving the March, April and June payments under the SPA, but argued these were capital repayments, not income from an investment, and should not be considered income for child support purposes. He claimed that the BP Investment had yet to generate any revenue, and that the BP Companies were

experiencing financial difficulties, making it possible he would incur a substantial loss.

[25] On an interim basis, Campbell J. was not prepared to determine whether the $177,836.40 that A.W.H. received constituted a return of capital or income for the purposes of child support: *S.L.H. v A.W.H.*, 2018 YKSC 54 at para 23.

[26] Instead, she approached interim child support by dividing $1,165,626.77, the portion of A.W.H.'s personal injury settlement she considered attributable to loss of future income, by the 24 years of income it could be considered as replacing. This amounted to at least $48,567.78 per year in lost future income and, together with $13,100 in rental income and $30,000 in employment income, she imputed A.W.H. an income of $91,667.78: at paras 21, 25 and 39. From the evidence before her, Campbell J. determined that, while A.W.H. was not capable of working regular or long hours, he was capable of working part-time and there was suitable work available for him: at para 37.

Child Support at Trial

[27] At trial, A.W.H. argued that he could not expect any income in relation to the BP Investment or in relation to any of his accident settlement funds. He claimed he was making less than $3 per month on all his investments and valued the BP Investment at $90,000: Aston Reasons at para 44.

[28] Justice Aston concluded that A.W.H.'s Financial Statement was completely unreliable as evidence of his true financial circumstances, demanding adverse inferences. He found that A.W.H. admitted to receiving $275,000 from BPH in the 17 months after execution of the SPA, but his Financial Statement showed no trace that these funds had been saved or reinvested. In Aston J.'s view, the BPH shares, on their face, were still worth more than $1 million under the SPA. He rejected A.W.H.'s argument that the SPA would not be honored, noting a recent letter from Mr. Hoopes, which indicated Bore Path intended to fulfill its obligations under the SPA and to redeem the shares in full: at para 50. He also noted that A.W.H.'s monthly expenses far exceeded what he claimed to be receiving in income and that

A.W.H. undervalued all of his real estate holdings compared to the professional valuations he tendered: at para 44.

[29] Justice Aston found that A.W.H. had an obligation to support the Children through reasonable use of his capital to generate income. He also found that in 2016, A.W.H. had at least $1.3 million to invest, which he substantially invested in the BP Companies, and in acquiring and renovating a lake property to rent out on Airbnb. Regardless of the actual income being generated from these investments, had the $1.3 million been reasonably invested in 2016, without encroaching on capital, A.W.H. could have derived a return of between 4% or 5%—amounting to an annual return of between $52,000 to $65,000. In addition, he found that A.W.H. had the potential to work 20 hours per week and, based on his abilities, could earn $40/hr equating to employment income of $35,000-$40,000 per year. In the result, he ordered that A.W.H. pay S.L.S. child support for the Children based on an imputed income of $90,000: at para 68.

[30] In 2020, based on Aston J.'s findings, Chief Justice Veale issued an order requiring A.W.H.'s share of the proceeds of sale of joint marital assets be held in trust, to be applied towards his future child support payments: *S.L.H. v A.W.H.*, 2020 YKSC 12. In making the 2020 Order, Veale C.J., rejected A.W.H.'s evidence that he was disabled from competitive employment in any capacity since April 8, 2013.

2023 Application to Retroactively Vary Child Support

[31] S.L.S. and A.W.H. brought cross-applications, seeking various forms of relief. Most of the issues were resolved and are not the subject of this appeal. The final issue was A.W.H.'s application for a retroactive variation to the Aston Order as it related to child support and special and extraordinary (s 7) expenses.

[32] On November 30, 2022, A.W.H. provided S.L.S. with email notice that he intended to seek a variation of child support. The email did not provide information about his income or proof that it had changed. It was not considered effective notice of an application to vary.

[33] On September 27, 2023, A.W.H. applied for a variation in child support, retroactive to that date. He argued that there had been a material change in circumstances relating to his income since the Aston Order and that income should no longer be imputed to him in relation to the BP Investment because, contrary to the trial judge's expectation, he had not received a further return on his investment, BPH was in the process of liquidation and it was no longer registered as a business in the Yukon.

[34] He also argued that his receipt of Canada Pension Plan Disability benefits ("CPP-D benefits") amounted to a material change in circumstances based on his family doctor's statement that he is unable to work and will not be able to do so in the future.

[35] S.L.S. argued that there had been no change in A.W.H.'s circumstances justifying a variation, as A.W.H. made clear at trial that, once he received a transfer of the appellant's CPP credits, he intended to immediately apply for CPP-D benefits. This was an anticipated change that was known to the trial judge.

[36] The matter was to be heard by Justice Wenckebach. In advance, she ordered A.W.H. to file his bank statements from January 1, 2019 to December 31, 2023, on the basis that these would demonstrate whether A.W.H. received funds from BPH after trial.

Reasons on the Variation Application

Had there been a material change in A.W.H.'s receipt of investment income?

[37] On May 1, 2025, in reasons indexed as *S.L.H. v A.W.H.*, 2025 YKSC 22, Wenckebach J. found that A.W.H. should no longer be imputed income in relation to his BP Investment. She wrote:

> [28] The trial judge's conclusion that A.W.H. would continue to receive investment income has, therefore, not come to be. I take no issue with the trial judge's determination that, even if the investment failed, he would not discount the investment income entirely. However, I also conclude that A.W.H. should not suffer the consequences of his bad investments indefinitely. A.W.H. has established that there has been a significant, long-lasting change to his investment income, which was not one of choice.

[38] In particular, she found from 2020 onward, there was no evidence that A.W.H. received sustained income from sources other that CPP-D benefits and social assistance: at paras 27-28.

Had there been a material change in circumstances in relation to A.W.H.'s ability to work?

[39] In this respect, Wenckebach J. agreed with S.L.S.'s submission that much of the evidence provided by A.W.H. about his ability to work did not demonstrate a change in circumstances. Notes from his family doctor dated December 3, 2019, and June 4, 2023, stating that he was unable to work, were an extension of the evidence already rejected at trial. She described A.W.H.'s filed affidavit as, in part, taking issue with Aston J.'s conclusion that he was able to work and S.L.S.'s ongoing belief that he is not as disabled as he claims.

[40] She described the doctor's evidence as "nothing more than a recitation of facts and conclusory statements that A.W.H. has chronic lower back pain and is unable to work", concluding that even if the doctor's notes were new evidence, it would not establish a material change in circumstances: at paras 32-35.

[41] Accepting that A.W.H.'s evidence that he underwent a failed back surgery could mark a change, A.W.H. did not say that his condition worsened as a result. Rather, he said that the surgery had not improved his functioning: at para 36. In fact, A.W.H.'s affidavit suggested that his condition had minimally improved post surgery: at para 29.

[42] However, the chambers judge concluded that A.W.H.'s receipt of CPP-D benefits was "determinative":

> [37] ... A.W.H.'s position is that I should accept his eligibility for CPP-D as conclusive proof that he cannot work. It would have been better for A.W.H. to provide medical evidence other than that which he provided in his court application. Ultimately, however, in this case, being in receipt of CPP-D is sufficient to establish a material change in circumstances.

<u>Legal Test for Retroactive Variation of Child Support</u>

[43] In *Colucci*, the Supreme Court of Canada set out the legal framework for considering an application to retroactively decrease child support.

[44] Where a final order is in place, once a material change in the payors' circumstances is established, a presumption arises in favour of retroactively decreasing child support to the date the payor gave effective notice to the recipient, up to three years before formal notice of the application to vary.

[45] Effective notice requires clear communication of the change in circumstances, accompanied by disclosure of any available documentation necessary to substantiate the change and allow the recipient parent to meaningfully assess the situation: at para 113.

[46] The court retains discretion to depart from the presumptive date of retroactivity, where the result would otherwise be unfair. The factors set out in *D.B.S. v S.R.G.*, 2006 SCC 37 at paras 99-135 (adapted to reflect a decrease in the payor's income) guide the exercise of a court's discretion.

[47] As adapted, and as applicable to this appeal, those factors are: (i) whether the payor had an understandable reason for delay in seeking a decrease; (ii) the

payor's conduct; (iii) the Children's circumstances; and (iv) hardship to the payor if support is not decreased (viewed in context of hardship to the Children and the recipient if support is decreased).

[48] In this case, the chambers judge determined that the effective date of notice of the application to vary was September 27, 2023. That finding is not appealed.

Standard of Review

[49] Whether there has been a material change in circumstances supporting a retroactive variation is question of mixed fact and law. Questions of fact or mixed fact and law will not be reversed on appeal unless there was palpable (obvious) and overriding (material) error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras 15-18.

[50] There are strong reasons for the significant deference that must be given to trial judges in relation to support orders as set out in *Hickey v Hickey*, 1999 CanLII 691, [1999] 2 S.C.R. 518. The standard of review avoids giving parties an incentive to appeal judgments, and incur added expense, in the hope that an appeal court will have a different appreciation of the relevant factors and evidence. It also promotes finality in family law litigation: at para 12.

Analysis

[51] In my view, there was no legal error in the chambers judge's finding that there had been a material change in circumstances in relation to A.W.H.'s BP Investment. Based on Aston J.'s findings about A.W.H.'s lack of frank financial disclosure, the chambers judge ordered A.W.H. to produce his banking records from 2019 to 2023. She was satisfied, on that evidence, that A.W.H. had not received any further payments in respect of his BPH Investment. S.L.S.'s evidence about a call that she made, apparently confirming that Bore Path was still in business, was not persuasive. On the evidentiary record, including the extensive bank records disclosed, there was no evidence of further income from that investment. I would therefore not disturb the chambers judge's finding of a material change or its legal implications.

[52] I reach a different conclusion with respect to A.W.H.’s receipt of CPP-D benefits. In my view, the chambers judge erred in law in finding this was acceptable as new, determinative, proof of disability.

[53] A.W.H.’s evidence that he was unable to work as a result of his injuries was not new. He had maintained that position throughout.

[54] In making the 2018 Order, Campbell J. acknowledged the contradictory evidence about A.W.H.’s physical capacity. In respect of his ability to care for his children, A.W.H.’s family physician stated that he had a “permanent disability and is unable to care for his children”, yet, A.W.H.’s sworn statement said that “his disability and overall function have evolved over time in a positive way.” On the evidence, Campbell J. concluded that although A.W.H.’s health did not “appear to allow him to work regular or long hours, he is capable of working on a part-time basis.”: at para 37.

[55] In the Aston Reasons, Aston J. observed that A.W.H. “portrayed himself as a man who is unable to work at meaningful employment more than a few hours a week but at the same time capable of all the childcare responsibilities” he proposed to assume: at para 59. He also found that, after observing the parties at trial and reviewing the trial evidence, A.W.H. had “a greater physical capacity for employment than he admits to”: at para 61. Beyond A.W.H.’s capacity for physical work, Aston J. noted his proficiency in medical and legal research, high intelligence, strong communication skills, and the transferability of his professional chiropractic training to other employment: at para 62.

[56] In his 2020 Order, Veale C.J. accepted Aston J.’s findings as binding, including that A.W.H. was intentionally unemployed and capable of earning $35,000–$40,000 per annum: at para 3. He rejected A.W.H.’s evidence that he was disabled from competitive employment and that he suffered from “permanently disabling medical conditions”: at paras 3, 15, 18.

[57] In making her 2025 Order, Wenckebach J. erred in treating A.W.H.'s inability to work as a new circumstance based on the three pieces of evidence before her: (i) the December 3, 2019 note from his family physician; (ii) the June 4, 2023 note from the same physician repeating the same conclusions; and (iii) evidence of a 2022 surgery producing only minimal improvement: at para 29.

[58] On the submissions of A.W.H.'s counsel, he continued to try to secure employment and, in 2022, 2023 and 2024 performed some part-time work.

[59] The chambers judge accepted that much of A.W.H.'s evidence did not demonstrate a change in circumstances and that the physician's notes were not new evidence, but "nothing more" than recitations of facts and conclusory statements which did not establish a material change in circumstances: at paras 29-35.

[60] Finally, I accept S.L.S.'s submission that it was an error in law to determine that A.W.H.'s receipt of CPP-D benefits was a material change in circumstances, and determinative of his inability to earn income due to disability.

[61] As the British Columbia Court of Appeal stated in *Herber v Herber*, 1992 CanLII 709, [1992] B.C.J. No. 2096 at para 30, a determination by the pension authority that a person is disabled for the purpose of benefits is not, in law, proof that the person is so disabled. It is not admissible for proof of their disability.

[62] This was reinforced by the Alberta Court of Appeal in *Balisky v Balisky*, 2020 ABCA 432, where the Court upheld the trial judge's finding that the appellant had adduced insufficient evidence to prove that she was unable to work, despite having accepted the appellant's evidence that she was in receipt of CPP disability payments: at paras 25, 29.

[63] There is good reason for that conclusion. As the Court explained in *Falkener v Falkener*, 2020 BCCA 303 at para 71, entitlement to CPP-D benefits is a conclusion reached by a third-party adjudicator, in a different forum, without witnesses or cross-examination.

[64] The chambers judge's reliance on A.W.H.'s entitlement to CPP-D benefits was misplaced.

Disposition

[65] As a result, and in the absence of other persuasive evidence that A.W.H.'s circumstances had changed and he was no longer capable of part-time work, I would set aside the chambers judge's conclusion in that regard and impute part-time employment income to him in the amount of $50,000. In my view, increasing the imputed employment income amount in the Aston Order is appropriate given the passage of time and annual increases in the minimum hourly rate in the Yukon. According to the chambers judge's order, A.W.H. received CPP-D benefits of $15,701 in 2023. A.W.H.'s income for child support purposes is to be based on the total of his CPP-D benefits in each year and $50,000 in imputed income.

[66] I would retroactively vary A.W.H.'s income for child support purposes to September 27, 2023, the retroactive date selected by Wenckebach J. I expect that the parties will be able to resolve the quantum of the retroactive readjustment repayable by S.L.S.

[67] The matter is remitted to the Yukon Territory Supreme Court for any resultant adjustments in the event the parties cannot agree on the calculation of the readjustment in accordance with these reasons or a schedule for repayment of overpayment of child support. In other words, either party may bring the matter back before that court should they be unable to resolve these issues.

Costs

[68] S.L.S. has been partially successful on this appeal in changing the net amount of child support in her favour. In my view, the circumstances of this case do not justify awarding costs on an issue-by-issue basis. I would therefore find S.L.S. entitled to her costs of the appeal, subject to the parties' bringing to our attention any relevant offer to settle or factor of which we are presently unaware.

"The Honourable Justice MacNaughton"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Justice Manocchio"