

CANADA / JUDGMENT

Collins v. Morris

2000 BCSC 1599

COURT

Supreme Court of British Columbia

DECIDED

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Registry: Cranbrook

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GREGORY WILLIAM COLLINS
PLAINTIFF

AND:

LAURIE ANN MORRIS
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MELNICK

Counsel for Plaintiff R.S. Miles

Appearing in Person L.A. Morris

Date and Place of Hearing/Trial: October 16, 2000

Cranbrook, BC

- [1] This was an application by Mr. Collins for an order that he be given interim custody of the parties' youngest son, David Joseph Collins, an order determining child support payable in accordance with the Federal Child Support Guidelines, SOR/97-175, an order reducing or cancelling arrears of maintenance pursuant to the parties' separation agreement and certain other orders including an order with respect to access.

I. BACKGROUND

- [2] The parties were married in April 1984 and separated in May 1998. They entered into a separation agreement on January 6, 1999 and were divorced on April 28, 1999. The parties entered into two amending agreements with respect to their separation agreement dated July 1, 1999 and April 17, 2000, respectively.
- [3] At the present time, Mr. Collins is living common-law with the former wife of Mr. Morris, to whom the defendant Laurie Ann Morris (Ms. Morris) is now married. There are three children of the marriage of the parties, Steven Hartley Collins, aged 13, Nathan Gregory Collins, aged 14, and David, aged ten.
- [4] When the marriage broke down (Mr. Collins says this was because Ms. Morris was having an affair with Mr. Morris; she says the affair was a consequence of the marriage breakdown), Ms. Morris left the matrimonial home with the three children of the marriage. The first separation agreement therefore contemplated Mr. Collins paying to Ms. Morris support for all three children. That agreement provided for Mr. Collins to pay Ms. Morris \$673 a month child support. The agreement also provided that the matrimonial home would be listed for sale and that, until sold, Mr. Collins would be responsible for all expenses relating to its mortgage and maintenance. There were other provisions respecting responsibility for certain family debts.
- [5] In June 1999, Ms. Morris moved back into the family home after it was vacated by Mr. Collins the month before. Ms. Morris discovered that he had failed to pay three mortgage payments and certain utilities. Further, because she and Mr. Morris had not received timely advice that he would be leaving the home, they were obliged to pay rent for the apartment in which they had been residing.
- [6] Ms. Morris concedes that she had verbally agreed at one point to reduce the maintenance being paid by Mr. Collins but, she says, that was on the understanding that he would be continuing to live in the house and being responsible for its upkeep.
- [7] In the first amending agreement of July 1, 1999, the parties agreed that Mr. Collins would transfer his share in the matrimonial home to Ms. Morris and that she would promptly endeavour to obtain his release from all personal obligations, including the covenant to pay under the mortgage registered against the matrimonial home.
- [8] At the time of separation, Mr. Collins was employed by J.H. Huscroft Ltd. of Creston. He left that employment voluntarily because he wished to move to Penticton. The breakup of his marriage had left him depressed and, he claims, he was being harassed by Ms. Morris. She firmly denied such harassment and claims that Mr. Collins left his employment because he received a settlement from the Workers' Compensation Board for approximately \$21,900. I note that in the second amending agreement Ms. Morris agreed that Mr. Collins should be solely entitled to all benefits received from the Workers' Compensation Board and acknowledged that she had no claim to them. She now seeks to attribute those proceeds as

income in Mr. Collins' hands for the purpose of determining his income for calculating child support under the Child Support Guidelines.

- [9] Subsequent to Mr. Collins moving to Penticton, Steven determined that he wished to live with Mr. Collins. Thereafter, Nathan came to the same decision. At the time of this hearing, David remains with Ms. Morris. The parties agree that Nathan and Steven should reside with Mr. Collins. However, Mr. Collins seeks an order giving interim day to day care and control of David to him, if only on a trial basis. He argues that David wishes to be with him and wants to live with his two brothers. Ms. Morris counters that David in fact wishes to live with her, has many friends in Creston whom he enjoys and, although he does very much miss his brothers, he does not wish to live with his father.
- [10] Mr. Collins retained Ms. Jane Teed of Kamloops who has a private consulting practice providing custody and access investigations. She prepared a report dated April 5, 2000 in which she recommended that, because of the conflict between Steven and Ms. Morris, Steven should take up residence with Mr. Collins effective June 15, 2000. At that time, she found that Nathan and David were uncertain about where they wished to maintain their primary residence and both expressed the wish to live with both parents. She therefore recommended that Nathan and David retain their primary residence with Ms. Morris.
- [11] Subsequently, by the end of August 2000, Nathan had made the decision to move to Penticton to live with his father as well. In her report, Ms. Teed made the following observation which was a very positive one, considering the high level of animosity between Mr. Collins and Ms. Morris throughout the past two years:

These three boys are charming youngsters who love both their parents and show fewer signs of hurt and anger than I would expect, given the behaviour of their parents. However, I realize that children are remarkably adaptable and resilient. I also note that the boys are mutually supportive of one another to a degree that I see only in quite well adjusted children.

- [12] Notwithstanding that the piano that was a family asset allocated to Ms. Morris in the January 6, 1999 separation agreement, Mr. Collins advances a claim for it as he says it was purchased for Nathan's use. Ms. Morris stands on the terms of the separation agreement, says that Nathan hadn't played it for six months before he moved to Penticton, and in any event, she has sold the piano.
- [13] Mr. Collins says that he has not been able to obtain remunerative employment comparable to the level he enjoyed while at J.H. Huscroft Ltd. and thus his capacity to pay child support has diminished substantially.

- [14] Mr. Collins points out that, to the end of August 1999, when he resigned from his position with J.H. Huscroft Ltd., he earned \$25,850. For the balance of that year, he earned \$6,360 from employment insurance benefits and a position with Interior Joinery Ltd. In 2000, his income to the end of August was \$9,960 from Interior Joinery, employment insurance benefits and the firm where he is currently employed, Greenwood Forest Products Ltd. Thus, Mr. Collins projects that he will have an annual income of \$14,950 in 2000.
- [15] In providing for child maintenance of \$673 a month for three children, the separation agreement in fact made provision for support at a level somewhat less than would have been payable under the Child Support Guidelines had Mr. Collins continued to be employed at J.H. Huscroft Ltd.
- [16] Mr. Collins further argues that, although Ms. Morris is not visibly employed, she in fact works for Mr. Tom Morris, her husband, in his construction business by doing bookkeeping and other odd jobs that would otherwise require Mr. Morris to employ another individual. Thus, she is indirectly contributing to the family pool of income and Mr. Collins submits that she should have attributed to her income an amount equivalent to the approximately \$15,000 he says that he will probably earn in 2000. He bolsters his position by evidence from Ms. Terri Morris, the woman with whom he is cohabiting (and the former wife of Mr. Tom Morris), who said that she had observed Ms. Morris working as a carpenter's helper for Mr. Morris and that she believes that Ms. Morris does all the bookkeeping, types estimates, does job control, pays payables and collects receivables for Acron Construction, Mr. Morris' company. She says that she used to do that for Mr. Morris when she was married to him. She also states that she was present in court in Creston in March 2000 and, when dealing with her own child support issues with Mr. Morris, Ms. Morris told the provincial court judge that "their" income was \$28,000 last year. It was her estimate that the income generated from that business was considerably higher. That is denied by Mr. Morris.
- [17] Although she does not have a formal application before the Court, Ms. Morris advanced an argument requesting extraordinary expenses, particularly for orthodontic work for David and smaller expenditures for eye glasses for David and, while he was still with her, Steven.

II. DISCUSSION

A. Interim Custody of David

- [18] I do not believe that it would be in David's best interest to have him live with his father on a trial basis. That would cause too much uncertainty in his life. It is either appropriate that he live primarily with Mr. Collins now or it is not. There are two particular reasons in favour of David being with Mr. Collins. They are that Mr. Collins has extended family in the Okanagan and it would be good for all three boys if they could reside together in the same home. However, David has always resided with Ms. Morris and I am not convinced, on the evidence before me, that he wants to live with his father. I suspect that the proposal to have him live with Mr. Collins on a trial basis is an attempt to put him in a position where moral suasion

could be brought to bear to convince him that that is what he wants to do. He does have friends in Creston and there is no suggestion that Ms. Morris (or Mr. Collins for that matter) is anything other than a good parent. Mr. Collins has not made out a persuasive case that the status quo should be disturbed. I would not order that David be in the day to day care and control of his father. He will remain with Ms. Morris.

B. Child Maintenance

- [19] Ms. Morris advances the argument that Mr. Collins is deliberately under-employed in the sense that he left a job that paid well in pursuit of his own personal interests and not those of the children. Mr. Collins concedes that his leaving the Creston area was not for the benefit of the children but says that his emotional condition was such that he needed to get away from the area and move closer to his own extended family where he had the benefit of their support. He denies that alcohol or drug problems, which he has had in the past, had any bearing on his decision nor, he says, does he currently suffer from those problems. There is some discrepancy between what he reports in his own affidavits and what Ms. Teed says in her report as to when he stopped drinking (in fact Ms. Terri Morris says that he currently is an occasional drinker), but I conclude that this is not a factor that I presently need to consider.
- [20] I am satisfied that Mr. Collins' move was a justifiable one and one that was in his long-term best interests even though it impacted on his short-term capacity to earn income. One hopes that now that he has steady employment with Greenwood Forest Products Ltd., his income level will rise considerably above that which he projects for 2000, if not to the level that he earned while at J.H. Huscroft Ltd.
- [21] Ms. Morris raises the interesting question as to whether the settlement from the Workers' Compensation Board should be considered in imputing income to Mr. Collins. I say that because of the provisions of the second amending agreement in which Ms. Morris agrees that she has no claim to that benefit and that Mr. Collins is solely entitled to it. I find that these covenants have the effect only of determining that as between Ms. Morris and Mr. Collins, he should have sole entitlement to the settlement from the Workers' Compensation Board. They do not imply that those benefits cannot be used to impute income to Mr. Collins for the purpose of determining his liability to pay child support pursuant to the Guidelines.
- [22] There is no evidence before me as to whether the settlement from the Workers' Compensation Board attracted tax or not. If not, then it would be subject to being grossed up to a larger amount to reflect equivalent income. It is, however, appropriate in my view to reflect the face amount of the Workers' Compensation Board benefit as income in Mr. Collins' hands for the purpose of determining his capacity to pay child support.
- [23] If one were to project Mr. Collins' 1999 income from J.H. Huscroft Ltd. through to the end of 1999 one would arrive at an annual income for him (according to Mr. Miles' calculations) of \$38,780 approximately. Ms. Morris has suggested attributing an additional \$3,000 to Mr.

Collins' 1999 income to bring it to the level of \$35,000 which she submits was his income in 1998. She then suggests that the remaining amount of the Workers' Compensation Board settlement be attributed to him in the year 2000 which would place him in an approximately similar position with respect to income for this year.

- [24] I find Ms. Morris' suggestion entirely reasonable and therefore attribute income to Mr. Collins for 1999 and 2000 of \$35,000 per annum for the purpose of calculating child maintenance. According to the 1997 tables, that gives rise to a child support obligation of \$665 a month for three children, \$504 a month for two children and \$303 a month for one child. I conclude that Mr. Collins had a responsibility to pay child support to Ms. Morris of \$665 to and including June 1, 2000; thereafter the sum of \$504 to and including August 1, 2000 and thereafter \$303 as of September 1, 2000 for the support of David only.
- [25] I recognize that, in the year 2001, Mr. Collins' income will be determined by his actual employment. Thus, there is liberty to apply, should the parties be not otherwise able to agree, to have his support obligation for the maintenance of David adjusted once his income earning pattern from his present employer is established. I would expect that to be within the first two or three months of 2001.
- [26] It is less simple to determine whether income should be attributed to Ms. Morris because of her alleged employment with Acron Construction. In reality, Mr. Collins' argument rests largely with what Ms. Terri Morris assumes Ms. Morris is doing for Mr. Morris' firm together with Ms. Morris' statement as to "our income" and Ms. Terri Morris having observed Ms. Morris helping Mr. Morris on certain job sites. I believe that it is reasonable to assume, from the evidence that is before me, that Acron Construction, and thus the family pool of income of Mr. and Ms. Morris, is benefiting from work done by Ms. Morris from time to time. She probably isn't being paid directly for her work but is indirectly benefiting by doing so. The best I can do is attribute a nominal amount of income to Ms. Morris and that I do in the amount of \$6,000 a year. At that level, she would not be responsible to pay child maintenance to Mr. Collins according to the Guidelines.
- [27] I note that Mr. Collins alleges that Ms. Morris is a one-half owner of a business which, from my brief note, I understand is a shop that sells quilts or quilting supplies and that she invested \$20,000 in this business to start it up. There is no suggestion in the material, however, that she earns any income from that investment.

C. Arrears

- [28] I trust that with the determination I have made above as to the parties' respective liabilities to pay child support, they can do the necessary mathematical calculations to compute the amount of the arrears. If they can agree on the amount, that figure may be inserted in the order. If there is disagreement, each may provide me with his or her respective calculations and I will make the determination.

[29] There is no compelling evidence before me for arrears to be reduced or cancelled. Given his current actual (as opposed to imputed) level of income, however, and the fact that he has a responsibility for the custody of two children, I would order that Mr. Collins not be required to make any payments on the arrears for a period of six months and thereafter in the amount of \$100 a month. I should add that, had I found Ms. Morris responsible for the payment of child support, I would have offset that responsibility to pay maintenance against the amount of the arrears until they were discharged.

D. Royal Bank Loan

[30] Ms. Morris covenanted in the first amending agreement to endeavour to obtain Mr. Collins' release from all personal obligations which, I conclude, includes a joint loan she has with him at the Royal Bank of Canada. I take from her evidence that the balance of that loan is now something less than \$2,000. She states, however, that she will not keep her part of the bargain because he was in breach of certain of his covenants in the separation agreements. I conclude that Ms. Morris is probably in a position to make financial arrangements to fulfil her obligation under the first amending agreement. I order that she do so within three months of the date of this judgment.

E. Piano

[31] According to the separation agreement, the piano was part of the matrimonial property that was given to Ms. Morris. Mr. Morris no longer has any claim on it, whether Nathan wishes to start piano lessons again or not. In any event, the piano is sold. That claim of Mr. Collins is dismissed.

F. The Teed Report

[32] Mr. Collins submitted that Ms. Morris should be responsible for one-half the cost of the Teed report. Ms. Morris did not wish to have the Teed report prepared but submitted to being interviewed because she thought that was in the best interests of herself and her children. I am not convinced that, in the circumstances that have been put before me, she should bear any part of the cost of Ms. Teed's report.

G. Extraordinary Expenses

[33] There is no application before me by Ms. Morris for extraordinary expenses. I therefore do not intend to consider them. I will say this, however. Had such an application been properly before me, it is very likely that I would have determined that she was entitled to reimbursement for one-half of the \$4,000 orthodontic expense (upon proof of payment) and one-half of the expenses for eye glasses for David and Steven of \$160 and \$292, respectively. However, at the same time, assuming that Mr. Collins countered with his present financial circumstances, I would equally as likely have concluded that, notwithstanding my having attributed income to him from his Workers' Compensation Board settlement, his present

responsibilities for two children would have precluded him, on the basis of financial hardship, from being responsible for contributing to those extraordinary expenses. I stress that these comments are gratuitous only because I have not made any decision on the subject of extraordinary expenses and, if Ms. Morris chooses to bring a formal application before the Court, I will direct that another judge deal with that issue.

H. Access

- [34] Ms. Morris claims that her personal financial circumstances do not permit her to transport Steven and Nathan from Penticton to Creston for access visits nor David from Creston to Penticton for that purpose. She says that she and Mr. Morris have only one vehicle and that is his truck which is necessary to him for his employment.
- [35] However, given that I have determined that two children will reside with Mr. Collins and one child with Ms. Morris, it is particularly important that each child have access to the other parent usually in circumstances where the three children can spend time together as well. The specified access schedule proposed by Mr. Miles in Mr. Collins' notice of motion would be somewhat onerous not only in terms of cost to the parties but in terms of travel for the children. Therefore, subject to what the parties might otherwise specifically agree to in writing, I direct that there be specified access as follows:
- (a) alternate long weekends for Thanksgiving and Easter. As I do not know whether there was access during this past Thanksgiving weekend, I will leave it to the parties to determine who shall have which weekend to start the process with liberty to apply if they cannot agree;
 - (b) one-half of the school holidays for Christmas with Mr. Collins' access to include Christmas Eve and Christmas Day in alternating years commencing with Christmas 2000;
 - (c) one-half of the school holidays for spring break, starting with Ms. Morris having access for spring break 2001;
 - (d) summer access of one calendar month in the summer, with Mr. Collins having access for August 2000 and July 2001, Ms. Morris for July 2000 and August 2001 and alternating accordingly thereafter; and
 - (e) telephone access whenever the children choose to contact either party by telephone.
- [36] In setting out this access schedule, it is my contemplation that the three children will be together for each access visit. It may be that, at other times of the year (or upon written agreement during some of the above times) Steven and Nathan can have an access visit alone with Ms. Morris while David visits alone with Mr. Collins. I do not intend to suggest that access visits can only take place with all three boys together. However, that should represent the substantial majority of all access visits.

[37] Mr. Collins will be responsible for two-thirds of the cost of transportation for access, Ms. Morris one-third. I recommend, but do not order, that they respectively deliver the children or child to the other in Grand Forks.

III. CONCLUSION

[38] The parties will have joint custody of the three children of the marriage. Mr. Collins will exercise primary day to day care of Steven and Nathan and Ms. Morris will exercise primary day to day care of David.

[39] Access to the child or children of which the other party has primary day to day care and control will be as outlined above.

[40] Ms. Morris is not responsible for payment of any part of the cost of Ms. Teed's report. She is, however, responsible for performing her covenant in the first amending agreement to remove Mr. Collins as a responsible party from the Royal Bank loan within three months. Mr. Collins' claim for the piano is dismissed.

[41] Mr. Collins is responsible for the payment of child support as outlined above. That leads to a current responsibility of the payment of support for David of \$303. I have left it to the parties to calculate the arrears based on the findings I have made above. There is liberty to apply in the event of disagreement. I conclude that arrears should not be reduced or forgiven. However, no payment need be made on the arrears for a period of six months and thereafter at the rate of \$100 a month.

[42] I have imputed income to Ms. Morris as set out above. This is not an amount sufficient to give rise to a responsibility for her to pay child support for Steven and Nathan.

[43] As Ms. Morris was largely successful on this application, she is entitled to her costs on Scale 3.

"T.J. Melnick, J."

The Honourable Mr. Justice T.J. Melnick

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